



PIER 1  
SAN FRANCISCO, CA 94111

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**MANAGEMENT AGREEMENT**

No. \_\_\_\_\_

**BY AND BETWEEN**

**THE CITY AND COUNTY OF SAN FRANCISCO  
OPERATING BY AND THROUGH THE  
SAN FRANCISCO PORT COMMISSION**

**AND**

**[MANAGER]**

**PASEO AND OPEN SPACE  
MISSION ROCK PROJECT**

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**ELAINE FORBES  
EXECUTIVE DIRECTOR  
SAN FRANCISCO PORT COMMISSION  
KIMBERLY BRANDON, PRESIDENT  
GAIL GILMAN, VICE PRESIDENT  
WILLIE ADAMS, COMMISSIONER  
STEPHEN ENGBLOM, COMMISSIONER  
STEVEN LEE, COMMISSIONER**

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**MANAGEMENT AGREEMENT INFORMATION TABLE**

<i>Date:</i>	
<i>Agreement Number:</i>	
<i>Port:</i>	<b>CITY AND COUNTY OF SAN FRANCISCO,</b> a municipal corporation, operating by and through the <b>SAN FRANCISCO PORT COMMISSION</b>
<i>Port's Address:</i>	Port of San Francisco Pier 1 San Francisco, California 94111 Attention: Deputy Director, Real Estate and Development Telephone: (415) 274-0400 Facsimile: (415) 274-0494
<i>Manager:</i>	_____, a
<i>Manager's Main Contact Person and Mailing Address:</i>	<b>[NOTE: ADDRESS CANNOT BE P.O. BOX OR MAILBOX ETC. ADDRESS—DELETE BRACKETED LANGUAGE BEFORE SUBMITTING TO LEGAL]</b>  Telephone: ( ) Cell: ( ) Facsimile: ( ) Email:
<i>Manager's Billing Contact and Address:</i>	<b>[NOTE: PLEASE INCLUDE EVEN IF BILLING ADDRESS IS THE SAME AS MANAGER'S ADDRESS—DELETE BRACKETED LANGUAGE BEFORE COMPLETING BLI]</b>  Telephone: ( ) Cell: ( ) Facsimile: ( ) Email:
<i>Manager's Emergency Contact and Address:</i>	<b>[NOTE IF SAME AS MAIN CONTACT—DELETE BRACKETED LANGUAGE BEFORE COMPLETING BLI]</b>  Telephone: ( ) Cell: ( ) Facsimile: ( ) Email:
<i>Manager's Insurance Contact and Address (not broker):</i>	Note if same as Main Contact  Telephone: ( ) Cell: ( )



	Facsimile: ( ) Email:
<i>Contact Information for Manager's Agent for Service of Process:</i>	<b>[NOTE: ADDRESS CANNOT BE P.O. BOX OR MAILBOX ETC. ADDRESS—DELETE BRACKETED LANGUAGE BEFORE COMPLETING BLI]</b>
<i>Premises:</i>	<p>The “<b>Premises</b>” is comprised of:</p> <p><i>Parcel 1:</i> Dr. Maya Angelou Way Paseo, identified as APN 8719B-001; and</p> <p><i>Parcel 2:</i> Bridgeview Way Paseo, identified as APN 8719A-007; and</p> <p><i>Parcel 3:</i> Channel Street Open Space, identified as APN 8719C-004; and</p> <p><i>Parcel 4:</i> Westerly portion of Toni Stone Crossing, identified as APN 8719B-003; and</p> <p><i>Parcel 5:</i> Middle portion of Toni Stone Crossing, identified as APN 8719A-009; and</p> <p><i>Parcel 6:</i> Easterly portion of Toni Stone Crossing, identified as APN 8719A-010; and</p> <p><i>Parcel 7:</i> Dr. Maya Angelou Way, identified as APN 8719C-002; and</p> <p><i>Parcel 8:</i> Bridgeview Way, identified as APN 8719D-001; and</p> <p><i>Parcel 9/10/11:</i> [berms within Parcel K, Bridgeview cul de sac, walkway along MR Commons]</p> <p>in the City and County of San Francisco, State of California, each as further described in <b><i>Exhibit A</i></b>.</p> <p>The term Premises refers to the property that is subject to this Agreement from time to time, as may be adjusted as provided in <b><i>Section 3.2</i></b>, and will include all Improvements and alterations as and when constructed thereon.</p>
<i>Term (§4.1):</i>	One (1) 15-year term, as further described in <b><i>Section 4</i></b> .
<i>Termination (§4.2):</i>	<p>Manager may terminate prior to the Expiration Date upon ninety (90) days written notice to the Port, as further described in <b><i>Section 4.2(a)</i></b>.</p> <p>Port may terminate prior to the Expiration Date upon ninety (90) days written notice to Manager, as further described in <b><i>Section 4.2(b)</i></b>.</p>
<i>Renewal Options (§4.3):</i>	Three (3) Port options to extend, each for five (5) years, as further described in <b><i>Section 4.3</i></b> .

<i>Commencement Date:</i>	The date on which the Premises is released from the Master Lease (as defined below) and accepted by Port pursuant to Subsection 14.7(c) of the DDA (as defined below), and subject to approval of this Agreement by the Port Commission and the Board of Supervisors and Mayor.
<i>Expiration Date:</i>	Unless earlier terminated or extended in accordance with this Agreement, the Expiration Date will be the date that is fifteen (15) years after the Commencement Date; provided, however, that if the Commencement Date is not the first day of a month, then the Expiration Date shall be calculated from the first day of the first month after the Commencement Date.
<i>Management Fee:</i>	Management Fee is further described in <b>Section 2</b> .
<i>Annual Budget; Quarterly and Annual Reporting Obligations:</i>	Each annual operating budget and capital budget must be approved by Port, as further described in <b>Section 5</b> . Quarterly Report required within sixty days after the end of each calendar quarter and Annual Report provided on or prior to April of each year, both as further detailed in <b>Section 5.7(a)</b> .
<i>Environmental Security:</i>	TBD
<i>Maintenance and Repairs:</i>	During the Term and subject to an early termination otherwise contemplated in this Agreement, Manager will have the sole responsibility for maintaining the Premises in good order and condition equal to or better than other first-class public rights-of-way with private business use and public open space projects in California in accordance with <b>Exhibit D</b> . Manager may, but is not obligated to, complete Subsequent Horizontal Construction and any new improvements that did not exist on the Commencement Date, subject to Port's prior written approval.
<i>Private Use Restrictions (§7):</i>	Manager expressly acknowledges that the Premises are financed in part with tax-exempt bonds and are subject to limits by the Internal Revenue Code of 1986 (the "Code"). The Port must strictly limit Private Payments and Private Use within the meaning of Code section 141. The Manager must provide to the Port for review and approval all agreements, licenses, rentals or similar arrangements providing priority use for any person or entity other than the Port or Department of the City prior to entering into such arrangement, except as expressly set forth in this Agreement.

<p><i>Permitted Use; Prohibited Uses (§8):</i></p>	<p>The Premises shall be used as public rights-of-way and public open space. Manager must receive prior approval from the Port for any other use. Manager shall maintain and operate the Premises in accordance with <b>Sections 7 and 8</b>, and <b>Exhibit D</b>. Portions of the Premises may also be used for private business activities solely in accordance with <b>Section 7</b> below, with prior approval by the Port of the private business use before any such arrangement is entered into by the Manager; provided that outdoor dining within the Private Use Areas pursuant to a Private Use Agreement in accordance with this Agreement shall be deemed approved by the Port.</p> <p>Any other use within the Premises requires the prior written consent of Port, which may be withheld in its sole discretion.</p> <p>Prohibited Uses are specified in <b>Section 8</b> below.</p> <p>Port shall have all remedies set forth in this Agreement, and at law or equity in the event Manager performs any of the Prohibited Uses.</p>
<p><i>Utilities and Services:</i></p>	<p>In addition to the maintenance and management obligations described in this Agreement, Manager must manage the use and payment of: (a) electricity and (b) recycled water service on the Premises.</p>
<p><i>Annual Certifications:</i></p>	<p>Annually, within 30 days after Port’s request to complete the “<b>Manager Contact Information Sheet</b>” in the form attached hereto as <b>Exhibit E</b>, Manager shall provide Port with the completed and executed Manager Contact Information Sheet.</p>
<p><i>Prepared By:</i></p>	

[Remainder of page intentionally left blank.]

## **Management Agreement**

(Mission Rock Open Spaces)

This Management Agreement, dated for reference purposes only as of the Date set forth in the Management Agreement Information Table, above, is by and between the **CITY AND COUNTY OF SAN FRANCISCO**, a municipal corporation (“**City**”), operating by and through the **SAN FRANCISCO PORT COMMISSION** (“**Port**”), as owner, and the party identified in the Management Agreement Information Table as Manager (“**Manager**”).

Port and Seawall Lot 337 Associates, LLC, a Delaware limited liability company (together with its successors and assigns with respect to the Master Lease, “**Horizontal Developer**”), are parties to that certain Disposition and Development Agreement dated as of August 15, 2018 (as the same has been and may be amended, supplemented, modified and/or assigned from time to time, the “**DDA**”) and that certain Master Lease No. L-16417 dated August 15, 2018, by and between Horizontal Developer and Port (as the same has been and may be amended, supplemented, modified and/or assigned from time to time, the “**Master Lease**”). The DDA and Master Lease govern the mixed-use development of an approximately 28-acre site, known as “Mission Rock” as more particularly described in the DDA and Master Lease (the “**Project Site**”). The Premises are a portion of the Project Site and have been released from the Master Lease. Concurrent with this Agreement, Manager has entered into that certain Lease No. L- [REDACTED] and Loan Agreement with Port for China Basin Park (the “**Park Lease**”). For the avoidance of doubt, nothing in this Agreement shall modify or affect the Horizontal Developer’s obligations and responsibilities under the DDA or the Master Lease.

The Parties intend this Agreement to constitute one part of: (i) the “Management Agreement” as defined in the Rate and Method of Apportionment of Special Taxes for City and County of San Francisco Special Tax District No. 2020-1 (Mission Rock Facilities and Services) (as the same may be amended, supplemented, modified and/or assigned from time to time, the “**RMA**”), and (ii) the “Management Agreement” as defined in the Mission Rock Master Declaration of Restrictions recorded in the Official Records of San Francisco County on June 25, 2020 as Instrument No. 20209K94434400080 (as the same may be amended, supplemented, modified and/or assigned from time to time, the “**Master Declaration**”), and the Manager shall constitute the “Public Space Manager” as defined in the Master Declaration.

### **1. PURPOSE; MANAGEMENT AGREEMENT INFORMATION TABLE.**

**1.1. Qualified Management Agreement.** The Parties intend for this Agreement to be a qualified management contract with respect to facilities financed with proceeds of governmental or 501(c)(3) tax-exempt bonds, in accordance with Internal Revenue Service Revenue Procedure 2017-13, as that document may be modified, amplified, and/or superseded. The Parties agree to interpret this Agreement to qualify as such a management contract and, to the extent any provision or provisions of this Agreement conflict with or would otherwise imperil the qualification of this Agreement by a relevant regulatory body, including the Internal Revenue Service, as such a management contract, those provisions shall be deemed null and void. The Parties will take all actions necessary, including amending this Agreement when needed to be a qualified management contract under Internal Revenue Service Revenue Procedure 2017-13, as that document may be modified, amplified, and/or superseded. The Parties shall work in good faith to mutually agree upon replacement provisions which are consistent with the intent of this Agreement and allow this Agreement to remain a qualified management contract.

**1.2. Management Agreement Information Table.** The Management Agreement Information Table that appears on the preceding pages and all Exhibits and Schedules attached hereto are hereby incorporated by reference into this Management Agreement and shall be construed as a single instrument and referred to herein as this “**Agreement.**” In the event of any

conflict or inconsistency between the Management Agreement Information Table and the Management Agreement provisions, this Agreement will control.

## **2. MANAGEMENT FEE; COST REIMBURSEMENT; CONTINGENT SERVICES SPECIAL TAXES.**

**2.1. Management Fee.** The Parties hereby agree to the value and sufficiency of the consideration described in this Section. Port will pay Manager an annual Management Fee totaling Ten Thousand Dollars (\$10,000.00) (the “**Management Fee**”). The annual Management Fee identified above shall be prorated for the first year based on a 365-day calendar year in accordance with Commencement Date of this Agreement. Thereafter the Management Fee shall be adjusted annually by any change in CPI.

**(a) Revenue from Premises Offsets Management Fee.** The Parties anticipate that Manager will receive revenue from the leasing, licensing, and/or other private use of a portion of the Premises in accordance with the limitations and procedures set forth in **Section 7**. Port’s obligation to pay the Management Fee shall be offset by the revenues Manager receives or derives from such leasing, licensing, and/or other private use of the Premises (“**Premises Revenues**”), as if such rent, license fee, or other revenue were received by Port and directed to Manager as payment of a portion of Port’s Management Fee obligation.

**(b) In-Lieu Payment by Master Association.** Funds received by Manager from the Master Association for the Premises are “**Master Association Contributions**.” Port shall have no obligation to pay Manager the Management Fee so long as Manager receives one or more Master Association Contributions that, when aggregated with any Premises Revenues for the year, are equal to or are greater than the Management Fee in a given year. In this circumstance and for the avoidance of doubt, the Parties acknowledge both the non-monetary value to Manager of a Contingent Services Special Tax Levy equal to zero dollars and further that Manager will receive Master Association Contributions for Manager’s services and obligations under this Agreement from the Master Association in lieu of payment from Port.

**(c) Partial Payment by Master Association.** If Manager receives one or more Master Association Contributions in a given year that, when aggregated with any Premises Revenues for the year, are less than the Management Fee, then Port, upon levying the Permitted Contingent Services Special Tax Levy Amount as described in **Section 2.4(a)(iii)**, below, shall pay to Manager funds so that the combined value of Master Association Contributions, Premises Revenues, and amounts paid by Port to Manager in a year equal one hundred percent (100%) of the Management Fee.

**2.2. Port Contribution.** Notwithstanding **Section 2.1** and subject to Port’s sole and absolute discretion, Port may contribute funds, resources, or both to Manager in furtherance of the operations or programming of the Premises. Any Port contribution shall be subject to such terms and conditions as Port may define prior to the contribution and Manager’s acceptance of such contribution and accompanying terms and conditions.

**2.3. Cost Reimbursement.** In addition to the Management Fee, Manager shall be entitled to reimbursement for reasonable costs expended in accordance with the Budget. Manager shall be reimbursed as follows: first, from Master Association Contributions; second, as direct payments from Port upon levy of the Contingent Services Special Tax but only to the extent Master Association Contributions in a given year are less than twenty-five percent (25%) of the Maximum Contingent Services Special Tax Revenues under the RMA; and third, as may be directed by Port in its sole and absolute discretion.

**2.4. Contingent Services Special Taxes.** During the Term, the Permitted Contingent Services Special Tax Levy Amount shall be calculated pursuant to this Section, and which amount shall be subject to Port Commission approval with each annual Budget.

**(a) Initial Permitted Contingent Services Special Tax Levy Amount.**

Based on the Initial Budget approved by the Port Commission, the “Permitted Contingent Services Special Tax Levy Amount” shall be defined depending on the status of this Agreement and the Park Lease, as follows:

**(i)** Zero Dollars (\$0.00), if this Agreement and the Park Lease are both in effect and the Master Association provides revenues to Manager equal to or greater than the Maximum Contingent Services Special Tax Revenues under the RMA; or

**(ii)** No more than seventy-five percent (75%) of the Maximum Contingent Services Special Tax Revenues under the RMA, if this Agreement is in effect but the Park Lease is not in effect, so long as the Master Association provides to Manager Master funds equal to or greater than twenty-five percent (25%) of the Maximum Contingent Services Special Tax Revenues under the RMA.

**(iii)** as shown in the table below for demonstrative purposes only. Provided further, that if funds provided by the Master Association to Manager for the Premises are less than twenty-five percent (25%) of the Maximum Contingent Services Special Tax Revenues under the RMA, then the Permitted Contingent Services Special Tax Levy Amount shall increase so that the combined value of the Master Association Contributions plus the revenue, if fully levied, from the Contingent Services Special Tax equals one hundred percent (100%) of the Maximum Contingent Services Special Tax Revenues under the RMA.

<b>Permitted Contingent Services Special Tax Levy Amount:</b>	\$0.00*	75%*
Status of this Agreement:	In Effect	In Effect
Status of Park Lease:	In Effect	Not in effect
* Amount or percentage may increase pending Master Association Contribution to Manager as described in <b>Section 2.4(a)(iii)</b> .		

**(b)** Manager shall calculate the Permitted Contingent Services Special Tax Levy Amount for each scenario described in **Section 2.4(c)**, below, for submission and approval with each annual Budget.

**(c) Future Permitted Contingent Services Special Tax Levy Amount.**

After the Initial Budget year, Manager’s future calculations of the Permitted Contingent Services Special Tax Levy Amount shall be based on actual expenses from one or more prior years using the following formulas, unless otherwise mutually agreed by the Parties:

**(i)** If this Agreement and the Park Lease are both in effect, then Zero Dollars (\$0.00).

**(ii)** If this Agreement is in effect but the Park Lease is not in effect, then an amount equal to the product of (1) the then-current Maximum Contingent Services Special Tax Revenues under the RMA, and (2) a fraction in which the numerator equals the actual operation and maintenance costs applicable to the Park Lease in the most recently concluded year, and the denominator equals the sum of the actual operation and maintenance costs applicable to both this Agreement and the Park Lease, inclusive of any applicable Management Fee; as shown in the formula below for demonstrative purposes only.

Permitted Contingent Special Services Tax Levy Amount	=	Max. Contingent Services Special Tax Revenues (current)	x	$\frac{\text{Park Lease O\&M prior costs}}{\text{Park Lease O\&M prior costs} + \text{Management Agreement O\&M prior costs}}$
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**3. ACCESS RIGHTS.** In consideration of the stated conditions and agreements, Port hereby grants permission to Manager to manage, operate, and otherwise carry on the Permitted Use within the Premises described in the Management Agreement Information Table and *Exhibit A* attached hereto. Manager's access rights in this Agreement are revocable, personal, non-assignable, non-exclusive, and non-possessory privilege to enter and use the Premises for the Permitted Use.

**3.1. Adjustment of Premises.**

(a) **Mutual Adjustment of Premises.** From time to time during the Term, the Parties reserve the right, upon mutual agreement of Port and Manager, to modify the Premises, including to accommodate the completion of the Subsequent Horizontal Construction and any subsequent Improvements as approved by Port.

(b) **Memorandum of Technical Corrections.** In addition, the Parties reserve the right, upon mutual agreement of Port and Manager, to enter into memoranda of technical corrections hereto to reflect any non-material changes in the actual legal description and square footages of the Premises, and upon full execution thereof such memoranda shall be deemed to become a part of this Agreement.

**3.2. Encroachment.**

(a) If Manager or its Agents uses or occupies space outside the Premises without the prior written consent of Port (the "**Encroachment Area**"), then upon written notice from Port ("**Notice to Vacate**"), Manager shall immediately vacate such Encroachment Area and pay as an additional charge for each day Manager used, occupied, uses or occupies such Encroachment Area, an amount equal to the square footage of the Encroachment Area, multiplied by the higher of the (a) highest rental rate then approved by the San Francisco Port Commission for the Encroachment Area, or (b) then current fair market rent for such Encroachment Area, as reasonably determined by Port (the "**Encroachment Area Charge**"). If Manager uses or occupies such Encroachment Area for a fractional month, then the Encroachment Area Charge for such period shall be prorated based on a thirty (30) day month. In no event shall acceptance by Port of the Encroachment Area Charge be deemed a consent by Port to the use or occupancy of the Encroachment Area by Manager or its Agents or Invitees, or a waiver (or be deemed as a waiver) by Port of any and all other rights and remedies of Port under this Agreement (including Manager's obligation to Indemnify Port as set forth in this Section), at law or in equity.

(b) In addition, Manager shall pay to Port an additional charge in the amount of Two Hundred Dollars (\$200) upon delivery of the initial Notice to Vacate plus the actual cost associated with a survey of the Encroachment Area. In the event Port determines during subsequent inspection(s) that Manager has failed to vacate the Encroachment Area, then Manager shall pay to Port an additional charge in the amount of Three Hundred Dollars (\$300) for each additional Notice to Vacate, if applicable, delivered by Port to Manager following each inspection. The parties agree that the charges associated with each inspection of the Encroachment Area, delivery of each Notice to Vacate and survey of the Encroachment Area represent a fair and reasonable estimate of the administrative cost and expense which Port will

incur by reason of Port's inspection of the Premises, issuance of each Notice to Vacate and survey of the Encroachment Area. Manager's failure to comply with the applicable Notice to Vacate and Port's right to impose the foregoing charges shall be in addition to and not in lieu of any and all other rights and remedies of Port under this Agreement, at law or in equity.

(c) In addition to Port's rights and remedies under this Section, the terms and conditions of **Section 15** (Indemnity and Exculpation) shall also apply to Manager's and its Agents' use and occupancy of the Encroachment Area as if the Premises originally included the Encroachment Area, and Manager shall additionally Indemnify Port from and against any and all loss or liability resulting from delay by Manager in surrendering the Encroachment Area including, without limitation, any loss or liability resulting from any Claims against Port made by any tenant or prospective tenant founded on or resulting from such delay and losses to Port due to lost opportunities to lease any portion of the Encroachment Area to any such tenant or prospective tenant, together with, in each case, reasonable attorneys' fees and costs.

(d) All amounts set forth in this Section shall be due within three (3) business days following the applicable Notice to Vacate and/or separate invoice relating to the actual cost associated with a survey of the Encroachment Area. By signing this Agreement, each party specifically confirms the accuracy of the statements made in this Section and the reasonableness of the amount of the charges described in this Section.

**3.3. Accessibility Inspection Disclosure.** Manager is hereby advised that the Premises has not been inspected by a Certified Access Specialist ("CASp") and Port will have no liability or responsibility to make any repairs or modifications to the Premises in order to comply with accessibility standards.

"A Certified Access Specialist (CASp) can inspect the subject premises and determine whether the subject premises comply with all of the applicable construction-related accessibility standards under state law. Although state law does not require a CASp inspection of the subject premises, the commercial property owner or lessor may not prohibit the lessee or tenant from obtaining a CASp inspection of the subject premises for the occupancy or potential occupancy of the lessee or tenant, if requested by the lessee or tenant. The parties will mutually agree on the arrangements for the time and manner of the CASp inspection, the payment of the fee for the CASp inspection, and the cost of making any repairs necessary to correct violations of construction-related accessibility standards within the premises."

**3.4. San Francisco Disability Access Disclosures.** Manager is hereby advised that the Premises may not currently meet all applicable construction-related accessibility standards, including standards for public restrooms and ground floor entrances and exits. Manager understands and agrees that Manager may be subject to legal and financial liabilities if the Premises does not comply with applicable federal and state disability access Laws and Manager fails to address the noncompliance, whether by partial closure or as otherwise contemplated in this Agreement. As further set forth in and subject to the terms of **Section 9**, Manager further understands and agrees that during this Agreement, it is Manager's obligation, at no cost to Port, to cause Manager's use and operation of the Premises to be in compliance with the ADA and any other federal or state disability access Laws in effect as of the date of this Agreement. During this Agreement it is Manager's obligation, at no cost to Port, to cause any Alterations or Improvements to the Premises performed by or on behalf of Manager, to be in compliance with the ADA and any other federal or state disability access Laws in effect as of the date of such Alteration or Improvements. Port acknowledges it will be responsible for, and that Manager shall have no obligation to, cause the Premises to be in compliance with any changes to the ADA and any other new or changed federal or state disability access Laws that both: (a) become effective after the date of this Agreement, and (b) impose an affirmative obligation to comply prior to or regardless of any Alterations or Improvements. Manager will notify Port if it is making any Alterations or Improvements to the Premises that might impact accessibility standards required under federal and state disability access Laws.



**3.5. Proximity of Development Project.** Manager acknowledges that during the Term, a Port program or project and/or the Development Project(s) described in the Management Agreement Information Table, is being constructed on the Premises or on property in the vicinity of the Premises. Manager is aware that the construction of such project(s) and the activities associated with such construction will generate certain adverse impacts which may result in inconvenience to or disturbance of Manager. Impacts may include, but are not limited to, increased vehicle and truck traffic, traffic delays and re-routing, loss of street and public parking, dust, dirt, construction noise and visual obstructions. Manager hereby waives any and all Claims against Port, City and their Agents arising out of such inconvenience or disturbance.

**3.6. As-Is Condition.** Manager acknowledges and agrees that Manager is familiar with the Premises, the Premises are being accepted in their then-existing and as-is condition, with no representations, warranties, or other obligations of Port, including but not limited to the repair or construction of any Improvements or alterations, and subject to all applicable Laws governing their use, occupancy and possession. Manager represents and warrants to Port that Manager acknowledges its receipt of *Schedule 3* regarding the presence of certain Hazardous Materials, *Schedule 2* regarding the condition of the substructure, if any, and the FEMA disclosure notice attached as *Schedule 3.7*. Manager further represents and warrants to Port that Manager has investigated and inspected, either independently or through agents of Manager's own choosing, the condition of the Premises and the suitability of the Premises for Manager's business and intended use. Manager acknowledges and agrees that neither Port nor any of its Agents have made, and Port hereby disclaims, any representations or warranties, express or implied, concerning the Premises, the physical or environmental condition of the Premises, the present or future suitability of the Premises for Manager's business, or any other matter whatsoever relating to the Premises, including, without limitation, any implied warranties of merchantability or fitness for a particular purpose.

**3.7. Release and Waiver.** As part of its agreement to accept the Premises in their "As Is With All Faults" condition (but excluding any express obligation of Port or breach by Port of any express representation, warranty, or covenant in this Agreement), Manager, on behalf of itself and its successors and assigns, will be deemed to waive any right to recover from, and forever release, acquit and discharge, Port and the other Indemnified Parties of and from any and all Claims, whether direct or indirect, known or unknown, foreseen or unforeseen, that Manager may now have or that may arise on account of or in any way be connected with (i) the physical, geotechnical or environmental condition in, on, under, above, or about the Premises, including any Hazardous Materials in, on, under, above or about the Premises (including soil and groundwater conditions), (ii) the suitability of the Premises for the Permitted Use, (iii) any Laws applicable thereto, including Environmental Laws, (iv) damages by death of or injury to any Person, or to property of any kind whatsoever and to whomever belonging, and (v) goodwill, or business opportunities arising at any time and from any cause in, on, around, under, and pertaining to the Premises, including all claims arising from the joint, concurrent, active or passive negligence of any of Indemnified Parties, but excluding any intentionally harmful acts committed solely by Port or City. Notwithstanding the foregoing, the releases and waivers in this Section shall not be applicable to any default by Port in the performance of any of Port's obligations under this Agreement.

**3.8. Port's Right to Institute Rules and Regulations.** Port may impose Rules and Regulations related to public rights-of-way and public open space, energy, water, gas, and other matters within Port jurisdiction reasonably necessary for the proper use, operation and maintenance of public rights-of-way, public parks, and public open space within Port jurisdiction. Upon Manager request, Port shall meet and confer with Manager before imposing Rules and Regulations applicable to the Premises. Port hereby confirms that no Rules and Regulations currently exist for the Premises. Manager agrees to be bound by such reasonable Rules and Regulations Port later imposes; provided that no such Rules or Regulations shall impose restrictions or requirements that are materially more onerous than comparable rules and

regulations generally applicable to public rights-of-way and public open space, unless such Rules and Regulations are (a) specific to a unique feature, aspect, or characteristic of the Premises (including but not limited to the management and operation of the Premises), and (b) reasonable, as determined by the Port Commission. Manager also acknowledges that Port's exercise of any of its rights regarding the Premises and other Port property in the vicinity of the Premises will not entitle Manager to any damages.

#### **4. TERM; TERMINATION.**

**4.1. Term.** The Term of this Agreement (the "**Term**") will be for the period of years specified in the Management Agreement Information Table, commencing on the Commencement Date and expiring on the Expiration Date, subject to renewal as set forth in **Section 4.3**, unless earlier terminated.

#### **4.2. Termination Rights.**

**(a) Manager Termination.** Manager may terminate this Agreement prior to the Expiration Date upon ninety (90) days written notice to Port if:

**(i)** The City levies the Contingent Services Special Tax above the Permitted Contingent Services Special Tax Amount Levy, as defined in **Section 2.4**; or

**(ii)** One or more Specified Related Agreements terminate due solely to Port's default under that agreement (and such default was not caused by circumstances outside Port's reasonable control), and Port and Manager are unable to agree on appropriate compensation (or either Party fails to fulfill or comply with such agreement) for the costs of non-potable water used in the either the Premises or the areas previously covered by the terminated agreement(s); or

**(iii)** Manager demonstrates to Port, in Port's reasonable discretion, that all Manager funds presently held or anticipated by Manager are less than the amount of funds reasonably necessary to operate and maintain the Premises in accordance with this Agreement and otherwise comply with any new rules, regulations, or other requirements imposed upon Manager; and upon such demonstration, Port, in its sole and absolute discretion, chooses not to provide funds reasonably adequate to fill the applicable funding gap.

**(b) Port Termination.** Port may terminate this Agreement prior to the Expiration Date upon ninety (90) days written notice to Manager if:

**(i)** The Park Lease, or any other Specified Related Agreement, is terminated due solely to Manager's default under that agreement (and such default was not caused by circumstances outside Manager's reasonable control), and Port and Manager are unable to agree on appropriate compensation for the costs of non-potable water used in the areas previously covered by the terminated agreement(s); or

**(ii)** Upon any third notice of Event of Default within a thirty-six (36) month period, and regardless of Manager's prior cure, so long as the notices do not arise exclusively from a single event or occurrence; or

**(iii)** An uncured Event of Default is continuing, pursuant to **Section [ ]**; or

**(iv)** Port does not obtain approval for this Agreement as may be required in accordance with pursuant to subsection 15 of Charter Section 10.104, as it may be amended from time to time ("Proposition J"); or

**(v)** Notwithstanding **Sections 4.2(b)(ii)** or **4.2(b)(iii)**, upon a failure to strictly comply with the prohibitions against private use described in **Section 7** of this Agreement, so long as such failure is identified in writing to Manager and Manager has not

resolved such failure within thirty (30) days, to Port’s satisfaction, in Port’s sole and absolute discretion (individually and collectively, “4.2(b)(v)”).

**4.3. Renewal Options.** Subject to Manager’s compliance with the terms of this Agreement and continued tenancy under the Park Lease, Manager grants to Port three (3) options (“**Renewal Options**”) to extend the Term, each for an additional five (5) years (each, a “**Renewal Term**”). Each Renewal Term will commence upon the date after the applicable Expiration Date upon the same terms and conditions of this Agreement unless otherwise expressly agreed by the Parties.

**5. ANNUAL BUDGETS, REVENUES, ACCOUNTING, BOOKS & RECORDS.**

**5.1. Initial Budget.**

(a) **First Year.** The Parties have agreed upon an initial annual operating budget and initial capital budget (collectively, the “**Initial Budget**”) for the operation, maintenance, and repair of the Premises during the remainder of the first fiscal year of the Term, or other such time period agreed upon by the Parties. The Initial Budget is attached hereto as Exhibit B.

(b) **Budget Benchmark.** The Parties agree that each annual budget for the Premises, inclusive of the Operating Budget, Capital Budget, and Management Fee, shall be equal to or exceed twenty-five percent (25%) of the Maximum Contingent Services Special Tax Revenues under the RMA (the “**Budget Benchmark**”), unless later revised as described in **Section 5.1(c)**. If the budget exceeds twenty-five percent of the Maximum Contingent Services Special Tax Revenues under the RMA, then Manager shall identify appropriate sources of funds for such excess.

(c) **Methodology to Calculate Budget Benchmark.** The Parties agree that they may, by mutual agreement, revise the Budget Benchmark as a percentage of the Maximum Contingent Services Special Tax Revenues under the RMA based on actual expenses from one or more prior years using the following formula: an amount equal to the product of (1) the then-current Maximum Contingent Services Special Tax Revenues under the RMA, and (2) a fraction in which the numerator equals the actual operation and maintenance costs applicable to this Agreement in one or more recently concluded years, and the denominator equals the sum of the actual operation and maintenance costs applicable to both this Agreement and the Park Lease (or, if the Park Lease has been terminated, the area that was subject to the Park Lease prior to such termination) in the same year(s), each inclusive of any respective Management Fee; as shown in the formula below for demonstrative purposes only.

Future Budget Benchmark Amount	=	Max. Contingent Services Special Tax Revenues (current)	x	$\frac{\text{Management Agreement O\&M prior costs}}{\text{Park Lease O\&M prior costs} + \text{Management Agreement O\&M prior costs}}$
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**5.2. Annual Operating Budget and Capital Budget.**

(a) Prior to the expiration of the Initial Budget, and on an annual basis thereafter, Manager will prepare and submit to Port an operating budget for Port’s approval in its reasonable discretion (“**Operating Budget**”) for the Premises for the following fiscal year (or portion thereof as agreed to by Port) and an updated capital budget (“**Capital Budget**”) for the Premises for the following five (5) fiscal years in similar forms to the Initial Budget (or as otherwise requested by Port). Each budget approved by Port during the Term will be referred to

herein as the “**Budget.**” The Operating Budget shall be limited to operating expenses, including maintenance and repair costs, and shall exclude capital expenses that extend the useful life of the Premises, or a feature or component thereof, and reconstruction or replacement of the same.

(b) Port will review and respond to Manager, including listing any specific objections to such proposed budget, within thirty (30) calendar days after receipt of such proposed budget. If Port fails to respond to such proposed budget within such thirty (30) calendar day period, then Manager will deliver to Port a second notice requesting Port’s response (“**Second Budget Notice**”). The Second Budget Notice must display prominently on the envelope enclosing such notice and the first page of such notice, substantially the following: “**APPROVAL REQUEST FOR MISSION ROCK OPEN SPACE MATTERS. IMMEDIATE ATTENTION REQUIRED; FAILURE TO RESPOND WITHIN FIFTEEN (15) CALENDAR DAYS WILL RESULT IN THE REQUEST BEING DEEMED APPROVED.**” If Port fails to respond within fifteen (15) calendar days after Port’s receipt of the Second Budget Notice, then such non-response will be deemed to be approval of such proposed budget. If Port timely objects to a proposed budget and the Parties cannot mutually agree upon an updated budget prior to the commencement of the fiscal year, then the Port shall be deemed to have approved a budget equal to the prior year’s Budget. Any revision to or modification of the deemed-approved budget beyond the variance permitted in *Section 5.3*, below, shall be subject to Port review and approval as described in this Section.

(c) No later than forty-five (45) days after the end of each quarter, Manager shall provide Port with a quarterly budget update for informational purposes only. Each quarter, Port or Manager may request a reforecasting of the Budget for the remainder of the fiscal year. Port approval for a Budget reforecast shall only be required if the reforecast Budget includes deviations from the then-current Budget that would require Port consent or approval pursuant to *Section 5.3*. In the event of an anticipated Budget shortfall, Port may request information from the Manager regarding Manager’s intended approach to address the Budget shortfall.

(d) In preparing each Operating Budget and Capital Budget, (i) Manager may consult with the Master Association to the extent required in connection with the portion of the budgets relating to association dues, and (ii) after the third year of the Term, Port and Manager shall meet to discuss funding sources for costs associated with maintenance and operation of the Premises and any other public open spaces operated or maintained by Manager within the Mission Rock STD.

**5.3. Permitted Budget Variance.** Manager will utilize commercially reasonable, good faith efforts to operate the Premises without exceeding the parameters of the Initial Budget and subsequent Budgets; provided however, that (i) Manager shall have no obligation to spend amounts set forth in the Budget, and (ii) Manager’s failure to operate the Premises within the Initial Budget or any subsequent Budget parameters will not be deemed a default by Manager hereunder unless such failure was the result of Manager’s failure to act in good faith or Manager’s failure to obtain Port’s consent to any expenditures or variances as required hereunder. Without limiting the foregoing, Manager will not make expenditures for the operation and maintenance or improvement of the Premises in any fiscal year that would deviate from the Budget by twenty-five percent (25%) or more of the corresponding line item in the applicable Budget for such fiscal year, without obtaining Port’s prior written consent, in Port’s reasonable discretion. Subject to the foregoing, Manager will have the right, without obtaining Port’s prior written consent, to the following (each, a “**Permitted Variance**”):

(a) re-allocate or increase Operating Expenses within the Operating Budget subject to the following conditions:

(i) re-allocation or increases shall not increase the total Operating Budget unless operating expenses are solely funded by additional identified funds, including Master Association Contributions;

(ii) subject to the prior condition, re-allocation or increases cannot result in the total Operating Budget exceeding 125% of the previously-approved Operating Budget;

(iii) re-allocation is prohibited from the WPA line item, unless there is a corresponding decrease in WPA costs; and

(b) re-allocate capital expenses within the Capital Budget, but any re-allocation shall not increase the total Capital Budget.

(c) Expense variances beyond those identified above shall require the Port's prior written approval.

(d) In the event of an emergency, as reasonably determined by Manager, Manager may seek oral approval from the Port's Executive Director or the Director's designee to make expenditures in excess of applicable line items in the Budget for: (i) emergency repairs required to prevent further immediate damage to property or injury to persons, or (ii) expenses required to ensure the general safety of the public, but after oral approval will follow the procedures set forth in this Section in reallocating funds seeking an amendment to the Budget, or including the costs of such repairs or expenses in a future Budget.

**5.4. Annual Budget Reconciliation.** No later than March 31st for each fiscal year during the Term, Manager will deliver to Port a reasonably detailed written statement (each an "**Annual Reconciliation**") setting forth (i) Manager's final determination of the actual Operating Expenses and Capital Expenses incurred with respect to the operation, maintenance and repair of the Premises for the immediately preceding fiscal year and (ii) the amount of any variance between the actual Operating Expenses and Capital Expenses incurred for the immediately preceding fiscal year and the estimated amounts for such Operating Expenses and Capital Expenses set forth in the applicable Budget for such fiscal year.

**5.5. Premises Revenue Allocation.** Premises Revenue will be first used to offset the Management Fee. If Premises Revenues exceed the Management Fee, excess revenues shall offset the Management Fee for each of the following three years. If Premises Revenues are adequate to pre-pay or have pre-paid the Management Fee for three (3) years, then all excess Premises Revenue shall be dedicated to Port and either transferred to Port or used as expressly directed by Port.

**5.6. Separate Accounting.** Manager shall separately account for all funds received (sources) and expended upon (uses), or otherwise related to the Premises, including operating expenses, capital expenses, Premises Revenue, Master Association Contributions, and the Management Fee.

**5.7. Reporting.**

(a) **Quarterly Report.** Within sixty (60) days after the end of each calendar quarter, Manager will deliver to Port a quarterly report for the Premises ("**Quarterly Report**") including: (i) actual operating expenses and actual capital expenses plus an updated proposed budget based on known changes to Master Association Contributions, Premises Revenues, Port contributions, operating expenses, and/or capital expenses, and (ii) any Private Use Agreements entered into during the prior quarter. Port may request additional information in its reasonable discretion.

(b) **Annual Report.** Prior to April 1 of each year, Manager will deliver to Port an "**Annual Report**" for the previous calendar year that includes a narrative on Park operations for the prior calendar year, and the following:

(i) The Annual Report must identify as separate line items for the Premises: actual Premises Revenues, Master Association Contributions, Port contributions and any other revenue or income related to the Premises, operating expenses, and capital expenses.

The Annual Report must also contain a summary of improvements, maintenance, and activities on the Premises during the prior calendar year, including but not limited to:

(ii) A table summarizing the material terms of any new Private Use Agreement, or other agreement affecting the Premises with a term equal to or greater than one year and entered into during the prior calendar year, in substantially the same format attached as *Exhibit C*; and

(iii) A premises evaluation report that will be prepared by a qualified professional conducting an annual inspection and evaluation of the condition of the Premises using applicable provisions of a maintenance evaluation methodology mutually agreed upon by the Port and Manager consistent with this Management Agreement; and

(iv) Copies of each Private Use Agreement entered into during the prior calendar year; and

(v) The amount of any budget surplus or deficit to be carried over from a previous calendar year.

**5.8. Books and Records.** Manager will make available to Port during the Term, upon no less than ten (10) business days prior written notice to Manager, complete and accurate Books and Records that contain all information required to permit Port to verify total Gross Revenues and deductions and exclusions therefrom that are in accordance with this Agreement and with generally accepted accounting practices consistently applied, or other such method as is reasonably acceptable to Port, from period to period with respect to all operations of the business to be conducted in or from the Premises and will retain such Books and Records for a period of the later of (i) three (3) years after the end of each calendar year to which such Books and Records apply or, (ii) if an audit is commenced or if a controversy should arise between the Parties hereto, until such audit or controversy is terminated (the “**Audit Period**”).

**5.9. Audits.** Port Representatives will have the right, from time to time, to examine and/or cause a complete audit (but not to make copies, unless in connection with discovery in the course of litigation) of any or all Annual Reconciliations and Manager’s Books and Records. In connection with any such examination and/or audit, Port Representatives will have the right, from time to time, to request, in a written notice given to Manager (each, a “**Records Request**”), that Manager make, or cause to be made, available to Port Representatives, at the Premises or at Manager’s principal office within the City and County of San Francisco, the Books and Records relating to any Audit Period. Manager, within thirty (30) days after Manager’s receipt of any Records Request (each such 30-day period, a “**Submission Period**”), will make, or cause to be made, available to Port Representatives the Books and Records requested by Port in such Records Request, which Books and Records will be sufficient to permit an accurate determination of Operating Expenses and Capital Expenses for the applicable Audit Period. If, with respect to any Records Request, Manager fails to make, or cause to be made, available the Books and Records requested by such Records Request at the Premises or at Manager’s principal office within the City and County of San Francisco within the applicable Submission Period (a “**Records Default**”) and such Records Default will continue for a period of ten (10) Business Days following written notice thereof to Manager, such Records Default will constitute an immediate Event of Default by Manager hereunder. For purposes of this Section, the phrase “make available” or other words of similar import will be deemed to require that Manager make, or cause to be made, the Books and Records requested by any Records Request available to Port representatives at Manager’s election, either at the Premises or at Manager’s principal office within the City and County of San Francisco. Notwithstanding anything to the contrary herein, unless there is a continuing Event of Default by Manager under this Agreement, Port will not initiate a new audit more than one time in any calendar year.

## 6. MAINTENANCE OBLIGATIONS, OPERATING REQUIREMENTS.

**6.1. General Maintenance Standard.** Manager will have the sole responsibility for maintaining the Premises in good order and condition equal to or better than first-class public rights-of-way and open space projects in California.

**6.2. Manager's Role to Fulfill Certain Port Obligations.** Port intends for Manager to fulfill Port's maintenance, operations, management, and reporting obligations identified in the following agreements on behalf of Port: (a) that certain Memorandum of Understanding Regarding Jurisdiction, Acceptance, and Maintenance of Public Improvements at the Mission Rock Special Use District, (b) that certain Interdepartmental Master Encroachment Permit and Maintenance Agreement (Mission Rock – Phase 1) between Port and City Department of Public Works (the "IMEP"), and (c) Recycled Water Purchase Agreement, and each of which have been transmitted in their entirety, including exhibits, attachments, and appendices to Manager. **Exhibit D** is a compilation of the maintenance, operations, management, and reporting obligations required of Manager as understood by the Parties. The Parties agree that **Exhibit D** may, by mutual agreement, be updated, revised, amended, or substituted and that such alteration or substitution shall not constitute a material change so long as **Exhibit D** continues to implement the general maintenance standard set forth in **Section 6.1** and truly and accurately reflects Port's contractual obligations identified in this **Section 6.2**.

**6.3. Paseos.** Manager expressly agrees to follow and apply the maintenance, operations, management, and reporting standards identified in the IMEP throughout the Premises for like materials and installations, including within the Dr. Maya Angelou Paseo and Bridgeview Paseo.

## 7. PRIVATE USE RESTRICTION.

**7.1. Private Use.** The Permitted Use shall include private business use(s), as defined in Internal Revenue Code Section 141 and 26 Code of Federal Regulations Section 1.141-3 and as it may be amended, revised, or superseded ("**Private Use**"), only to the extent authorized in this **Section 7**, which section shall be strictly interpreted in furtherance of the purposes of this Agreement as described in **Section 1.1**, above. For the avoidance of doubt, the Parties understand that seating and table space that is (a) in fact available for public use on a first-come, first-served basis and consistent with 26 Code of Federal Regulations Section 1.141-3(c), and (b) not exclusively reserved or dedicated for any food or beverage services or other non-State or local governmental entities, or natural persons engaged in a trade or business, is not currently considered a Private Use and is therefore a Permitted Use.

**7.2. Private Use Areas.** Maximum Private Use Areas and associated uses are depicted and described in **Exhibit E**. Manager shall manage and collect revenue from any Private Use Area in strict accordance with the square footage limitations and use restrictions described in **Exhibit E**, and the terms and conditions of this section.

**7.3. Private Use Agreements.** Port developed a form agreement attached as **Exhibit F** (the form "**Private Use Agreement**") that Manager may execute with persons engaged in a trade or business, including ground-floor tenants of adjacent buildings, for use of one or more Private Use Areas. Each Private Use Agreement is subject to, and shall be null and void unless compliant with, the following conditions.

(a) The counterparty entering the Private Use Agreement cannot be subject to an active debarment or suspension order from the City; and has not in the last ten (10) years, and is not currently, subject to an eviction or other enforcement order prosecuted by or for the Port. To comply with this provision, Manager shall:

(i) confirm that the applicable counterparty is not listed as a suspended or debarred entity as reported by the City, which information is publicly available at

<https://sf.gov/resource/2022/suspended-and-debarred-contractors> (or other City database specified by the Port in writing that is accessible to Manager); and

(ii) include representations in its form agreements that the applicable counterparties (A) are not subject to an active debarment or suspension order from the City, and (B) have not been debarred or suspended by the City in the last ten (10) years, and (C) are not currently, subject to an eviction or judicial action or other enforcement order prosecuted by or for the Port; and

(iii) for any agreement with a term of more than one (1) year, provide advance notice to Port of each proposed counterparty to a Private Use Agreement prior to execution to confirm eligibility.

(b) Each Private Use Agreement must subject the counterparty to a cross-default provision with any contract with the Port, which cross-default provision may be prosecuted by Port in its sole and absolute discretion;

(c) Each Private Use Agreement must include indemnification and waiver of claims clauses similar to the provisions in **Section 15** (Indemnity and Exculpation);

(d) Each Private Use Agreement must state that the counterparty must comply with all applicable Laws and every applicable condition of this Agreement;

(e) Each Private Use Agreement must include a provision where the counterparty expressly waives any and all relocation assistance and benefits in connection with this Agreement to the extent permitted by applicable Laws;

(f) Each Private Use Agreement must include a provision where the counterparty expressly agrees to report the Private Use Agreement to the County Assessor in accordance with San Francisco Administrative Code Sections 23.38 and 23.39 (or any successor statute);

(g) Each Private Use Agreement must include insurance provisions requiring that the counterparty's liability and other insurance policies name **"THE CITY AND COUNTY OF SAN FRANCISCO, THE SAN FRANCISCO PORT COMMISSION, AND THEIR OFFICERS, AGENTS, EMPLOYEES, AND REPRESENTATIVES"**;

(h) Each Private Use Agreement must be consistent with this Management Agreement; and

(i) Each Private Use Agreement must be fully disclosed without redaction to the Port within thirty (30) days of execution.

(j) Manager must receive no less than the applicable parameter rate (rent or fee) in effect at the time of execution of each Private Use Agreement, except for counterparties operating during a temporary community-oriented offering, such as a farmers' market, craft market, or food truck. Community-oriented offerings on the Premises are limited to no more than [five (5)] days per year. For the avoidance of doubt, the Parameter Rental Rate Schedule for Fiscal Year 2023-2024 to be applied to each Active Edge Agreement is identified within the "Open Land, Pier and Airspace Rates" category as "Improved Land & Sidewalk (including outdoor dining)."

## **8. USE OF THE PREMISES.**

**8.1. Permitted Use.** The Premises shall be used and occupied only for the Permitted Use specified in the Management Agreement Information Table and for no other purpose; provided that Manager shall not be in breach or default under this Agreement if Manager has taken commercially reasonable steps generally consistent with public rights of way and public open space in San Francisco to prevent the occurrence of Prohibited Uses by Persons other than



Manager or Manager's Agents on the Premises. Any other use within the Premises requires the prior written consent of Port, which may be withheld in Port's sole discretion.

**8.2. Prohibited Uses.** Manager agrees that the following activities, by way of example only and without limitation, and any other use that is not a Permitted Use (in each instance, a "**Prohibited Use**" and collectively, "**Prohibited Uses**"), are inconsistent with this Agreement, are strictly prohibited and are considered Prohibited Uses:

- (a) any activity, or the maintaining of any object, which is not within the Permitted Use;
- (b) camping;
- (c) sleeping when the Premises or a portion thereof is closed, unless associated with an event at a reserved facility and within a designated area;
- (d) drug use;
- (e) consuming alcohol or carrying open containers unless expressly approved, such as at a reserved facility, within a designated area, or at a permitted establishment, or as may otherwise be lawful;
- (f) climbing or affixing items to buildings, trees, lawn, or furniture, except as otherwise permitted;
- (g) using amplified sound, unless within a designated area or such use is otherwise in compliance with Laws and required Regulatory Approvals;
- (h) panhandling;
- (i) disorderly conduct, including fighting, yelling, disturbing other Premises users, or defying directions from Manager, Manager's staff, or its Agents;
- (j) peddling and vending merchandise without a permit;
- (k) lighting fires or cooking except in any designated areas or with a permit;
- (l) littering or dumping waste;
- (m) graffiti, placing stickers, posting flyers, or otherwise defacing property;
- (n) removing or damaging plants, soil, furnishings, or other fixtures from the Premises;
- (o) feeding or harassing animals or harming their natural habitat;
- (p) any activity, or the maintaining of any object, which will in any way increase the existing rate of, affect or cause a cancellation of, any fire or other insurance policy covering the Premises, any part thereof or any of its contents;
- (q) any activity which constitutes waste or nuisance;
- (r) any activity which will in any way injure, obstruct or interfere with the rights of owners or occupants of adjacent or surrounding properties, including, but not limited to, rights of ingress and egress;
- (s) any auction, distress, fire, bankruptcy or going out of business sale on the Premises without the prior written consent of Port, which consent may be granted, conditioned, or withheld in the sole and absolute discretion of Port;
- (t) construction staging for any construction occurring off the Premises, unless Manager obtains both Port's written consent and all relevant permits;

(u) any vehicle and equipment maintenance, including but not limited to, fueling, changing oil, transmission or other automotive fluids, or the washing of any vehicles or equipment;

(v) the storage of any and all excavated materials, including but not limited to, dirt, concrete, sand, asphalt, and pipes, unless Manager obtains both Port's written consent and all relevant permits; or

(w) the storage of any and all aggregate material, or bulk storage, such as wood or of other loose materials, unless Manager obtains both Port's written consent and all relevant permits.

**8.3. Notice of Prohibited Use Charge.** In the event Port determines after inspection that Prohibited Uses are occurring due to Manager's direct action or Manager's failure to take commercially reasonable steps generally consistent with other public rights-of-way and open space in San Francisco to prevent the occurrence of Prohibited Uses in operating the Premises, Port will notify Manager of the Prohibited Use and Manager will promptly commence commercially reasonable steps generally consistent with other public rights-of-way and open space in San Francisco to prevent the occurrence of Prohibited Uses and will pay to Port, as Additional Rent, an amount equaling Two Hundred Dollars (\$200.00) upon delivery of written notice to Manager to cease the Prohibited Use ("**Notice to Cease Prohibited Use**"). In the event Port determines in subsequent inspection(s) that Manager has not taken commercially reasonable steps generally consistent with other public parks and open space in San Francisco to prevent the occurrence of Prohibited Uses, then Manager will pay to Port, as Additional Rent, an amount equaling Three Hundred Dollars (\$300.00) for each additional Notice to Cease Prohibited Use delivered to Manager. The parties agree that the charges associated with each inspection and delivery of the Notice to Cease Prohibited Use, if applicable, represent a fair and reasonable estimate of the administrative cost and expense which Port will incur by reason of Port's inspection and Manager's failure to comply with the applicable Notice to Cease Prohibited Use and that Port's right to impose the foregoing charges will be in addition to and not in lieu of any and all other rights under this Agreement, at law or in equity. By signing this Agreement, each party specifically confirms the accuracy of the statements made in this Section and the reasonableness of the amount of the charges described in this Section.

## **9. COMPLIANCE WITH LAWS; REGULATORY APPROVAL; PORT ACTING AS OWNER OF PROPERTY.**

**9.1. Compliance With Laws.** Manager, at Manager's sole cost and expense, promptly shall comply with all Laws relating to or affecting Manager's use of the Premises and services under this Agreement.

**9.2. Regulatory Approval.** Manager understands that Manager's activity on the Premises may require Regulatory Approvals from Regulatory Agencies. Manager shall be solely responsible for obtaining any such Regulatory Approvals, and Manager shall not seek any Regulatory Approval without first obtaining the prior written approval of Port. All costs associated with applying for and obtaining any necessary Regulatory Approval shall be borne solely and exclusively by Manager. Port, at no cost to Port, will reasonably cooperate with Manager in its efforts to obtain such Regulatory Approvals, including submitting letters of authorization for submittal of applications consistent with all applicable Laws and the further terms and conditions of this Agreement. Port may elect in Port's sole discretion to participate as co-permittee for one or more Regulatory Approvals. Manager shall be solely responsible for complying with any and all conditions imposed by Regulatory Agencies as part of a Regulatory Approval; provided, however, Manager shall not agree to the imposition of conditions or restrictions in connection with its efforts to obtain a permit or other entitlement from any Regulatory Agency (other than Port), if the Port is required to be a co-permittee under such permit, or if the conditions or restrictions it would impose on the project could adversely affect use or occupancy of other areas controlled or owned by the Port or would create obligations on

the part of the Port (whether on or off of the Premises) to perform or observe (other than fees that would be reimbursed by Manager), unless in each instance the Port has previously approved such conditions in writing, in Port's sole and absolute discretion. Port will join in any application by Manager for any required Regulatory Approval and execute such permit where required, provided that Port has no obligation to join in any such application or sign the permit if Port does not approve the conditions or restrictions imposed by the Regulatory Agency under such permit as set forth above in this section.

Any fines or penalties imposed as a result of the failure of Manager to comply with the terms and conditions of any Regulatory Approval shall be promptly paid and discharged by Manager, and Port shall have no liability, monetary or otherwise, for the fines and penalties. Manager in its sole discretion has the right to appeal or contest any condition in any manner permitted by Law imposed by any such Regulatory Approval; provided, however, if Port is a co-permittee, then Manager will have first obtained Port's prior consent, not to be unreasonably withheld, prior to commencing any such appeal or contest. Manager will provide Port with prior notice of any such appeal or contest and keep Port informed of such proceedings. No Port Approval will limit Manager's obligation to pay all costs of complying with any conditions or restrictions. To the fullest extent permitted by Law, Manager agrees to Indemnify City, Port and their Agents from and against any Claim which City or Port may incur as a result of Manager's failure to obtain or comply with the terms and conditions of any Regulatory Approval, except to the extent that such Claim arises solely from the willful misconduct or gross negligence of the Port acting in its proprietary capacity.

**9.3. Port Acting As Owner of Property.** By signing this Agreement, Manager agrees and acknowledges that (i) Port has made no representation or warranty that any required Regulatory Approval can be obtained, (ii) although Port is an agency of City, Port has no authority or influence over any other Regulatory Agency responsible for the issuance of such required Regulatory Approvals, (iii) Port is entering into this Agreement in its capacity as a landowner with a proprietary interest in all or a portion of the Premises, and not as a Regulatory Agency of City with certain police powers, and (iv) Manager is solely responsible for obtaining any and all required Regulatory Approvals in connection with the Permitted Activity on, in or around the Premises. Accordingly, Manager understands that there is no guarantee, nor a presumption, that any required Regulatory Approval(s) will be issued by the appropriate Regulatory Agency and Port's status as an agency of City shall in no way limit the obligation of Manager to obtain approvals from any Regulatory Agencies (including Port) which have jurisdiction over the Premises. Manager hereby releases and discharges Port from any liability relating to the failure of any Regulatory Agency (including Port) from issuing any required Regulatory Approval.

## **10. UTILITIES, SERVICES, MAINTENANCE AND REPAIR.**

**10.1. Utilities.** Port has no responsibility or liability of any kind with respect to any utilities that may be on, in or under the Premises. Except as may be otherwise provided in the Management Agreement Information Table, Manager shall make arrangements and shall pay all charges for all Utilities to be furnished on, in or to the Premises or to be used by Manager; provided that Port shall take such actions as are reasonably necessary to enable Manager to obtain utilities. Manager will procure all electricity for the Premises from the San Francisco Public Utilities Commission at rates to be determined by the SF Public Utilities Commission. If the SF Public Utilities Commission determines that it cannot feasibly provide service to Manager, Manager may seek another provider.

**10.2. Services.** Port has no responsibility or liability of any kind with respect to the provision of any services to Manager, or on, in, or to the Premises. Manager shall make arrangements and shall pay all charges for all services to be furnished on, in, or to the Premises, or to be used by Manager, including, without limitation, security service, garbage and trash collection, janitorial service and extermination service.

**10.3. Maintenance and Repair.** Manager shall at all times during the Term, at its sole cost and expense, maintain and repair in good and working order, condition and repair the Premises and all improvements and alterations thereon. For the avoidance of doubt, repair generally includes those actions and activities that maintain the normal operating condition of the Premises, or a feature or component thereof; repair generally excludes those actions or activities that extends the useful life of the Premises, or a feature or component thereof. In the event that Manager or its Agents or Invitees cause any damage (excepting ordinary wear and tear) to the Premises or any other Port property, Manager shall be responsible to repair the same. In the event Manager fails to promptly commence efforts to maintain the Premises or repair any damage to the Premises caused by Manager or its Agents, Port may maintain or repair the same at Manager's sole cost and expense and Manager will promptly reimburse Port therefor. Except in the event of an emergency, Port will first provide no less than fourteen (14) calendar days prior notice to Manager before commencing any maintenance or repair pursuant to this Section. If Manager does not commence maintenance or repair of or provide assurances reasonably satisfactory to Port that Manager will commence maintenance or repair of the same within such fourteen (14) calendar day period (subject to reasonable extension for planned events and sponsorship activities that interfere with non-emergency maintenance or repair), then Port may proceed to take the required action. This provision shall survive the expiration or earlier termination of this Agreement.

## **11. RISK OF LOSS.**

Notwithstanding Manager's obligations under *Section 15* (Indemnity and Exculpation) and *Section 16* (Hazardous Materials), ultimate risk of loss or damage for any casualty to the Premises, regardless of the cause, shall remain with the Port, including to the extent such casualty or Claim is not covered by Manager's insurance as required under *Section 12* (Insurance). Manager shall reasonably cooperate to assist Port with any and all damages, claims, or failures related to the Premises, including but not limited to compiling evidence and reports, and filing, processing, and collecting on claims as may be authorized in writing by Port.

## **12. INSURANCE.**

**12.1. Required Insurance Coverage.** Manager, at its sole cost and expense, will maintain, or cause to be maintained, throughout the Term, the following insurance (provided, (i) for the avoidance of doubt and without limiting Manager's obligations if the Park Lease is not in effect, while the Park Lease is in effect, the same insurance policies carried by Manager under the Park Lease shall satisfy the requirements of this Agreement, and (ii) if the Park Lease is terminated and this Agreement remains in effect, Manager may carry such lesser insurance as the City's Risk Manager determines is commercially reasonable):

(a) **Commercial General Liability Insurance.** Comprehensive or "Commercial General Liability" insurance, with limits not less than Forty Million Dollars (\$40,000,000.00) each occurrence combined single limit for bodily injury (including death) and property damage, including coverages for contractual liability, independent contractors, broad form property damage, personal injury, fire damage and legal liability with limits not less than Two Hundred Fifty Thousand Dollars (\$250,000.00), and explosion, collapse and underground (XCU) coverage during any period in which Manager is conducting any activity on or Alteration or Improvement to the Premises with risk of explosion, collapse, or underground hazards; personal and advertising liability, and the products-completed operations. This policy must also cover non-owned and for-hire vehicles and all mobile equipment or unlicensed vehicles, such as forklifts.

(b) **Liquor Liability and Food Products Liability.** If Manager has (or is required under Laws to have) a liquor license and is selling or distributing or allows (irrespective of whether Manager has a liquor license) alcoholic beverages on the Premises, or is selling or distributing food products on the Premises, then liquor liability coverage with limits not less than Five Million Dollars (\$5,000,000) each occurrence, and food products liability insurance with

limits not less than Five Million Dollars (\$5,000,000) each occurrence, and Manager will require any Operator, Agent, or Subtenant (including licensees or concessionaires) who has (or is required under Laws to have) a liquor license and who is selling, allowing, or distributing alcoholic beverages and food products on the Premises, to maintain coverage in amounts at least comparable to the above limits on Manager's policies.

(c) **Automobile Insurance.** Manager will maintain policies of business automobile liability insurance covering all owned, non-owned, or hired motor vehicles to be used in connection with Manager's use and occupancy of, and activity at, the Premises, affording protection for bodily injury (including death) and property damage with limits of not less than the limits required for commercial general liability insurance for each occurrence combined single limit.

(d) **Environmental Liability Insurance.** During the course of any Hazardous Materials Remediation activities, Manager will maintain, or require by written contract that its remediation contractor or remediation consultant will maintain, environmental pollution liability insurance, on an occurrence form, with limits of not less than Five Million Dollars (\$5,000,000) each occurrence for Bodily Injury, Property Damage, and clean-up costs, with the prior written approval of Port (such approval not to be unreasonably withheld, conditioned or delayed).

(e) **Construction Activities.** At all times during any period of Manager's construction of Improvements or Alterations,

(i) Manager will cause Manager's Agents (including Manager's contractor) to carry such insurance coverage and limits as will be reasonably approved by Port and the City's Risk Manager, taking into account the nature and scope of the work and industry custom and practice.

(ii) In addition, Manager will carry "Builder's All Risk" insurance on a form reasonably approved by Port, in the amount of one hundred percent (100%) of the completed value of all new construction, insuring all new construction, including all materials and equipment incorporated in, on or about the Premises, and in transit or storage off-site, that are or will be part of the permanent Improvements, against "all risk" and "special form" hazards.

(iii) Manager will require all providers of professional services, including architectural, design, engineering, geotechnical, and environmental professionals under contract with Manager for any Improvements or any Alterations to maintain professional liability (errors or omissions) insurance, with limits not less than Five Million Dollars (\$5,000,000.00) each claim and Ten Million Dollars (\$10,000,000) in the aggregate, with respect to all professional services provided to Manager therefor.

(f) **Special Events/Participants.** For any event at the Premises, Manager, Event Venue Users, concessionaires or Agents, as applicable, must maintain Special Events/Participants Liability Insurance (GL) acceptable to Port, with limits not less than One Million Dollars (\$1,000,000.00).

(g) **Workers' Compensation; Employer's Liability.** Manager will carry (if applicable) and will require Manager's Agents to carry Worker's Compensation Insurance with Employer's Liability limit not less than One Million Dollars (\$1,000,000.00) for each accident, injury or illness, on employees eligible for each (if any).

(h) **Personal Property Insurance.** Manager, at its sole cost and expense, will procure and maintain on all of Manager's Property and Alterations, in, on, or about the Premises, personal property insurance on all risk form, excluding earthquake and flood, in an amount not less than full replacement value or a stated value, at Manager's sole discretion, for the replacement of Manager's Property. In addition to the foregoing, Port may, in its sole discretion, insure any personal property leased to Manager by Port pursuant to this Agreement in such amounts as Port deems reasonably appropriate and Manager will have no interest in the proceeds

of such personal property insurance. Port will have no responsibility or obligation to maintain insurance or replace Manager's Property, Alterations, or any Improvements regardless of cause of loss.

(i) **Sexual Molestation.** For any Event where minors are present, sexual molestation and abuse coverage with minimum limits of Two Million Dollars (\$2,000,000) per occurrence and Four Million Dollars (\$4,000,000) in the aggregate. Coverage may be held as a separate policy or included by endorsement in the Commercial General Liability or Errors and Omissions policy.

(j) **Other Coverage.** Not more often than every year and upon not less than sixty (60) days prior written notice, in connection with the annual budget process Port may require Manager to increase the insurance limits set forth above or to provide other coverage and/or different coverage amounts as may be: (i) required by Law, (ii) reasonably required by the City's Risk Manager, or (iii) as is reasonably prudent for private operators of public parks and open spaces similar in size, character, age and location as the Premises with respect to risks comparable to those associated with the use of the Premises.

**12.2. Claims-Made Policies.** If any of the insurance required in *Section 12.1* above is provided under a claims-made form of policy, Manager will maintain such coverage continuously throughout the Term and without lapse for a period of three (3) years beyond the termination of this Agreement, to the effect that should occurrences during the Term give rise to claims made after termination of this Agreement, such claims will be covered by such claims-made policies.

**12.3. Annual Aggregate Limits.** If any of the insurance required in *Section 12.1* above is provided under a form of coverage which includes an annual aggregate limit or provides that claims investigation or legal defense costs be included in such annual aggregate limit, such annual aggregate limit will be double the occurrence limits specified herein.

**12.4. Payment of Premiums.** Manager will pay the premiums for maintaining all required insurance.

**12.5. Waiver of Subrogation Rights.** Notwithstanding anything to the contrary contained herein, Port and Manager (each a "**Waiving Party**") each hereby waives any right of recovery against the other party for any loss or damage sustained by such other party with respect to the Premises or any portion thereof or the contents of the same or any operation therein, whether or not such loss is caused by the fault or negligence of such other party, to the extent such loss or damage is covered by insurance which is required to be purchased by the Waiving Party under this Agreement or is actually covered by insurance obtained by the Waiving Party. Each Waiving Party agrees to cause its insurers to issue appropriate waiver of subrogation rights endorsements to all policies relating to the Premises; provided, the failure to obtain any such endorsement will not affect the above waiver.

**12.6. General Insurance Matters.**

(a) All liability insurance policies required to be maintained by Manager hereunder will contain a cross-liability clause, will name as additional insureds by written endorsement the "**CITY AND COUNTY OF SAN FRANCISCO AND THE SAN FRANCISCO PORT COMMISSION AND THEIR OFFICERS, DIRECTORS, COMMISSIONERS EMPLOYEES AND AGENTS,**" will be primary and non-contributory to any other insurance available to the additional insureds with respect to claims arising under this Agreement, and will provide that such insurance applies separately to each insured against whom complaint is made or suit is brought except with respect to the limits of the company's liability.

(b) All insurance policies required to be maintained by Manager hereunder will be issued by an insurance company or companies reasonably acceptable to Port with an AM Best rating of not less than A-VIII and authorized to do business in the State of California.

Manager's compliance with this Section will in no way relieve or decrease Manager's liability under this Agreement.

(c) All insurance policies required to be maintained by Manager hereunder will be endorsed to provide for thirty (30) days prior written notice of cancellation for any reason, intended non-renewal, or reduction in coverage to Manager and Port.

(d) Manager will deliver to Port certificates of insurance, additional insured policy endorsements and waiver of subrogation endorsements in a form satisfactory to and at the direction of Port, such as hard copy documentation or use of an internet-based insurance compliance tracking systems such as EXIGIS, evidencing the coverages required herein, together with evidence of payment of premiums, on or before the Commencement Date, and upon renewal of each policy not less than thirty (30) days before expiration of the term of the policy. If Port is using an internet-based insurance compliance tracking system, Manager's broker will complete the insurance questionnaire and submit all required documentation. Manager will, upon Port's request, promptly furnish Port with a complete copy of any insurance policy required hereunder.

### 13. NOTICES.

Except as otherwise expressly provided in this Agreement or by Law, all notices (including notice of consent or non-consent) required or permitted by this Agreement or by Law must be in writing and be delivered by: (a) hand delivery; (b) first class United States mail, postage prepaid; or (c) overnight delivery by a nationally recognized courier or the United States Postal Service, delivery charges prepaid. Notices to a party must be delivered to that party's mailing address in the Management Agreement Information Table, unless superseded by a notice of a change in that party's mailing address for notices, given to the other party in the manner provided above, or by Manager in Manager's written response to Port's written request for such information.

All notices under this Agreement shall be deemed to be duly delivered: (a) on the date personal delivery actually occurs; (b) if mailed, on the business day following the business day deposited in the United States mail or, if mailed return receipt requested, on the date of delivery or on which delivery is refused as shown on the return receipt; or (c) the business day after the business day deposited for overnight delivery.

Notices may not be given by facsimile or electronic mail, but either party may deliver a courtesy copy of a notice by facsimile or electronic mail.

### 14. DEFAULT BY MANAGER; REMEDIES.

**14.1. *Event of Default.*** The occurrence of any one or more of the following events shall constitute a default ("**Event of Default**") by Manager:

(a) failure to pay to Port any sum payable hereunder when due, and such default continues for a period of five (5) business days following written notice from Port; or

(b) failure of Manager or its Agents to use the Premises solely for the Permitted Use, as determined by Port in its reasonable discretion, and such failure continues for a period of twenty-four (24) hours following written notice from Port; provided, however, that if such default cannot reasonably be cured within such twenty-four (24) hours, Manager will not be in default of this Agreement if Manager commences to cure the default within such period and diligently and in good faith continues to cure the default; or

(c) failure of Manager to take commercially reasonable steps generally consistent with other public rights-of-way and open space in San Francisco to prevent the occurrence of Prohibited Uses by Persons other than Manager or its Agents, in conjunction with the occurrence of such Prohibited Uses, and such failure continues for a period of ten (10) days following written notice from Port; or

(d) an Event of Default under the WPA (as defined under the WPA), which Event of Default continues without cure for five (5) Business Days after written notice from Port; provided, however, if such Event of Default cannot reasonably be cured within such five (5) day period, Manager will not be in default of this Agreement if Manager commences to cure the Event of Default within such five (5) day period and diligently and in good faith continues to cure the Event of Default, provided, however, without limitation of the foregoing, the Parties agree for purposes of this subsection that Manager's internal meetings to determine the path to cure such Event of Default will be deemed to be a commencement of cure; or

(e) an assignment, or attempted assignment, of this Agreement by Manager, and such assignment continues without cure for a period of five (5) business days after written notice by Port. For the avoidance of doubt, Port will notify Manager of its conclusion that an assignment in violation of this Agreement has occurred, which conclusion may be revised after meeting and conferring with Manager regarding the assignment, as well as Manager's actions in response to notice of Port's conclusion; or

(f) failure by Manager to maintain any insurance required to be maintained by Manager under this Agreement, or failure by Manager or Manager's broker to provide evidence of required insurance, or if any such insurance will be canceled or terminated or will expire or be reduced or materially changed, except as permitted in this Agreement, and Manager's or Manager's broker's failure to either maintain, or to deliver evidence of, such coverage or failure to reinstate such coverage, all within three (3) business days following written notice from Port; or

(g) failure by Manager to comply with the provisions of **Section 16** below, and Manager's failure to cure the foregoing default within one (1) Business Day following written notice from Port; provided however, if such default cannot reasonably be cured within such one (1) Business Day, then Manager will not be in default of this Agreement if Manager commences to cure the default within such one (1) Business Day (which commencement includes Manager's internal meeting that determines the path to cure such default), and diligently and in good faith continues to cure the default, provided further, Manager will have no more than six (6) months to cure such default unless Port provides one or more written consents to extend this period in Port's reasonable discretion and each consent may not extend the cure period for more than three hundred sixty-five (365) calendar days; or

(h) failure by Manager to discharge any lien or encumbrance placed on the Premises or any part thereof in violation of this Agreement, and such violation or failure continues without cure for a period of thirty (30) days following Manager's knowledge of such lien or encumbrance, including but not limited to written notice from Port specifying the nature of such violation or failure; or

(i) failure by Manager to observe, keep or perform any of the other terms, covenants, agreements or conditions contained in this Agreement and required to be observed or performed by Manager and not specifically enumerated in this Section, and such failure continues without cure for a period of thirty (30) days after written notice by Port that specifies the nature of such failure; provided that if such failure is not capable of cure within such thirty (30) day period, Manager will have a reasonable period to complete such cure if Manager promptly undertakes action to cure and thereafter diligently prosecutes the same to completion within sixty (60) days after the receipt of notice of default from Port; provided further, Manager will have no more than ninety (90) days to cure such default unless Port provides one or more written consents to extend this period in Port's reasonable discretion and each consent may not extend the cure period for more than three hundred sixty-five (365) calendar days; or

(j) Manager becomes bankrupt or insolvent or makes a transfer in fraud of creditors, or make an assignment for the benefit of creditors, or bring or have brought against Manager any action or proceedings of any kind under any provision of the U.S. Bankruptcy Code or under any other insolvency, bankruptcy or reorganization act and, in the event such



proceedings are involuntary, Manager is not discharged from the same within one hundred eighty (180) days thereafter; or

(k) a receiver is appointed for a substantial part of the assets of Manager and such receiver is not discharged within one hundred eighty (180) days; and

(l) without limiting the provisions of *Sections 14.1(b), 14.1(c), or 14.1(g)*, or lengthening the cure periods under those subsections, failure by Manager to comply with Laws and Manager's failure to cure the foregoing default within forty-eight (48) hours following written notice from Port; provided however, if such default cannot reasonably be cured within such forty-eight (48) hour period, Manager will not be in default of this Agreement if Manager commences to cure the default within such forty-eight (48) hour period and diligently and in good faith continues to cure the default, provided further, Manager will have no more than thirty (30) days to cure such default unless Port provides one or more written consents to extend this period in Port's reasonable discretion and each consent may not extend the cure period for more than three hundred sixty-five (365) calendar days.

**14.2. Port's Remedies.** Upon default by Manager, Port shall, without further notice or demand of any kind to Manager or to any other person, and in addition to any other remedy Port may have under this Agreement and at law or in equity, have the ability to immediately terminate this Agreement and Manager's right to use the Premises. Upon notice of any such termination, Manager shall immediately vacate and discontinue its use of the Premises and Port may take any and all action to enforce Manager's obligations.

## 15. INDEMNITY AND EXCULPATION.

**15.1. General Indemnity.** Subject to *Section 15.6*, Manager will Indemnify Port, City, including, but not limited to, all of their respective boards, commissions, departments, agencies, and other subdivisions, and their respective Agents (collectively, "**Indemnified Parties**") from, and will defend them, without cost to the Indemnified Parties, against any and all Claims arising directly or indirectly out of: (a) any accident, injury to or death of any person, including any Agents and/or Invitees of Manager, or loss or damage to or destruction of any property occurring in, on, over, or under the Premises during Manager's services under this Agreement, (b) any default by Manager in the observance or performance of any of the terms, covenants or conditions of this Agreement, (c) the use, manner of use or services under this Agreement, or condition of the Premises or the activities therein by Manager, its Agents, Invitees, or concessionaires during Manager's services under this Agreement, (d) any construction or other work on the Premises permitted by Manager during Manager's services under this Agreement, or (e) any acts, omissions, or negligence of Manager, its Agents, or Invitees, in, on, over, or under the Premises.

### 15.2. Hazardous Materials Indemnity.

(a) Subject to *Section 15.6*, in addition to its obligations under *Section 15.1*, Manager agrees to Indemnify the Indemnified Parties from any and all Claims and Hazardous Material Claims that arise as a result of: (i) any Hazardous Material Condition existing or occurring during the Term or pursuant to Manager's obligations under *Section \_\_\_\_\_*, and (ii) Manager's or Manager's Agent's Exacerbation of any Hazardous Material Condition during Manager's services under this Agreement.

(b) Manager's obligation to Indemnify the Indemnified Parties includes: (i) actual costs incurred in connection with any Investigation or Remediation requested by Port or required by any Environmental Regulatory Agency and to restore the affected area to its condition before the Release; (ii) actual damages for diminution in the value of the Premises; (iii) actual damages for the loss or restriction on use of rentable or usable space or of any amenity of the Premises; (iv) actual damages arising from any adverse impact on marketing the space; (v) actual sums paid in settlement of Claims, Hazardous Material Claims, Environmental Regulatory Actions, including fines and penalties; (vi) actual natural resource damages; and (vii) reasonable

attorneys' fees, consultant fees, expert fees, court costs, and all other litigation, administrative or other judicial or quasi-judicial proceeding expenses. If Port pays any costs within the scope of this section, Manager must reimburse Port for Port's costs, plus interest at the Interest Rate from the date Port incurs each cost until paid, within five (5) business days after Port's payment demand and evidence reasonably supporting the demand.

**15.3. Scope of Indemnities.** Subject to *Section 15.6*, the Indemnification obligations of Manager set forth in this Agreement will be enforceable regardless of the joint or concurrent, active or passive negligence of the Indemnified Parties, and regardless of whether liability without fault is imposed or sought to be imposed on the Indemnified Parties. The Indemnification obligations of Manager set forth in this Agreement will be enforceable except to the extent that such Indemnity is void or otherwise unenforceable under applicable Law in effect on, or validly retroactive to, the date of this Agreement. Except as specifically provided otherwise, the Indemnification obligations of Manager set forth in this Agreement will exclude Claims resulting solely from the willful misconduct or gross negligence of the Indemnified Parties.

In addition to Manager's obligation to Indemnify the Indemnified Parties, Manager specifically acknowledges and agrees that it has an immediate and independent obligation to defend the Indemnified Parties from any Claim which actually or potentially falls within the Indemnification obligations of Manager set forth in this Agreement, even if the allegations are or may be groundless, false or fraudulent. This Indemnification by Manager will begin from the first notice that any claim or demand is or may be made and will continue at all times thereafter until finally resolved.

**15.4. Exculpation and Waiver.** To the fullest extent permitted by law, Manager, as a material part of the consideration to be rendered to Port, hereby waives any and all Claims, including without limitation all Claims arising from the joint or concurrent, active or passive, negligence of the Indemnified Parties, but excluding any Claims caused solely by the Indemnified Parties' willful misconduct or gross negligence. The Indemnified Parties will not be responsible for or liable to Manager, and Manager hereby assumes the risk of, and waives and releases the Indemnified Parties from all Claims, whether direct or indirect, known or unknown, foreseen or unforeseen, for any injury, loss or damage to any person or property in or about the Premises by or from any cause whatsoever including, without limitation, (i) any act or omission of persons occupying adjoining premises, (ii) theft, (iii) explosion, fire, steam, oil, electricity, water, gas or rain, pollution or contamination, (iv) stopped, leaking or defective systems, (v) construction defects, (vi) damages to goods, wares, goodwill, merchandise, equipment or business opportunities, (vii) Claims by persons in, upon or about the Premises, or any other Port property for any cause arising at any time, (viii) alleged facts or circumstances of the process or negotiations leading to this Agreement prior to the Commencement Date, (ix) inability to use all or any portion of the Premises due to sea level rise, and (x) any other acts, omissions or causes in, on, over, or under the Premises to the fullest extent permitted by law, but excluding any Claims arising from the Indemnified Parties' willful misconduct or gross negligence.

Manager understands and expressly accepts and assumes the risk that any facts concerning the Claims released in this Agreement might be found later to be other than or different from the facts now believed to be true, and agrees that the releases in this Agreement will remain effective. Therefore, with respect to the Claims released in this Agreement, Manager waives any rights or benefits provided by Section 1542 of the Civil Code, which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE

MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Initials:

\_\_\_\_\_

Name:

\_\_\_\_\_

Title:

\_\_\_\_\_

Manager specifically acknowledges and confirms the validity of the release made above and the fact that Manager was represented by counsel who explained the consequences of the release at the time this Agreement was made, or that Manager had the opportunity to consult with counsel, but declined to do so.

**15.5. Not Limited by Insurance.** Manager's Indemnification obligations set forth in *Section 15.1* above and all of Manager's other Indemnification obligations set forth in this Agreement will not be limited by the amount of insurance proceeds that are available pursuant to the insurance coverage that Manager is required to maintain pursuant to this Agreement.

**15.6. Exclusions from Indemnifications, Waivers, and Releases.**

(a) Nothing in this Section relieves the Indemnified Parties from liability, nor will the Indemnities set forth in *Section 15.1*, (General Indemnity), *Section 15.2* (Hazardous Materials Indemnity), or the defense obligations set forth in *Sections 15.3* (Scope of Indemnities), or any other indemnification obligation of Manager under this Agreement extend to Claims:

(i) to the extent such Claim(s) exceed the limit defined in *Section 12.1(a)* for Manager's Commercial General Liability insurance, as applicable at the time of the Claim; or

(ii) caused by the gross negligence or willful misconduct of the Indemnified Parties; or

(iii) from third parties' claims for exposure prior to the Commencement Date to either Pre-Existing Hazardous Materials or to Hazardous Materials.

(b) If it is reasonable for an Indemnified Party to assert that a claim for Indemnification under this Section is covered by a pollution liability insurance policy, pursuant to which such Indemnified Party is an insured party or a potential claimant, then Port will reasonably cooperate with Manager in asserting a claim or claims under such insurance policy but without waiving any of its rights under this Section. Notwithstanding the foregoing, if an Indemnified Party is a named insured on a pollution liability insurance policy obtained by Manager, the Indemnification from Manager under this Section will not be effective unless such Indemnified Party has asserted and diligently pursued a claim for insurance under such policy and until any limits from the policy are exhausted, on condition that (i) Manager pays any self-insured retention amount required under the policy, and (ii) nothing in this sentence requires any Indemnified Party to pursue a claim for insurance through litigation prior to seeking indemnification from Manager. For the avoidance of doubt, Manager shall have no obligation to obtain a pollution liability insurance policy.

**15.7. Survival.** The provisions of *Section 15* will survive the expiration or earlier termination of this Agreement.

**16. HAZARDOUS MATERIALS.**

**16.1. Requirements for Handling.** Neither Manager nor its Agents or Invitees may Handle or permit any other person to Handle any Hazardous Material in, on, over, or under the Premises, subject only to the following exceptions and provided that Handling is at all times in full compliance with all Environmental Laws: (a) any Hazardous Materials which do not require a permit or license from, or that need not be reported to, a governmental agency and are used in compliance with all applicable laws and any reasonable conditions or limitations required by Port, (b) janitorial, office, cooking, or landscaping supplies or materials in such amounts as are customarily used for purposes similar to the Permitted Uses, (c) standard building materials and equipment that do not contain asbestos or asbestos containing materials, lead, or polychlorinated biphenyl (PCBs) for use in connection with maintenance and repairs in accordance with **Section 10.3**, and (d) Hazardous Materials that are or have been Handled for Remediation purposes under the jurisdiction of and as permitted by an Environmental Regulatory Agency.

**16.2. Manager Responsibility.** Manager agrees to protect its Agents and Invitees in its operations on the Premises from hazards associated with Hazardous Materials in accordance with all Environmental Laws and also agrees, for itself and on behalf of its Agents and Invitees, that during its services under this Agreement, each of them:

(a) will not permit any Hazardous Materials (other than Pre-Existing Hazardous Materials) to be present in, on, over, or under the Premises except as permitted under **Section 16.1**;

(b) will not cause or permit any Hazardous Material Condition; and

(c) will comply with all Environmental Laws relating to the Premises and any Hazardous Material Condition, and will not engage in or permit any activity at the Premises, or in the operation of any vehicles or vessels used in connection with the Premises in violation of any Environmental Laws.

**16.3. Manager's Environmental Condition Notification Requirements.**

(a) Manager must notify Port as soon as practicable, orally or by other means that will transmit the earliest possible notice to Port staff, followed within twenty-four (24) hours by written notice, of and when Manager learns or has reason to believe Hazardous Materials were Released or, except as allowed under **Section 16.1**, Handled, in, on, over, or under the Premises, or emanating from the Premises, or from off-site conditions or events affecting receptors or the environmental condition in, on, over, or under the Premises, or from any vehicle or vessel that Manager or its Agents or Invitees use on the Premises during Manager's services under this Agreement, or to transport Hazardous Materials that existed on the Premises prior to the Term from the Premises during Manager's services under this Agreement, whether or not the Release or Handling is in quantities that would be required under Environmental Laws to be reported to an Environmental Regulatory Agency.

(b) Manager must notify Port as soon as practicable, orally or by other means that will transmit the earliest possible notice to Port staff, followed within twenty-four (24) hours by written notice, and contemporaneously provide Port with an electronic copy, of:

(i) Any notice of the Release or Handling of Hazardous Materials, in, on, over, or under the Premises or from any vehicles or vessels Manager, or its Agents and Invitees uses during Manager's services under this Agreement that Manager or its Agents or Invitees provides to an Environmental Regulatory Agency;

(ii) Any notice of a violation, or a potential or alleged violation, of any Environmental Law that Manager or its Agents or Invitees receives from any Environmental Regulatory Agency with respect to the Premises;

(iii) Any other Environmental Regulatory Action that is instituted or threatened by any Environmental Regulatory Agency against Manager or its Agents or Invitees and that relates to the Release or Handling of Hazardous Materials, in, on, over, or under the

Premises, or from any vehicles or vessels Manager, or its Agents and Invitees uses on the Premises, or to transport Hazardous Materials that existed on the Premises prior to the Term from the Premises during Manager's services under this Agreement;

(iv) Any Hazardous Material Claim that is instituted or threatened by any third party against Manager or its Agents or Invitees and that relates to the Release or Handling of Hazardous Materials, in, on, over, or under the Premises, or from any vehicles or vessels Manager, or its Agents and Invitees uses on the Premises, or to transport Hazardous Materials that existed on the Premises prior to the Term from the Premises during Manager's services under this Agreement; and

(v) Any notice of the termination, expiration, or substantial amendment of any Environmental Regulatory Approval needed by Manager or its Agents or Invitees for their operations at the Premises.

(c) Manager must notify Port of any meeting, whether conducted face-to-face or telephonically, between Manager and any Environmental Regulatory Agency regarding an Environmental Regulatory Action concerning the Premises. Port will be entitled to participate in any such meetings at its sole election.

(d) Manager must notify Port of any Environmental Regulatory Agency's issuance of an Environmental Regulatory Approval concerning the Premises or Manager's or its Agents' or Invitees' operations at the Premises. Manager's notice to Port must state the issuing entity, the Environmental Regulatory Approval identification number, and the date of issuance and expiration of the Environmental Regulatory Approval. In addition, Manager must provide Port with a list of any plan or procedure required to be prepared and/or filed with any Environmental Regulatory Agency for operations on the Premises, including a "Spill Prevention Control and Countermeasure Plan." Manager must provide Port with copies of any of the documents within the scope of this section upon Port's request.

(e) Manager must provide Port with copies of all non-privileged communications with Environmental Regulatory Agencies and all non-privileged communications with other persons regarding potential or actual Hazardous Material Claims arising from Manager's or its Agents' or Invitees' operations at the Premises. Upon Port's request, Manager must provide Port with an explanation of the basis for any claim of privilege and summary information regarding the parties to, the quantity and extent of, and the subject of such communications.

(f) Port may from time to time request, and Manager will be obligated to provide, information reasonably adequate for Port to determine that any and all Hazardous Materials are being Handled in a manner that complies with all Environmental Laws.

#### **16.4. Requirement to Remediate.**

(a) Manager's Remediation obligations under this subsection are subject to subsection (b).

(i) After notifying Port in accordance with **Section 16.3(a)**, Manager must Remediate at its sole cost in compliance with all Environmental Laws and this Agreement, any Hazardous Material Condition occurring during the Term or caused by Manager or Manager's Agent's or Invitees Handling of Hazardous Materials during Manager's services under this Agreement, provided Manager may take any immediate actions to address an emergent Hazardous Material Condition to confine or limit the extent or impact of such Hazardous Material Condition and will then provide notice to Port in accordance with **Section** . Manager must obtain Port's approval of a Remediation work plan, whether or not required under Environmental Laws, then begin Remediation actions immediately following Port's approval of the work plan and continue diligently until Remediation is complete, as determined by the applicable Regulatory Agency.

(ii) In addition to its obligations under clause (i), before this Agreement terminates for any reason, Manager must Remediate at its sole cost and in compliance with all Environmental Laws and this Agreement: (A) any Hazardous Material Condition caused by Manager's or its Agents' or Invitees' Handling of Hazardous Materials during the Term; and (B) any Hazardous Material Condition discovered during Manager's services under this Agreement that any Regulatory Agency requires to be Remediated if Remediation would not have been required but for Manager's use of or changes to the Premises.

(iii) If Environmental Laws governing Remediation require a remedial action plan, Manager must provide a draft of its plan to Port for comment and approval before submittal to the appropriate Environmental Regulatory Agency, and a copy of the final plan as submitted. Port shall approve or disapprove of such Hazardous Materials Remediation plan promptly, but in any event within thirty (30) days, after receipt thereof. If Port disapproves of any such Hazardous Materials Remediation plan, Port shall specify in writing the reasons for its disapproval.

(iv) In all situations relating to Handling or Remediating Hazardous Materials, Manager must take all actions that are reasonably necessary in Port's reasonable judgment to protect the value of the Premises, such as obtaining Environmental Regulatory Approvals related to Hazardous Materials and taking measures to remedy any deterioration in the condition or diminution of the value of any portion of the Premises in any manner related directly or indirectly to Hazardous Materials.

(b) Unless Manager or its Agents or Invitees Exacerbate the Hazardous Material Condition, Manager will not be obligated to Remediate any Hazardous Material Condition: (i) caused solely by City, Port, or their Agents during Manager's services under this Agreement; or (ii) arising before the Commencement Date.

**16.5. Port's Right to Audit.** Port will have the right, but not the obligation, to inspect and audit the Premises for any Hazardous Materials, including the right to Investigate, at reasonable times under **Section 17** (Port's Entry on Premises). Port's failure to inspect or obtain samples or to detect conditions attributable to Manager's operations if an inspection is conducted may not be deemed to be a release of any liability for any Hazardous Materials subsequently determined to be Manager's responsibility under this Agreement.

**16.6. Notification of Asbestos.** Port hereby notifies Manager, in accordance with the OSHA Asbestos Rule (1995), 59 Fed. Reg. 40964, 29 CFR §§ 1910.1001, 1926.1101 (as amended, clarified and corrected) (OSHA Asbestos Rule); California Health and Safety Code §§ 25915-259.7 and Cal-OSHA General Industry Safety Order for Asbestos, 8 CCR § 5208, of the presence of asbestos-containing materials ("ACMs") and/or presumed asbestos-containing materials ("PACMs") (as such terms are defined in Cal-OSHA General Industry Safety Order for Asbestos), in the locations identified in the summary/table, if any, set forth in **Schedule 1** attached hereto.

This notification by Port is made pursuant to a building inspection survey(s), if any, performed by Port or its contractors qualified to perform an asbestos building survey identified in the summary/table, if any, set forth in **Schedule 1** attached hereto. Such survey(s), monitoring data and other information are kept at Port of San Francisco, Pier 1, San Francisco, California, 94111 and are available for inspection upon request.

Manager hereby acknowledges receipt of the notification specified in the first paragraph of **Section 16.6** hereof and the notice or report attached as **Schedule 1** hereto and understands, after having consulted its legal counsel, that it must make its employees and contractors aware of the presence of ACMs and/or PACMs in or about the Premises in order to avoid or minimize any damage to or disturbance of such ACMs and/or PACMs. Manager further acknowledges its obligations under Cal-OSHA General Industry Safety Order for Asbestos to provide information

to its employees and contractors regarding the presence of ACMs and PACMs at the Premises and to provide a training program for its employees that conforms with 8 CCR § 5208(j)(7)(C).

Manager agrees that its waiver of Claims set forth in **Section 15** (Indemnity and Exculpation) is given with full knowledge of the presence, or possibility, of asbestos in or about the Premises and the potential consequences of such fact. Manager is aware that the presence, or possibility, of asbestos in or about the Premises may limit Manager's ability to repair or maintain the Premises without Manager first performing abatement of such asbestos. The presence of asbestos in the Premises and the removal or non-removal by Port of all or a portion of the asbestos in the Premises, will not, however, (a) entitle Manager to any Claim, or (b) relieve Manager of any of its obligations hereunder.

Notwithstanding any other provisions of this Agreement, Manager agrees to Indemnify Port for Manager's acts or omissions that result in (y) asbestos-related enforcement actions related to the Premises, including both administrative or judicial proceedings, and (z) any Claims related to the Premises arising from an alleged violation of Cal-OSHA General Industry Safety Order for Asbestos and/or exposures to asbestos.

**16.7. Notification of Lead.** Port hereby notifies Manager of the potential presence of lead-containing and presumed lead-containing materials in the Premises. Disturbance or removal of lead is regulated by, among other Laws, 29 CFR §§ 1910.1025, 1926.62; California Health & Safety Code §§ 105185-105197 and 105250-105257; Cal-OSHA Construction Safety Order for Lead, Title 8 CCR § 1532.1; Title 17 CCR Chapter 8; and Port Building Code § 3424.

Manager agrees that its waiver of Claims set forth in **Section 15** (Indemnity and Exculpation) is given with full knowledge of the presence, or possibility, of lead in or about the Premises and the potential consequences of such fact. Manager is aware that the presence, or possibility, of lead in or about the Premises may limit Manager's ability to repair or maintain the Premises without Manager first performing abatement of such lead. The presence of lead in the Premises and the removal or non-removal by Port of all or a portion of the lead, whether in the Premises, will not, however, (a) entitle Manager to any Claim, or (b) relieve Manager of any of its obligations hereunder.

Notwithstanding any other provisions of this Agreement, Manager agrees to Indemnify Port for Manager's acts or omissions that result in (y) lead-related enforcement actions related to the Premises, including both administrative or judicial proceedings, and (z) any Claims related to the Premises arising from an alleged violation of Cal-OSHA Construction Safety Order for Lead and/or exposures to lead.

**16.8. Storm Water Pollution Prevention.**

(a) Manager must comply with the applicable provisions of the Statewide General Permit for Discharge of Industrial Storm Water issued by the State Water Resources Control Board, and shall comply with the Mission Rock District Storm Water Pollution Prevention Plan ("SWPPP"), which is attached as **Exhibit F**.

(b) Post-Construction Requirements. In addition to requiring compliance with the permit requirements under **Section 16.8(a)**, Manager will comply with the post-construction stormwater control provisions of the Statewide General Permit for Discharge of Stormwater from Small Municipalities and the San Francisco Stormwater Management Requirements and Design Guidelines, subject to review and permitting by the Port.

**16.9. Presence of Hazardous Materials.** Manager is hereby advised that Hazardous Materials (as herein defined) may be present on or near the Premises, including, but not limited to, vehicle fluids, janitorial products, tobacco smoke, and building materials containing chemicals, such as asbestos, naturally-occurring radionuclides, lead and formaldehyde. Further, the following known Hazardous Materials are present on the property: asbestos in building, if any, as described in **Schedule 1** attached hereto, naturally occurring asbestos, contamination

commonly found in fill, petroleum contamination, lead-based paint, etc. and the Hazardous Materials described in the reports listed in **Schedule 16.9**, copies of which have been delivered to or made available to Manager. By execution of this Agreement, Manager acknowledges that the notice set forth in this section satisfies the requirements of California Health and Safety Code Section 78700 and related Laws. Manager must disclose the information contained in this **Section 16.9** to any subtenant, licensee, transferee, or assignee of Manager's interest in this Agreement. Manager also acknowledges its own obligations pursuant to California Health and Safety Code Section 78700 as well as the penalties that apply for failure to meet such obligations.

**16.10. Survival.** The provisions of this **Section 16** (other than **Sections 16.6** and **16.7**) will survive the expiration or earlier termination of this Agreement, provided however that (a) Manager's obligations under **Sections 16.4** shall survive only with respect to Remediation obligations that first arise during the Term or are caused by Manager or Manager's Agents carrying out Manager's surviving obligations under **Section 16.4** and this Section after the Term, and (b) Manager's obligations under **Sections 16.1, 16.2, 16.3, and 16.8** shall survive only with respect to Manager and Manager's Agents who are carrying out Manager's surviving obligations under **Section 16.4** and this section.

## **17. PORT'S ENTRY ON PREMISES.**

**17.1. Entry for Inspection.** Port and its authorized Agents shall have the right to enter the Premises without notice at any time for the purpose of inspecting the Premises to determine whether the Premises is in good condition and whether Manager is complying with its obligations under this Agreement; to perform any necessary maintenance, repairs or restoration to the Premises in accordance with this Agreement; and to show the Premises to prospective Managers, tenants or other interested parties. Port agrees to give Manager reasonable prior notice of Port's entering on the Premises except in an emergency for the purposes set forth in this Section. Such notice shall be not less than twenty-four (24) hours' prior notice, except in the event of emergency. Manager shall have the right to have a representative of Manager accompany Port or its Agents on any entry into the Premises. Notwithstanding the foregoing, no notice shall be required for Port's entry onto public areas of the Premises.

**17.2. Emergency Entry.** Port may enter the Premises at any time, without notice, in the event of an emergency. Port shall have the right to use any and all means that Port may deem proper in such an emergency in order to obtain entry to the Premises. Entry to the Premises by any of these means, or otherwise, shall not under any circumstances be construed or deemed to be a breach of Manager's rights under this Agreement.

**17.3. No Liability.** Port shall not be liable in any manner, and Manager hereby waives any Claims against Port for damages, for any inconvenience, disturbance, loss of business, nuisance, or other damage, including without limitation any abatement or reduction in Fees due hereunder, arising out of Port's entry onto the Premises, or entry by the public (as Manager has a non-exclusive right to use the Premises) onto the Premises provided however that: (a) Manager's waiver excludes damage resulting solely from the willful misconduct or gross negligence of Port or its authorized representatives, and (b) Port shall at its own cost and expense, and as soon as reasonably practicable, repair such damage and/or restore the Premises to substantially the same condition prior to the occurrence of damage caused by Port's or Port's Agent's non-emergency entry pursuant to **Section 17.1**.

## **18. IMPROVEMENTS AND ALTERATIONS.**

Unless specified in the Management Agreement Information Table or otherwise approved in advance by Port in writing, Manager shall not make, nor suffer to be made, alterations or improvements to the Premises (including the installation of any trade fixtures affixed to the Premises or whose removal will cause injury to the Premises). Notwithstanding the foregoing,



the Parties shall use good faith efforts to approve the “Lounge” designed by 100architects if adequate funding becomes available.

## **19. CONDITION OF PREMISES UPON TERMINATION.**

Upon the expiration or earlier termination of this Agreement, Manager shall ensure the Premises in the condition required by and consistent with **Section 6** (subject to ordinary wear and tear). Ordinary wear and tear will not include any damage or deterioration that would have been prevented by proper maintenance by Manager, or Manager otherwise performing all of its obligations under this Agreement. The Premises will be clean, free of debris, waste, and Hazardous Materials (other than Pre-Existing Hazardous Materials), and free and clear of all liens and encumbrances other than liens and encumbrances existing as of the Commencement Date and any other encumbrances created or approved in writing by Port. On or before the expiration or earlier termination of this Agreement, Manager at its sole cost will remove from the Premises, and repair any damage caused by removal of, Manager’s Property, including any signage and alterations and improvements performed by Manager or its Agents and specified by Port. Except for those designated by Port, alterations and improvements will remain in the Premises as Port property.

Without any prior notice, Port may elect to retain or dispose of Manager’s personal property and any alterations and improvements that Manager has installed with or without Port’s consent that Manager does not remove from the Premises prior to the expiration or earlier termination of this Agreement. These items shall be deemed abandoned. Port may retain, store, remove, and sell or otherwise dispose of Manager’s abandoned property, and Manager waives all Claims against Port for any damages resulting from Port’s retention, removal and disposition of such property; provided, however, that Manager shall be liable to Port for all costs incurred in storing, removing and disposing of Manager’s abandoned property and repairing any damage to the Premises or the Facility resulting from such removal. Manager agrees that Port may elect to sell Manager’s abandoned property and offset against the sales proceeds Port’s storage, removal, and disposition costs without notice to Manager. Manager hereby waives the benefits of California Civil Code Section 1993 et seq., to the extent applicable.

Manager’s obligation under this Section shall survive the expiration or earlier termination of this Agreement.

## **20. ATTORNEYS’ FEES; LIMITATIONS ON DAMAGES.**

**20.1. *Litigation Expenses.*** The prevailing party in any action or proceeding (including any cross complaint, counterclaim or bankruptcy proceeding) against the other party by reason of a claimed default, or otherwise arising out of a party’s performance or alleged non-performance under this Agreement, shall be entitled to recover from the other party its costs and expenses of suit, including but not limited to, reasonable attorneys’ fees, which fees shall be payable whether or not such action is prosecuted to judgment. “**Prevailing party**” within the meaning of this Section shall include, without limitation, a party who substantially obtains or defeats, as the case may be, the relief sought in the action, whether by compromise, settlement, judgment or the abandonment by the other party of its claim or defense. Attorneys’ fees under this Section shall include attorneys’ fees and all other reasonable costs and expenses incurred in connection with any appeal.

**20.2. *City Attorney.*** For purposes of this Agreement, reasonable fees of attorneys of the City’s Office of the City Attorney shall be based on the fees regularly charged by private attorneys with an equivalent number of years of professional experience (calculated by reference to earliest year of admission to the bar of any state) who practice in San Francisco in Law firms with approximately the same number of attorneys as employed by the Office of the City Attorney.

**20.3. *Limitation on Damages.*** Manager agrees that Manager will have no recourse with respect to, and Port shall not be liable for, any obligation of Port under this Agreement, or

for any Claim based upon this Agreement, except to the extent of the fair market value of Port's fee interest in the Premises (as encumbered by this Agreement). Manager's execution and delivery hereof and as part of the consideration for Port's obligations hereunder Manager expressly waives all such liability.

**20.4. *Non-Liability of City Officials, Employees and Agents.*** No elective or appointive board, commission, member, officer, employee or other Agent of City and/or Port shall be personally liable to Manager, its successors and assigns, in the event of any default or breach by City and/or Port or for any amount which may become due to Manager, its successors and assigns, or for any obligation of City and/or Port under this Agreement. Under no circumstances shall Port, City, or their respective Agents be liable under any circumstances for any consequential, incidental or punitive damages.

**20.5. *Limitation on Port's Liability Upon Transfer.*** In the event of any transfer of Port's interest in and to the Premises, Port (and in case of any subsequent transfers, the then transferor), subject to the provisions hereof, will be automatically relieved from and after the date of such transfer of all liability with regard to the performance of any covenants or obligations contained in this Agreement thereafter to be performed on the part of Port, but not from liability incurred by Port (or such transferor, as the case may be) on account of covenants or obligations to be performed by Port (or such transferor, as the case may be) hereunder before the date of such transfer.

## **21. MINERAL RESERVATION.**

The State of California ("**State**"), pursuant to Section 2 of Chapter 1333 of the Statutes of 1968, as amended, has reserved all subsurface mineral deposits, including oil and gas deposits, on or underlying the Premises and Manager acknowledges such reserved rights. In accordance with the provisions of Sections 2 and 3.5(c) of the Burton Act, Manager and Port hereby acknowledge that the State has reserved the right to explore, drill for and extract such subsurface minerals, including oil and gas deposits, solely from a single point of entry outside of the Premises, provided that such right will not be exercised so as to disturb or otherwise interfere with the Premises. In no event shall Port be liable to Manager for any Claims arising from the State's exercise of its rights nor shall such action entitle Manager to any additional of Fees or otherwise relieve Manager from any of its obligations under this Agreement.

## **22. CITY AND PORT REQUIREMENTS.**

The San Francisco Municipal Codes (available at [www.sfgov.org](http://www.sfgov.org)) and City and Port policies described or referenced in this Agreement are incorporated by reference as though fully set forth in this Agreement. The descriptions below are not comprehensive but are provided for notice purposes only; Manager is charged with full knowledge of each such ordinance and policy and any related implementing regulations as they may be amended from time to time. Manager understands and agrees that its failure to comply with any provision of this Agreement relating to any such code provision shall be deemed a material breach of this Agreement and may give rise to penalties under the applicable ordinance. Capitalized or highlighted terms used in this Section and not defined in this Agreement shall have the meanings ascribed to them in the cited ordinance.

### **22.1. *Nondiscrimination.***

**(a) Covenant Not to Discriminate.** In the performance of this Agreement, Manager covenants and agrees not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), weight, height, association with members of classes protected under Articles 131 or 132 of Division II of the San Francisco Labor and Employment Code (formerly Chapter 12B and 12C of the San Francisco Administrative Code) or in retaliation for opposition to any practices forbidden under Articles 131 or 132 of Division II of

the Labor and Employment Code against any employee of Manager, any City and County employee working with Manager, any applicant for employment with Manager, or any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by Manager in the City and County of San Francisco.

(b) **Sublicenses and Other Contracts**. Manager shall include in all contracts relating to the Premises a nondiscrimination clause applicable to such subtenant or other contractor in substantially the form of **Section 22.1(a)** above. In addition, Manager shall incorporate by reference in all sublicenses and other contracts the provisions of Sections 131.2(a), 131.2(c) – (k), and 132.3 of the Labor and Employment Code (formerly, sections 12B.2(a), 12B.2(c) - (k) and 12C.3 of the Administrative Code) and shall require all contractors to comply with such provisions.

(c) **Nondiscrimination in Benefits**. Manager does not as of the date of this Agreement and will not during its Term, in any of its operations in San Francisco or where the work is being performed for the City, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits (collectively “**Core Benefits**”) as well as any benefits other than the Core Benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local Law authorizing such registration, subject to the conditions set forth in Section 131.2 of the Labor and Employment Code.

(d) **CMD Form**. On or prior to the Agreement Commencement Date, Manager shall execute and deliver to Port the “Nondiscrimination in Contracts and Benefits” form approved by the CMD.

(e) **Penalties**. Manager understands that pursuant to Section 131.2(h) of the Labor and Employment Code, a penalty of \$50.00 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Agreement may be assessed against Manager and/or deducted from any payments due Manager.

**22.2. Requiring Health Benefits for Covered Employees.** Unless exempt, Manager agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in Labor and Employment Code Division II, Article 121 (formerly Administrative Code Chapter 12Q).

(a) For each Covered Employee Manager shall provide the appropriate health benefit set forth in Section 121.3(d) of the HCAO.

(b) Notwithstanding the above, if Manager meets the requirements of a “**small business**” by the City pursuant to Section 121.3(e) of the HCAO, it shall have no obligation to comply with **Section 22.2(a)** above.

(c) If, within 30 days after receiving written notice of a breach of this Agreement for violating the HCAO, Manager fails to cure such breach or, if such breach cannot reasonably be cured within such 30-day period, Manager fails to commence efforts to cure within such period, or thereafter fails to diligently pursue such cure to completion, the City shall have the remedies set forth in Section 121.5(f). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the City.

(d) Any Sublicense or Contract regarding services to be performed on the Premises entered into by Manager shall require the Sublicensee or Contractor and Subcontractors, as applicable, to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in Article 121 of Division II of the Labor and Employment Code. Manager shall notify the Office of Labor Standards

Enforcement (“**OLSE**”) when it enters into such a Sublicense or Contract and shall certify to OLSE that it has notified the Sublicensee or Contractor of the obligations under the HCAO and has imposed the requirements of the HCAO on the Sublicensee or Contractor through written agreement with such Sublicensee or Contractor. Manager shall be responsible for ensuring compliance with the HCAO for each agent, Contractor and Subcontractor performing services on the Premises. If any Sublicensee, Contractor or Subcontractor fails to comply, the City may pursue the remedies set forth in Section 121.5 of the Labor and Employment Code against Manager based on the Sublicensee’s, Contractor’s, or Subcontractor’s failure to comply, provided that OLSE has first provided Manager with notice and an opportunity to cure the violation.

(e) Manager shall not discharge, reprimand, penalize, reduce the compensation of, or otherwise discriminate against, any employee for notifying the City of any issue relating to the HCAO, for opposing any practice proscribed by the HCAO, for participating in any proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.

(f) Manager represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the requirements of the HCAO.

(g) Manager shall keep itself informed of the requirements of the HCAO, as they may change from time to time.

(h) Upon request, Manager shall provide reports to the City in accordance with any reporting standards promulgated by the City under the HCAO, including reports on Sublicensee, Contractors, and Subcontractors.

(i) Within ten (10) business days of any request, Manager shall provide the City with access to pertinent records relating to any Manager’s compliance with the HCAO. In addition, the City and its agents may conduct random audits of Manager at any time during the Term. Manager agrees to cooperate with City in connection with any such audit.

(j) If a Contractor or Subcontractor is exempt from the HCAO because the amount payable to such Contractor or Subcontractor under all of its contracts with the City or relating to City-owned property is less than \$25,000.00 (or \$50,000.00 for nonprofits) in that fiscal year, but such Contractor or Subcontractor later enters into one or more agreements with the City or relating to City-owned property that cause the payments to such Contractor or Subcontractor to equal or exceed \$75,000.00 in that fiscal year, then all of the Contractor’s or Subcontractor’s contracts with the City and relating to City-owned property shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements to equal or exceed \$75,000.00 in the fiscal year.

**22.3. First Source Hiring.** The City has adopted a First Source Hiring Program (San Francisco Administrative Code Sections 83.1 et seq.) which establishes specific requirements, procedures and monitoring for first source hiring of qualified economically disadvantaged individuals for entry-level positions as those terms are defined by the ordinance. Manager acknowledges receiving and reviewing the First Source Hiring Program materials and requirements and agrees to comply with all requirements of the ordinance as implemented by Port and/or City, including without limitation, notification of vacancies throughout the Term and entering into a First Source Hiring Agreement, if applicable. Manager acknowledges and agrees that it may be subject to monetary penalties for failure to comply with the ordinance or a First Source Hiring Agreement and that such non-compliance shall be a default of this Agreement.

**22.4. Local Business Enterprises.** The Port Commission encourages the participation of local business enterprises (LBEs) in Manager’s operations. Manager agrees to consult with the CMD to determine appropriate methods for promoting participation by LBEs in the scope of work. Architecture, Engineering, Laboratory Services (Materials Testing), Trucking and Hauling, and Security Guard Services are categories of services that may provide opportunities

for certified LBE participation. City maintains a list of certified LBEs at: <https://sfgov.org/cmd/LBE-certification-0>.

**22.5. Indoor Air Quality.** Manager agrees to comply with Section 711(g) of the Environment Code and any additional regulations adopted by the Director of the Department of the Environment pursuant to Environment Code Section 703(b) relating to construction and maintenance protocols to address indoor air quality.

**22.6. Prohibition Against Tobacco Advertising; Prohibition Against Tobacco Product Sales, Manufacture, and Distribution.** Manager acknowledges and agrees that no advertising of cigarettes or tobacco products is allowed on the Premises. This advertising prohibition includes the placement of the name of a company producing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. In addition, Manager acknowledges and agrees that no Sales, Manufacture, or Distribution of Tobacco Products (as such capitalized terms are defined in Health Code Section 19K.1) is allowed on the Premises and such prohibition must be included in all sublicenses or other agreements allowing use of the Premises. The prohibition against Sales, Manufacture, or Distribution of Tobacco Products does not apply to persons who are affiliated with an accredited academic institution where the Sale, Manufacture, and/or Distribution of Tobacco Products is conducted as part of academic research.

**22.7. Graffiti Removal.** Graffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with City's property maintenance goals and aesthetic standards; and results in additional graffiti and in other properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti must be abated as quickly as possible to avoid detrimental impacts on the City and its residents, and to prevent the further spread of graffiti.

Manager agrees to remove all graffiti from the Premises within forty-eight (48) hours of the earlier of Manager's: (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from Port or the Department of Public Works; provided however, if such graffiti cannot reasonably be removed within such period, Manager will not be in default of this Agreement if Manager diligently and in good faith continues to work to remove or abate such graffiti and actually completes such removal within thirty (30) days (or other reasonable period determined by the Port). The term "**graffiti**" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and that is visible from the public right-of-way, but does not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the Public Works Code, the Planning Code, or the Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (Calif. Civil Code §§987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§101 et seq.).

**22.8. Restrictions on the Use of Pesticides.** Chapter 3 of the San Francisco Environment Code (the Integrated Pest Management Program Ordinance or "**IPM Ordinance**") describes an integrated pest management ("**IPM**") policy to be implemented by all City departments. Manager shall not use or apply or allow the use or application of any pesticides on the Premises, and shall not contract with any party to provide pest abatement or control services to the Premises, without first receiving City's written approval of an integrated pest management plan that (i) lists, to the extent reasonably possible, the types and estimated quantities of

pesticides that Manager may need to apply to the Premises during the term of this Agreement, (ii) describes the steps Manager will take to meet the City's IPM Policy described in Section 300 of the IPM Ordinance and (iii) identifies, by name, title, address and telephone number, an individual to act as the Manager's primary IPM contact person with the City. Manager shall comply, and shall require all of Manager's contractors to comply, with the IPM plan approved by the City and shall comply with the requirements of Sections 300(d), 302, 304, 305(f), 305(g), and 306 of the IPM Ordinance, as if Manager were a City department. Among other matters, such provisions of the IPM Ordinance: (a) provide for the use of pesticides only as a last resort, (b) prohibit the use or application of pesticides on property owned by the City, except for pesticides granted an exemption under Section 303 of the IPM Ordinance (including pesticides included on the most current Reduced Risk Pesticide List compiled by City's Department of the Environment), (c) impose certain notice requirements, and (d) require Manager to keep certain records and to report to City all pesticide use by Manager's staff or contractors. If Manager or Manager's contractor will apply pesticides to outdoor areas, Manager must first obtain a written recommendation from a person holding a valid Agricultural Pest Control Advisor license issued by the California Department of Pesticide Regulation and any such pesticide application shall be made only by or under the supervision of a person holding a valid Qualified Applicator certificate or Qualified Applicator license under state Law. City's current Reduced Risk Pesticide List and additional details about pest management on City property can be found at the San Francisco Department of the Environment website, <http://sfenvironment.org/ipm>.

**22.9. *MacBride Principles Northern Ireland.*** Port and the City urge companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. Port and the City urge San Francisco companies to do business with corporations that abide by the MacBride Principles.

**22.10. *Tropical Hardwood and Virgin Redwood Ban.*** Port and the City urge Manager not to import, purchase, obtain or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood product. Except as expressly permitted by the application of Sections 802(b) and 803(b) of the Environment Code, Manager shall not provide any items to the construction of Alterations, or otherwise in the performance of this Agreement which are tropical hardwoods, tropical hardwood wood products, virgin redwood, or virgin redwood wood products. In the event Manager fails to comply in good faith with any of the provisions of Chapter 8 of the Environment Code, Manager shall be liable for liquidated damages for each violation in any amount equal to the contractor's net profit on the contract, or five percent (5%) of the total amount of the contract dollars, whichever is greater.

**22.11. *Preservative-Treated Wood Containing Arsenic.*** Manager may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Environment Code Chapter 13 is obtained from the Department of Environment under Section 1304 of the Environment Code. The term "**preservative-treated wood containing arsenic**" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniac copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Manager may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of Environment. This provision does not preclude Manager from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "**saltwater immersion**" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

**22.12. *Notification of Limitations on Contributions.*** If this Agreement is subject to the approval by City's Board of Supervisors, Mayor, or other elected official, the provisions of this **Section 22.12** shall apply. Through its execution of this Agreement, Manager acknowledges its obligations under Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the selling or leasing of any

land or building to or from the City whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making any campaign contribution to (a) the City elective officer, (b) a candidate for the office held by such individual, or (c) a committee controlled by such individual or candidate, at any time from the submission of a proposal for the contract until the later of either the termination of negotiations for such contract or twelve (12) months after the date the contract is approved. Manager acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of one hundred thousand dollars (\$100,000) or more. Manager further acknowledges that, if applicable, (i) the prohibition on contributions applies to each Manager; each member of Manager's board of directors, and Manager's principal officers, including its chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than ten percent (10%) in Manager; and any subcontractor listed in the Manager's bid or contract and (ii) within thirty (30) days of the submission of a proposal for the contract, the Port is obligated to submit to the Ethics Commission the parties to the contract. Additionally, Manager certifies that if this **Section 22.13** applies, Manager has informed each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126 by the time it submitted a proposal for the contract and has provided to City the names of each of the persons required to be informed.

**22.13. Sunshine Ordinance.** In accordance with Section 67.24(e) of the Administrative Code, contracts, contractors' bids, leases, agreements, responses to Requests for Proposals, and all other records of communications between Port and persons or firms seeking contracts will be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract, lease, agreement or other benefit until and unless that person or organization is awarded the contract, lease, agreement or benefit. Information provided which is covered by this Section will be made available to the public upon request.

**22.14. Conflicts of Interest.** Through its execution of this Agreement, Manager acknowledges that it is familiar with the provisions of Article III, Chapter 2 of Campaign and Governmental Conduct Code, and Sections 87100 et seq. and Sections 1090 et seq. of the California Government Code, and certifies that it does not know of any facts which would constitute a violation of these provisions, and agrees that if Manager becomes aware of any such fact during the Term, Manager shall immediately notify the Port.

**22.15. Drug-Free Workplace.** Manager acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1988 (41 U.S.C. §§ 8101 et seq.), the unlawful manufacture, distribution, possession or use of a controlled substance is prohibited on City or Port premises.

**22.16. Prevailing Wages and Working Conditions.** Manager shall comply with all applicable prevailing wage requirements, including but not limited to any such requirements in the California Labor Code, the City and County of San Francisco Charter or City and County of San Francisco Municipal Code. Any undefined, initially-capitalized term used in this Section shall have the meaning given to such term in San Francisco Administrative Code Section 23.61. Manager shall require its contractors and subcontractors performing ( i ) labor in connection with a "public work" as defined under California Labor Code Section 1720 et seq. (which includes certain construction, alteration, maintenance, demolition, installation, repair, carpet laying, or refuse hauling work if paid for in whole or part out of public funds) or (ii ) Covered Construction to: (A) pay workers performing such work not less than the highest prevailing rate of wages, (B) provide the same hours, working conditions and benefits as in each case are provided for similar work performed in San Francisco County, and (C) employ apprentices in accordance with San Francisco Administrative Code Section 23.61 (collectively, "**Prevailing Wage Requirements**"). Manager agrees to cooperate with the City in any action or proceeding against a contractor or subcontractor that fails to comply with the Prevailing Wage Requirements.

Manager shall include and shall require its agents, and contractors and subcontractors (regardless of tier), to include the Prevailing Wage Requirements and the agreement to cooperate in City enforcement actions in any Construction Contract with specific reference to San Francisco Administrative Code Section 23.61. Each such Construction Contract shall name the City and County of San Francisco, affected workers, and employee organizations formally representing affected workers as third party beneficiaries for the limited purpose of enforcing the Prevailing Wage Requirements, including the right to file charges and seek penalties against any contractor or subcontractor in accordance with San Francisco Administrative Code Section 23.61. Manager's failure to comply with its obligations under this Section shall constitute a material breach of this Agreement. A contractor's or subcontractor's failure to comply with this Section will enable the City to seek any remedy provided by Law, including those specified in San Francisco Administrative Code Section 23.61 against the breaching party.

Manager shall also pay, and shall require its agents, and contractors and subcontractors (regardless of tier) to pay, the Prevailing Rate of Wage for the following activities on the Premises as set forth in and to the extent required by San Francisco Labor and Employment Code Division II, Article 102 (formerly Administrative Code Chapter 21C): a Public Off-Street Parking Lot, Garage or Automobile Storage Facility (as defined in Section 102.3), a Show (as defined in Section 102.4), a Special Event (as defined in Section 102.8), Broadcast Services (as defined in Section 102.9), Commercial Vehicles, Loading and Unloading for Shows and Special Events (as defined in Section 102.10), and Security Guard Services for Events (as defined in Section 102.11).

**22.17. Public Transit Information.** Manager shall establish and carry on during the Term a program to encourage maximum use of public transportation by personnel of Manager employed on the Premises, including, without limitation, the distribution to such employees of written materials explaining the convenience and availability of public transportation facilities adjacent or proximate to the Facility and encouraging use of such facilities, all at Manager's sole expense.

**22.18. Food Service and Packaging Waste Reduction Ordinance.** Manager agrees to comply fully with and be bound by all of the provisions of the Food Service and Packaging Waste Reduction Ordinance, as set forth in Environment Code Chapter 16, including the remedies provided, and implementing guidelines and rules. By entering into this Agreement, Manager agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Manager agrees that the sum of one hundred dollars (\$100.00) liquidated damages for the first breach, two hundred dollars (\$200.00) liquidated damages for the second breach in the same year, and five hundred dollars (\$500.00) liquidated damages for subsequent breaches in the same year is a reasonable estimate of the damage that City will incur based on the violation, established in light of the circumstances existing at the time this Agreement was made. Such amounts shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Manager's failure to comply with this provision.

**22.19. Consideration of Criminal History in Hiring and Employment Decisions.**

(a) Manager agrees to comply with and be bound by all of the provisions of San Francisco Labor and Employment Code Division II, Article 142 (formerly Administrative Code Chapter 12T) (Criminal History in Hiring and Employment Decisions; "Article 142"), which are hereby incorporated, including the remedies and implementing regulations as may be amended from time to time, with respect to applicants and employees of Manager who would be or are performing work at the Premises.

(b) Manager shall incorporate by reference the provisions of Article 142 in all sublicenses of some or all of the Premises, and shall require all sublicensee to comply with such provisions. Manager's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.



(c) Manager and agents shall not inquire about, require disclosure of, or if such information is received base an Adverse Action on an applicant's or potential applicant for employment, or employee's: (1) Arrest not leading to a Conviction, unless the Arrest is undergoing an active pending criminal investigation or trial that has not yet been resolved; (2) participation in or completion of a diversion or a deferral of judgment program; (3) a Conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative; (4) a Conviction or any other adjudication in the juvenile justice system; (5) a Conviction that is more than seven years old, from the date of sentencing; or (6) information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

(d) Manager and agents shall not inquire about or require applicants, potential applicants for employment, or employees to disclose on any employment application the facts or details of any conviction history, unresolved arrest, or any matter identified in **Section 22.19(c)** above. Manager and agents shall not require such disclosure or make such inquiry until either after the first live interview with the person, or after a conditional offer of employment.

(e) Manager and agents shall state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment with Manager or agents at the Premises, that the Manager or agent will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of Article 142.

(f) Manager and agents shall post the notice prepared by OLSE, available on OLSE's website, in a conspicuous place at the Premises and at other workplaces within San Francisco where interviews for job opportunities at the Premises occur. The notice shall be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the Premises or other workplace at which it is posted.

(g) Manager and agents understand and agree that upon any failure to comply with the requirements of Article 142, the City shall have the right to pursue any rights or remedies available under Article 142 or this Agreement, including but not limited to a penalty of \$50 for a second violation and \$100 for a subsequent violation for each employee, applicant or other person as to whom a violation occurred or continued, termination or suspension in whole or in part of this Agreement.

If Manager has any questions about the applicability of Article 142, it may contact Port for additional information. Port may consult with the Director of the Purchasing Department who may also grant a waiver, as set forth in Section 142.8.

**22.20. Local Hire.** Any undefined, initially-capitalized term used in this Section shall have the meaning given to such term in San Francisco Administrative Code Section 23.62 (the "**Local Hiring Requirements**"). Manager's improvements and alterations under this Agreement are subject to the Local Hiring Requirements unless the cost for such work is (i) estimated to be less than the Threshold Amount (as defined in San Francisco Administrative Code Section 6.1) per building permit; (ii) is in connection with the set-up, execution and strike of special events of three (3) or fewer days costing in excess of the Threshold Amount; or (iii) meets any of the other exemptions in the Local Hiring Requirements. Manager agrees that it will comply with the Local Hiring Requirements to the extent applicable. Before starting any Manager's improvements or alterations, Manager shall contact City's Office of Economic Workforce and Development ("OEWD") to determine the work is a Covered Project subject to the Local Hiring Requirements.

Agreement shall include, and shall require its agents to include, a requirement to comply with the Local Hiring Requirements in any contract for a Covered Project with specific reference to San Francisco Administrative Code Section 23.62. Each such contract shall name the City and County of San Francisco as a third party beneficiary for the limited purpose of enforcing the Local Hiring Requirements, including the right to file charges and seek penalties. Manager shall

cooperate, and require its agents to cooperate, with the City in any action or proceeding against a contractor or subcontractor that fails to comply with the Local Hiring Requirements when required. Manager's failure to comply with its obligations under this Section shall constitute a material breach of this Agreement. A contractor's or subcontractor's failure to comply with this Section will enable the City to seek the remedies specified in San Francisco Administrative Code Section 23.62 against the breaching party.

**22.21. San Francisco Bottled Water Ordinance.** Manager is subject to all applicable provisions of Environment Code Chapter 24 (which are hereby incorporated) prohibiting the sale or distribution of drinking water in specified containers at City-permitted events held on the Premises with attendance of more than 100 people, except as otherwise set forth in Environmental Code Chapter 24.

**22.22. Vending Machines; Nutritional Standards and Calorie Labeling Requirements; Offerings.** Manager shall not install or permit any vending machine on the Premises without the prior written consent of Port. Any permitted vending machine must comply with the food and beverage nutritional standards and calorie labeling requirements set forth in San Francisco Administrative Code Section 4.9- 1(c), as may be amended from time to time (the "Nutritional Standards Requirements"). Manager agrees to incorporate the Nutritional Standards Requirements into any contract for the installation of a vending machine on the Premises or for the supply of food and beverages to that vending machine. Failure to comply with the Nutritional Standards Requirements or to otherwise comply with this Section shall be deemed a material breach of this Agreement. Without limiting Port's other rights and remedies under this Agreement, Port shall have the right to require the immediate removal of any vending machine on the Premises that is not permitted or that violates the Nutritional Standards Requirements. In addition, any Restaurant including any employee eating establishment located on the Premises is encouraged to ensure that at least twenty-five percent (25%) of Meals (as capitalized terms are defined in San Francisco Administrative Code section 4.9-1) offered on the menu meet the nutritional standards set forth in San Francisco Administrative Code section 4.9-1(e), as may be amended.

**22.23. Manager's Compliance with City Business and Tax Regulations Code.** Manager acknowledges that under Section 6.10-2 of the San Francisco Business and Tax Regulations Code, the City Treasurer and Tax Collector may require the withholding of payments to any vendor that is delinquent in the payment of any amounts that the vendor is required to pay the City under the San Francisco Business and Tax Regulations Code. If, under that authority, any payment Port is required to make to Manager under this Agreement is withheld, then Port will not be in breach or default under this Agreement, and the Treasurer and Tax Collector will authorize release of any payments withheld under this **Section 22.23** to Manager, without interest, late fees, penalties, or other charges, upon Manager coming back into compliance with its San Francisco Business and Tax Regulations Code obligations.

**22.24. Consideration of Salary History.** Manager shall comply with San Francisco Labor and Employment Code Division II, Article 141 (formerly Administrative Code Chapter 12K), the Consideration of Salary History Ordinance or "Pay Parity Act." For each employment application to Manager for work that relates to this Agreement or for work to be performed in the City or on City property, Manager is prohibited from considering current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant. Manager shall not (1) ask such applicants about their current or past salary or (2) disclose a current or former employee's salary history without that employee's authorization unless the salary history is publicly available. Manager is subject to the enforcement and penalty provisions in Article 141. Information about Article 141 is available on the web at <https://sfgov.org/olse/consideration-salary-history>.

**22.25. Employee Signature Authorization Ordinance.** The City has adopted an Employee Signature Authorization Ordinance (S.F. Admin Code Sections 23.50-23.56). That

ordinance requires employers of employees in hotel or restaurant projects on public property with fifty (50) or more employees (whether full-time or part-time) to enter into a “card check” agreement with a labor union regarding the preference of employees to be represented by a labor union to act as their exclusive bargaining representative. Manager shall comply with the requirements of such ordinance, if applicable, including, without limitation, any requirements in the ordinance with respect to its agents or operators.

### **23. WAIVER OF RELOCATION.**

Manager hereby waives any and all rights, benefits or privileges of the California Relocation Assistance Law, California Government Code §§ 7260 et seq., or under any similar Law, statute or ordinance now or hereafter in effect, if and to the extent allowed under applicable Law.

### **24. SIGNS.**

Except to the extent consistent with the Mission Rock Master Signage Plan, Manager shall not have the right to place, construct or maintain any business signage, awning or other exterior decoration or notices on the Premises without Port’s prior written consent. Any sign that Manager is permitted to place, construct or maintain on the Premises shall comply with all Laws relating thereto, including but not limited to Port’s Sign Guidelines, as revised by Port from time to time, the Mission Rock Master Signage Plan, and building permit requirements, and Manager shall obtain all Regulatory Approvals required by such Laws; provided, for the avoidance of doubt, that: (1) future revisions to the Port’s Sign Guidelines shall not require the removal or replacement of any signage that has already been installed unless expressly required by the Port Commission, and (ii) in the event of any conflict between the Port’s Sign Guidelines and the Mission Rock Master Signage Plan or other signage plan approved by the Port for Mission Rock, the Mission Rock-specific plan shall control. Manager, at its sole cost and expense, shall remove all easily-removable signs placed by it on the Premises at the expiration or earlier termination of this Agreement if so requested by Port, unless Port has expressly agreed to allow such sign(s) to remain after expiration or earlier termination of this Agreement.

### **25. MISCELLANEOUS PROVISIONS.**

**25.1. California Law; Venue.** This Agreement is governed by, and shall be construed and interpreted in accordance with, the Laws of the State of California and City’s Charter. Any legal suit, action, or proceeding arising out of or relating to this Agreement shall be instituted in the Superior Court for the City and County of San Francisco, and each party agrees to the exclusive jurisdiction of such court in any such suit, action, or proceeding (excluding bankruptcy matters). The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action, or proceeding in such court and irrevocably waive and agree not to plead or claim that any suit, action, or proceeding brought in San Francisco Superior Court relating to this Agreement has been brought in an inconvenient forum. The parties also unconditionally and irrevocably waive any right to remove any such suit, action, or proceeding to Federal Court.

**25.2. Entire Agreement.** This Agreement contains all of the representations and the entire agreement between the parties with respect to the subject matter of this Agreement. Any prior correspondence, memoranda, agreements, warranties, or representations, whether written or oral, relating to such subject matter are superseded in total by this Agreement. No prior drafts of this Agreement or changes from those drafts to the executed version of this Agreement shall be introduced as evidence in any litigation or other dispute resolution proceeding by any party or other person, and no court or other body should consider those drafts in interpreting this Agreement.

**25.3. Amendments.** No amendment of this Agreement or any part thereof shall be valid unless it is in writing and signed by all of the parties hereto.

**25.4. Severability.** If any provision of this Agreement or the application thereof to any person, entity or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such provision to persons, entities or circumstances other than those as to which is invalid or unenforceable, shall not be affected thereby, and each other provision of this Agreement shall be valid and be enforceable to the fullest extent permitted by Law and in accordance with **Section 1.1**, unless enforcement of this Agreement as so modified by and in response to such invalidation would be grossly inequitable under all of the circumstances, or would frustrate the fundamental purposes of this Agreement.

**25.5. Interpretation of Agreement.**

(a) Unless otherwise specifically stated in this Agreement, where a Party has a right of approval or consent, such approval or consent shall not be unreasonably withheld, conditioned, or delayed.

(b) References in this Agreement to Manager's acts or omissions will mean acts or omissions by Manager and its Agents, and Manager's Invitees to the extent Manager has not complied with Manager's obligations under **Section 8.1**, unless the context requires or specifically stated otherwise.

(c) Whenever an exhibit or schedule is referenced, it means an attachment to this Agreement unless otherwise specifically identified. All exhibits and schedules are incorporated in this Agreement by reference.

(d) Whenever a section, article or paragraph is referenced, it refers to this Agreement unless otherwise specifically provided. The captions preceding the articles and sections of this Agreement and in the table of contents have been inserted for convenience of reference only and must be disregarded in the construction and interpretation of this Agreement. Wherever reference is made to any provision, term, or matter "in this Agreement," "herein" or "hereof" or words of similar import, the reference will be deemed to refer to any reasonably related provisions of this Agreement in the context of the reference, unless the reference refers solely to a specific numbered or lettered article, section, subdivision, or paragraph of this Agreement.

(e) References to all Laws, including specific statutes, relating to the rights and obligations of either party mean the Laws in effect on the effective date of this Agreement and as they are amended, replaced, supplemented, clarified, corrected, or superseded at any time during the Term or while any obligations under this Agreement are outstanding, whether or not foreseen or contemplated by the parties. References to specific code sections mean San Francisco ordinances unless otherwise specified.

(f) The terms "include," "included," "including" and "such as" or words of similar import when following any general term, statement, or matter may not be construed to limit the term, statement, or matter to the specific items or matters, whether or not language of non-limitation is used, but will be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of the term, statement, or matter, and will be deemed to be followed by the phrase "without limitation" or "but not limited to."

(g) This Agreement has been negotiated at arm's length between persons sophisticated and knowledgeable in the matters addressed. In addition, each party has been represented by experienced and knowledgeable legal counsel, or has had the opportunity to consult with counsel. Accordingly, the provisions of this Agreement must be construed as a whole according to their common meaning in order to achieve the intents and purposes of the parties, without any presumption (including a presumption under California Civil Code § 1654) against the party responsible for drafting any part of this Agreement.

(h) The party on which any obligation is imposed in this Agreement will be solely responsible for paying all costs and expenses incurred in performing the obligation, unless the provision imposing the obligation specifically provides otherwise.

(i) Whenever required by the context, the singular includes the plural and vice versa, the masculine gender includes the feminine or neuter genders and vice versa, and defined terms encompass all correlating forms of the terms (e.g., the definition of “waive” applies to “waiver,” “waivers,” “waived,” “waiving,” etc.).

(j) References to days mean calendar days unless otherwise specified, provided that if the last day on which a party must give notice, respond to a notice, or take any other action under this Agreement occurs on a day that is not a business day, the date by which the act must be performed will be extended to the next business day.

**25.6. Successors.** The terms, covenants, agreements and conditions set forth in this Agreement shall bind and inure to the benefit of Port and Manager and, except as otherwise provided herein, their personal representatives and successors and assigns.

**25.7. Real Estate Broker’s Fees.** Port will not pay, nor will Port be liable or responsible for, any finder’s or broker’s fee in connection with this Agreement. If any person brings a claim for a commission or finder’s fee based on any contact, dealings, or communication with either Party, then such Party will defend the other Party from such claim, and will Indemnify the Port or Manager and its officers, employees, directors, owners, heirs, successors, legal representatives and assigns (“Manager Parties”), as applicable, from, and hold harmless the Indemnified Parties or Manager Parties, as applicable, against, any and all costs, damages, claims, liabilities, or expenses (including, without limitation, reasonable attorneys’ fees and disbursements) that the Port or Manager Parties, as applicable, incur in defending against the claim. The provisions of this Section will survive the termination of this Agreement.

**25.8. Counterparts.** For convenience, the signatures of the parties to this Agreement may be executed and acknowledged on separate pages which, when attached to this Agreement, shall constitute as one complete Agreement. This Agreement may be executed in any number of counterparts each of which shall be deemed to be an original and all of which shall constitute one and the same Agreement.

**25.9. Authority.** Manager does hereby covenant and warrant that Manager is a duly authorized and existing entity, that Manager has and is qualified to do business in California, that Manager has full right and authority to enter into this Agreement, and that each and all of the persons signing on behalf of Manager are authorized to do so. Upon Port’s reasonable request, Manager will provide Port with evidence reasonably satisfactory to Port confirming the foregoing representations and warranties.

**25.10. No Implied Waiver.** No failure by Port to insist upon the strict performance of any obligation of Manager under this Agreement or to exercise any right, power or remedy arising out of a breach thereof, irrespective of the length of time for which such failure continues, and no acceptance of full or partial Fees during the continuance of any such breach shall constitute a waiver of such breach or of Port’s rights to demand strict compliance with such term, covenant or condition. Port’s consent to or approval of any act by Manager requiring Port’s consent or approval shall not be deemed to waive or render unnecessary Port’s consent to or approval of any subsequent act by Manager. Any waiver by Port of any default must be in writing and shall not be a waiver of any other default (including any future default) concerning the same or any other provision of this Agreement.

**25.11. Time is of Essence.** Time is of the essence with respect to all provisions of this Agreement in which a definite time for performance is specified. Except as otherwise provided herein, Port will provide Manager with its approval or disapproval of any matter requiring Port’s approval in writing to Manager as soon as reasonably practical after Manager’s written request and not later than twenty-five (25) calendar days, as calculated from Port’s receipt of Manager’s

complete written request; provided however that if Port's Executive Director, in consultation with the City Attorney's Office, reasonably determines that Port Commission or Board of Supervisors action is required under applicable Laws, then the approval or disapproval shall be offered for consideration at the first Port Commission and subsequent Board of Supervisors hearings after receipt of Manager's written request, subject to notice requirements and reasonable staff preparation time.

**25.12. Cumulative Remedies.** All rights and remedies of either party hereto set forth in this Agreement shall be cumulative, except as may otherwise be provided herein.

**25.13. Survival of Indemnities.** Termination or expiration of this Agreement shall not affect the right of either party to enforce any and all indemnities and representations and warranties given or made to the other party under this Agreement (but solely as to matters that occurred and obligations first arising during the Term), the ability to collect any sums due, nor shall it affect any provision of this Agreement that expressly states it shall survive termination or expiration hereof.

**25.14. Relationship of the Parties.** Port is not, and none of the provisions in this Agreement shall be deemed to render Port, a partner in Manager's business, or joint venturer or member in any joint enterprise with Manager. Neither party shall act as the agent of the other party in any respect hereunder. This Agreement is not intended nor shall it be construed to create any third party beneficiary rights in any third party, unless otherwise expressly provided.

**25.15. No Recording.** Manager shall not record this Agreement or any memorandum hereof in the Official Records of the City and County of San Francisco.

**25.16. Additional Written Agreement Required.** Manager expressly agrees and acknowledges that no officer, director, or employee of Port or City is authorized to offer or promise, nor is Port or the City required to honor, any offered or promised rent credit, concession, abatement, or any other form of monetary consideration (individually and collectively, "Concession") without a written agreement executed by the Executive Director of Port or his or her designee authorizing such Concession and, if applicable, certification of the Concession from the City's Controller.

**25.17. Waiver of Indirect or Consequential Damages.** As a material part of the consideration for this Agreement, Manager shall not be liable to Port, and Port shall not seek and Port hereby waives any claims against Manager, for any punitive, indirect, consequential or special damages (including lost profits) due to the acts or omissions of Manager under this Agreement. Manager would not be willing to enter into this Agreement in the absence of a complete waiver of liability for punitive, indirect, consequential and special damages (including lost profits) due to the acts or omissions of Manager, and Port expressly assumes the risk resulting from such waiver.

**25.18. Nonliability of Manager's Members, Partners, Shareholders, Directors, Agents, Officers, and Employees.** No direct or indirect affiliate of Manager, or member, officer, partner, shareholder, director, board member, agent, or employee of Manager or a direct or indirect affiliate of Manager, shall be personally liable to Port, or any successor, for any default by Manager under this Agreement, and Port agrees that it shall have no recourse against any such Person with respect to any obligation of Manager under this Agreement, or for any amount that may become due Port or its successor or for any obligation or claim based upon this Agreement. No personal judgment shall be sought or obtained against any of the foregoing Persons in connection with this Agreement. Notwithstanding the foregoing, this Section shall in no way supersede federal, state, or municipal law (including but not limited to Chapter 28 of the San Francisco Administrative Code, the San Francisco Campaign and Governmental Conduct Code, and the San Francisco Police Code).

## **26. PORT FUNDS SUBJECT TO APPROPRIATION.**

Funding for any Port or City obligations under this Agreement requires lawful appropriation of funds by the Port Commission and Board of Supervisors, and certification by the Controller. The Controller is not authorized to make payments on any agreement for which funds have not been lawfully appropriated and certified as available, whether in the budget or by supplemental appropriation.

## **27. APPROVAL OF BOARD OF SUPERVISORS.**

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, MANAGER ACKNOWLEDGES AND AGREES THAT NO OFFICER OR EMPLOYEE OF CITY HAS AUTHORITY TO COMMIT CITY TO THIS AGREEMENT UNLESS AND UNTIL CITY'S BOARD OF SUPERVISORS WILL HAVE DULY ADOPTED A RESOLUTION APPROVING THIS AGREEMENT AND AUTHORIZING THE TRANSACTIONS CONTEMPLATED HEREBY. THEREFORE, ANY OBLIGATIONS OR LIABILITIES OF CITY HEREUNDER ARE CONTINGENT UPON ADOPTION OF SUCH A RESOLUTION, AND THIS AGREEMENT WILL BE NULL AND VOID IF CITY'S MAYOR AND THE BOARD OF SUPERVISORS DO NOT APPROVE THIS AGREEMENT, IN THEIR RESPECTIVE SOLE DISCRETION. APPROVAL OF THIS AGREEMENT BY ANY DEPARTMENT, COMMISSION OR AGENCY OF CITY WILL NOT BE DEEMED TO IMPLY THAT SUCH RESOLUTION WILL BE ENACTED, NOR WILL ANY SUCH APPROVAL CREATE ANY BINDING OBLIGATIONS ON CITY.

## **28. DEFINITIONS.**

For purposes of this Agreement, the following terms have the meanings ascribed to them in this Section or elsewhere in this Agreement as indicated:

“**Active Edge Areas**” is defined in *Section \_\_\_\_*.

“**ACMs**” is defined in *Section 15.6*.

“**Agents**” when used with reference to either party to this Agreement or any other person, means the officers, directors, commissioners, employees, agents, and contractors of the party or other person, and their respective heirs, legal representatives, successors, and assigns.

“**Agreement**” is defined in *Section 1*.

“**Alterations**” means any alterations, installations, improvements, or additions to any Improvements or to the Premises.

“**Annual Reconciliation**” is defined in *Section 5.4*.

“**Annual Report**” is defined in *Section 5.7(b)*.

“**Audit Period**” is defined in *Section 5.7*.

“**Books and Records**” means all of Manager's books, records, and accounting reports or statements relating to its business, this Agreement, and the operation and maintenance of the Premises, including cash journals, rent rolls, general ledgers, income statements, bank statements, income tax schedules relating to the Premises and any other bookkeeping documents used in Manager's business operations for the Premises, whether maintained by Manager or a third-party contractor.

“**Budget**” is defined in *Section 5.2(a)*.

“**CMD**” means the Contract Monitoring Division of the City's General Services Agency.

“**Cal-OSHA**” means the Division of Occupational Safety and Health of the California Department of Industrial Relations.

“**City**” is defined in *Section 1*.

“**Claim**” means all liabilities, injuries, losses, costs, claims, demands, rights, causes of action, judgments, settlements, damages, liens, fines, penalties and expenses, including without limitation, direct and vicarious liability of any kind for money damages, compensation, penalties, liens, fines, interest, attorneys’ fees, costs, equitable relief, mandamus relief, specific performance, or any other relief.

“**Concession...**” definitions [pending].

“**Commencement Date**” means the date specified in the Management Agreement Information Table.

“**Contingent Services Special Tax**” is defined in the RMA.

“**CPI**” means the Consumer Price Index for All Urban Consumers, Series ID CUURS49BSA0, as published by the U.S. Department of Labor, Bureau of Labor Statistics, applicable to San Francisco, California (or similar successor Series ID or index).

“**Cure Period**” means the period of time described in the Management Agreement Information Table.

“**Encroachment Area**” is defined in *Section 2.2*.

“**Encroachment Area Charge**” is defined in *Section 2.2*.

“**Environmental Laws**” means any Laws relating to Hazardous Material (including its Handling, Release, or Remediation) or to human health and safety, industrial hygiene, or environmental conditions in the environment, including structures, soil, air, bay water, and groundwater, and any environmental mitigation measure adopted under Environmental Law affecting any portion of the Premises. Environmental Laws include the Risk Management Plan, Mission Bay Area, San Francisco, California as approved by the Regional Board on May 11, 1999, as amended and as interpreted by Regulatory Agencies with jurisdiction (“**RMP**”), deed restrictions recorded against the Premises and the Site Mitigation Plan approved by the San Francisco Department of Health, all as presently in effect or as further amended during the Term of this Agreement.

“**Environmental Regulatory Action**” when used with respect to Hazardous Materials means any inquiry, Investigation, enforcement, Remediation, agreement, order, consent decree, compromise, or other action that is threatened, instituted, filed, or completed by an Environmental Regulatory Agency in relation to a Release, Exacerbation, or discovery of Hazardous Materials, including both administrative and judicial proceedings.

“**Environmental Regulatory Agency**” means the United States Environmental Protection Agency, OSHA, any California Environmental Protection Agency board, department, or office, including the Department of Toxic Substances Control and the San Francisco Bay Regional Water Quality Control Board, Cal OSHA, the Bay Area Air Quality Management District, the San Francisco Department of Public Health, the San Francisco Fire Department, the San Francisco Public Utilities Commission, Port, or any other Regulatory Agency now or later authorized to regulate Hazardous Materials.

“**Environmental Regulatory Approval**” means any approval, license, registration, permit, or other authorization required or issued by any Environmental Regulatory Agency, including any hazardous waste generator identification numbers relating to operations on the Premises and any closure permit.

“**Exacerbate**” or “**Exacerbating**” when used with respect to Hazardous Materials means any act or omission that (i) increases the quantity or concentration of Hazardous Materials in the affected area, (ii) causes the increased migration of a plume of Hazardous Materials in soil, groundwater, or bay water, causes a Release of Hazardous Materials that had been contained until the act or omission, or (iii) otherwise requires Investigation or Remediation that would not have been required but for the act or omission, it being understood that the mere discovery of



Hazardous Materials does not constitute “**Exacerbation.**” Exacerbate also includes the disturbance, removal or generation of Hazardous Materials in the course of Manager’s operations, Investigations, maintenance, repair, Improvements and Alterations under this Agreement. “**Exacerbation**” has a correlating meaning.

“**Expiration Date**” means the date specified in the Management Agreement Information Table.

“**Facility**” means the pier, building or other structure in or on which the Premises is located.

“**Fees**” means the Compensation (if monetary) and all other sums payable by Manager under this Agreement, including without limitation, any Late Charge and any interest assessed pursuant to *Section 4*.

“**Handle**” or “**Handling**” means to use, generate, process, manufacture, produce, package, treat, transport, store, emit, discharge, or dispose of a Hazardous Material.

“**Hazardous Material**” means any substance, waste, or material that is now or in the future designated by any Regulatory Agency to be capable of posing a present or potential risk of injury to human health or safety, the environment, or property. This definition includes anything designated or defined in any Environmental Law as hazardous, hazardous substance, hazardous waste, toxic, pollutant, or contaminant; any asbestos, ACMs, and PACMs, whether or not part of the structure of any existing Improvements on the Premises, any Improvements to be constructed on the Premises by or on behalf of Manager, or occurring in nature; and other naturally-occurring substances such as petroleum, including crude oil or any fraction, and natural gas or natural gas liquids.

“**Hazardous Material Claim**” means any Environmental Regulatory Action or any Claim made or threatened by any third party against the Indemnified Parties, or the Premises, relating to damage, contribution, cost recovery compensation, loss or injury resulting from the presence (other than the un-Exacerbated presence of Pre-Existing Hazardous Materials) or Release or Exacerbation of any Hazardous Material, including, without limitation, Losses based in common law. Hazardous Material Claims include, without limitation, Investigation and Remediation costs, fines, natural resource damages, damages for decrease in value of the Premises or any other Port property, the loss or restriction of the use or any amenity of the Premises or any other Port property, and attorneys’ fees and consultants’ fees and experts’ fees and costs.

“**Hazardous Material Condition**” means the presence (other than the un-Exacerbated presence of Pre-Existing Hazardous Materials), Release, or threatened Release of Hazardous Materials in, on, over or under the Premises, or from any vehicles or vessels Manager, or its Agents and Invitees uses during Manager’s services under this Agreement.

“**Initial Budget**” is defined in *Section 5.1*.

“**Improvements**” definition [pending].

“**Indemnified Parties**” is defined in *Section 14.1*.

“**Indemnify**” means to indemnify, protect, defend, and hold harmless forever. “**Indemnification**” and “**Indemnity**” have correlating meanings.

“**Interest Rate**” means ten percent (10%) per year or, if a higher rate is legally permissible, the highest rate an individual is permitted to charge under Law.

“**Investigate**” or “**Investigation**” when used with reference to Hazardous Materials means any activity undertaken to determine and characterize the nature and extent of Hazardous Materials that have been, are being, or are threatened to be Released in, on, under or about the Premises, and includes, without limitation, preparation and publication of site history, sampling,

and monitoring reports, performing equipment and facility testing such as testing the integrity of secondary containment and above and underground tanks, and sampling and analysis of environmental conditions before, during, and after Remediation begins and continuing until the appropriate Environmental Regulatory Agency has issued a no further action letter, lifted a clean-up order, or taken similar action.

“**Invitees**” means Manager’s clients, customers, invitees, patrons, guests, members, Managers, permittees, concessionaires, assignees, subtenants, and any other person whose rights arise through them.

“**Late Charge**” means a fee equivalent to fifty dollars (\$50.00).

“**Law**” means any present or future law, statute, ordinance, code, resolution, rule, regulation, judicial decision, requirement, proclamation, order, decree, policy (including the Waterfront Land Use Plan), and Regulatory Approval of any Regulatory Agency with jurisdiction over any portion of the Premises, including Regulatory Approvals issued to Port which require Manager’s compliance, and any and all recorded and legally valid covenants, conditions, and restrictions affecting any portion of the Premises, whether in effect when this Agreement is executed or at any later time and whether or not within the present contemplation of the parties.

“**Management Agreement Information Table**” refers to the summary of basic management agreement information attached to this Agreement.

“**Maximum Contingent Services Special Tax Revenues**” is defined in the RMA.

“**Mission Rock Long Term Reserve Fund**” is defined in **Section [ ]**.

“**Mission Rock STD**” means (i) the STD as defined in the RMA, and (ii) any areas which are contemplated for potential annexation into the Mission Rock STD pursuant to the terms of the RMA, regardless of whether or not such areas have been annexed.

“**Premises**” means the area described in the Management Agreement Information Table.

“**Notice to Cease Prohibited Use**” is defined in **Section 7**.

“**Notice to Vacate**” is defined in **Section 2.2**.

“**OSHA**” means the United States Occupational Safety and Health Administration.

“**PACMs**” is defined in **Section 15.6**.

“**Permitted Activity**” is means the activity described in the Management Agreement Information Table.

“**Permitted Contingent Services Special Tax Levy Amount**” is defined in **Section 2.4**.

“**Port**” is defined in **Section 1**.

“**Port’s Termination Right**” is defined in **Section [ ]**.

“**Premises Revenue**” is defined in **Section 2**.

“**prevailing party**” is defined in **Section 20.1**.

“**Pre-Existing Hazardous Materials**” means any Hazardous Materials existing in, on, or under the Premises as of the Commencement Date.

“**Prohibited Use**” is defined in **Section 7**.

“**Regulatory Agency**” means the municipal, county, regional, state, or federal government and their bureaus, agencies, departments, divisions, courts, commissions, boards, officers, commissioners, or other officials, including the Bay Conservation and Development Commission, any Environmental Regulatory Agency, the City and County of San Francisco (in

its regulatory capacity), Port (in its regulatory capacity), Port's Chief Harbor Engineer, the Dredged Material Management Office, the State Lands Commission, the Army Corps of Engineers, the United States Department of Labor, the United States Department of Transportation, or any other governmental agency now or later having jurisdiction over Port property.

**“Regulatory Approval”** means any authorization, approval, license, registration, or permit required or issued by any Regulatory Agency.

**“Release”** when used with respect to Hazardous Materials means any actual or imminent spilling, introduction, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing in, on, over or under the Premises.

**“Remediate”** or **“Remediation”** when used with respect to Hazardous Materials means to clean up, abate, contain, treat, stabilize, monitor, remediate, remedy, remove, or otherwise control Hazardous Materials, or to restore the affected area to the standard required by the applicable Environmental Regulatory Agency in accordance with applicable Environmental Laws and any additional Port requirements. “Remediation” also includes the creation of a remedial work plan to be approved by the appropriate Environmental Regulatory Agency when required.

**“RMA”** is defined in the preamble to this Agreement.

**“Second Budget Notice”** is defined in *Section 5.2(b)*.

**“SWPPP”** is defined in *Section 16.8(a)*.

**“Term”** is defined in *Section 3*.

**“Waiving Party”** is defined in *Section 12.5*.

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IN WITNESS WHEREOF, Port and Manager have executed this Agreement as of the last date set forth below

Manager: [INSERT NAME]

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Date signed: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Date signed: \_\_\_\_\_

Port: **CITY AND COUNTY OF SAN FRANCISCO,**  
a municipal corporation, operating by and through the  
**SAN FRANCISCO PORT COMMISSION**

By: \_\_\_\_\_  
Scott Landsittel,  
Deputy Director, Real Estate and Development

Date signed: \_\_\_\_\_

Approved as to Form: DAVID CHIU, City Attorney

By: \_\_\_\_\_  
Justin Bigelow  
Deputy City Attorney

Agreement Prepared by [INSERT NAME] , Commercial Property  
Manager \_\_\_\_\_ (initial)

**EXHIBIT A**

**PREMISES**

(To be attached.)

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**EXHIBIT B**  
**INITIAL BUDGET**

**EXHIBIT C**  
**FORM ANNUAL REPORT**

- 1. jMOU**
- 2. IMEP**
- 3.**

## **EXHIBIT D**

### **MANAGEMENT OBLIGATIONS**

Manager shall comply with the Maintenance Obligations and Operating Requirements provisions as set forth in *Exhibit C*.

- 4. CBP Lease §9**
- 5. IMEP**
- 6. jMOU**
- 7. Water Purchase Agreement**



**EXHIBIT E**

**MANAGER CONTACT INFORMATION SHEET**

**PORT OF SAN FRANCISCO - Management Contact Information**

<b>Manager Name on Contractor:</b>	
<b>dba, if applicable:</b>	

**Main Agreement** (Primary Contact : Recipient of Port general emails, mailings, notices, agreement admin, insurance & parking) REQ'D

Last Name	First Name	Middle Initial	Title
Mr / Mrs / Ms			
Address		City	State Zip Code
e-mail	Telephone	Cellular Phone	Fax

**Billing** (Recipient of all invoices, statements and billing issues) REQ'D  Check if same as mailing address

Last Name	First Name	Middle Initial	Title
Mr / Mrs /			
Address		City	State Zip Code
e-mail	Telephone	Cellular Phone	Fax

**Emergency** (First person to be contacted in case of emergency) REQ'D  Check if same as mailing address

Last Name	First Name	Middle Initial	Title
Mr / Mrs / Ms			
Address		City	State Zip Code
e-mail	Telephone	Cellular Phone	Fax

**Legal Notice** (Contact responsible for legal issues involving Management Agreement) REQ'D  Check if same as mailing address

Last Name	First Name	Middle Initial	Title
Mr / Mrs / Ms			
Address		City	State Zip Code
e-mail	Telephone	Cellular Phone	Fax

**Local/On-Site** (Other than Primary Agreement Contact) NOT REQ'D  Check if same as mailing address

Last Name	First Name	Middle Initial	Title
Mr / Mrs /			
Address		City	State Zip Code
e-mail	Telephone	Cellular Phone	Fax

**Corporate** (Other than Primary Agreement Contact. For information purposes only) NOT REQ'D  Check if same as mailing address

Last Name	First Name	Middle Initial	Title
Mr / Mrs / Ms			
Address		City	State Zip Code
e-mail	Telephone	Cellular Phone	Fax

<b>Signature:</b>	
<b>Print Name:</b>	
<b>Date:</b>	

<p><b>Email:</b> <a href="mailto:contact@sfport.com">contact@sfport.com</a></p> <p><b>MAIL to:</b> Port of San Francisco Attn: Real Estate Admin. Pier One, San Francisco, CA 94111</p>
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**EXHIBIT F**

**MISSION ROCK STORM WATER POLLUTION PREVENTION PLAN**

**SCHEDULE 1**

**ASBESTOS NOTIFICATION AND INFORMATION**

(To be attached.)

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**SCHEDULE 3**

**HAZARDOUS MATERIALS DISCLOSURE**

## SCHEDULE 3.7

04/12/2021

### FEMA-National Flood Insurance Program Disclosure Notice

As part of the National Flood Insurance Program (“NFIP”), Federal Emergency Management Agency (“FEMA”) issued the final flood insurance rate maps (“FIRMs”) for City and County of San Francisco on September 23rd, 2020, concluding a process that had been going on for more than a decade. This is the first time FEMA mapped flood risks for the City and County of San Francisco. FIRMs were later adopted by the Board of Supervisors through Ordinance 226-20 (“Floodplain Management Program Ordinance”) and became effective on March 23, 2021.

Based on detailed studies of coastal flood hazards associated with San Francisco Bay and the Pacific Ocean, the final FIRMs designate portions of the City and County of San Francisco (“City”), including portions of the waterfront, Mission Bay, Islais Creek, Bayview Hunters Point, Hunters Point Shipyard, Candlestick Point, Treasure Island, San Francisco International Airport, and Ocean Beach, in coastal flood hazard areas. Referred to as “Special Flood Hazard Areas” (“SFHAs”), these areas are subject to inundation during a flood having a 1 percent chance of occurrence in any given year. They are shown as zones beginning with the letter “A” or “V” on the FIRMs. Port’s structures over water, including piers and wharfs, are designated as Zone D (area of undetermined flood hazard). Zone D areas are not subject to Building Code and NFIP regulation. Historic structures are also exempted from compliance under the NFIP.

Additionally, the San Francisco Public Utilities Commission (“SFPUC”) has prepared the 100-Year Storm Flood Risk Map to show areas where flooding is highly likely to occur on City streets during a 100-year rain storm. More information about this map, including a searchable web map, is available at <https://www.sfwater.org/floodmaps>. The SFPUC 100-Year Storm Flood Risk Map only shows flood risk from storm runoff and, floodproofing measures are not required at this time.

The SFPUC map does not consider flood risk in San Francisco from other causes, such as inundation from the San Francisco Bay or the Pacific Ocean, which are shown on the FIRMs that FEMA has prepared for San Francisco. Conversely, the FIRMs do not show flooding from storm runoff in San Francisco, because our historical creeks and other inland waterbodies have been built over and are no longer open waterways. In most areas, the flood hazards identified by SFPUC and FEMA are separate. There are a few areas, however, near the shoreline where SFPUC’s Flood Risk Zones overlap with the FEMA-designated floodplains.

The FIRM provides flood risk information for flood insurance and floodplain management purposes under the NFIP. The SFHAs, shown on the FIRM, may impact flood insurance requirements and rates, permitting, and building requirements for tenants and permit holders for property in designated SFHAs on the FIRM. Flood insurance is available through the NFIP and the private market. Flood insurance for Zone D areas is not available through NFIP. Pre-FIRM buildings of any type are not required to buy flood insurance. For more information on purchasing flood insurance, please contact your insurance agent.

City’s Floodplain Management Program ordinance is based on NFIP requirements. Under the ordinance, the Port and the City must regulate new construction and substantial improvements or repairs to structures in SFHAs to reduce the risk of flood damage. The requirements may include elevation or floodproofing of structures and attendant utilities.

Additional information on this matter are available on the City/Port websites and FEMA website as listed below-



San Francisco Floodplain Management Program website:

<https://onesanfrancisco.orgisan-francisco-floodplain-management-program>

Port Floodplain Management Program Website:

<https://sfport.com/flood-plain-management-program>

FEMA's NFIP website:

[www.FloodSmart.gov](http://www.FloodSmart.gov).