

EXHIBIT D  
FORM OF GROUND LEASE

Port Draft 070618



**CITY AND COUNTY OF SAN FRANCISCO  
MARK FARRELL, MAYOR**

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**GROUND LEASE NO. L-16408**

**BY AND BETWEEN**

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

**AND**

**88 BROADWAY FAMILY LP,  
A CALIFORNIA LIMITED PARTNERSHIP**

**GROUND LEASE FOR SEAWALL LOT 322-1**

**ELAINE FORBES  
EXECUTIVE DIRECTOR**

**SAN FRANCISCO PORT COMMISSION**

**KIMBERLY BRANDON, PRESIDENT  
WILLIE ADAMS, VICE PRESIDENT  
GAIL GILMAN, COMMISSIONER  
VICTOR MAKRAS, COMMISSIONER  
DOREEN WOO HO, COMMISSIONER**

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<b>SCHEDULE 1</b>	<b>PREMISES CONDITIONS REPORT(S)</b>
<b>SCHEDULE 2</b>	<b>FEMA DISCLOSURE NOTICE</b>
<b>SCHEDULE 3</b>	<b>HAZARDOUS MATERIALS DISCLOSURE</b>

## GROUND LEASE AGREEMENT

This Ground Lease Agreement 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 landlord, and 88 Broadway Family LP, a California Limited Partnership as Tenant ("**Tenant**"). The exhibits, schedules and this Lease Agreement are and shall be construed as a single instrument and are referred to herein as this "**Lease**".

This Lease is made with reference to the following facts and circumstances:

**A.** Port is an agency of the City, exercising its functions and powers over property under its jurisdiction and organized and existing under the Burton Act and the City's Charter. The Port of San Francisco Waterfront Land Use Plan, including the Waterfront Design and Access Element ("**WLUP**") is Port's adopted land use document for property within Port jurisdiction, which provides the policy foundation for waterfront development and improvement projects.

**B.** Most Port property consists of tidelands and submerged lands that are subject to the common law public trust doctrine, the California Constitution, the Burton Act, and the related transfer agreement under which the State of California (the "**State**") transferred most of the San Francisco waterfront to the City in 1969.

**C.** As further described and depicted in *Exhibit A-1*, Seawall Lot 322-1 ("**SWL 322-1**") is a rectangular land parcel, assigned AP Lot 007, Block 0140, with frontages on Broadway, Front and Vallejo Streets and is located in the Northeast Waterfront area of the WLUP. SWL 322-1 is also known by its address as "**88 Broadway**". SWL 322-1 is located in the Northeast Waterfront Historic District and is within a C-2 (Community Business) zoning district, Waterfront Special Use District No. 3, and a 65-X Height and Bulk district.

**D.** The WLUP and the Planning Department's Northeastern Waterfront Subarea Plan and Northeast Embarcadero Study list hotel, entertainment, theatre and public open space as acceptable uses for the Sea Wall Lots.

**E.** Port and the San Francisco Mayor's Office of Housing and Community Development ("**MOHCD**") have been jointly working to site an affordable housing development on the Premises under state legislation (Senate Bill 815 (Chapter 660) (2007); Assembly Bill 2649 (Chapter 757) (2012); and Assembly Bill 2797 (Chapter 529) (2016)) ("**State Legislation**") that permits lifting Public Trust use restrictions otherwise applicable from the Premises to allow development of affordable housing for a 75-year term ("**Project**"). In March 2014, Port and MOHCD executed a Memorandum of Understanding (the "**Predevelopment MOU**") that sets forth their respective roles and responsibilities with respect to the Project (Port Commission Reso. 14- 16). As contemplated by the Predevelopment MOU, in 2015/2016, MOHCD conducted a competitive solicitation process to select a developer responsible for predevelopment, construction, and operation of the Project. In April 2016, MOHCD awarded the opportunity to a developer-team led by BRIDGE Housing Corporation ("**BRIDGE**") and the John Stewart Company ("**JSCo**") who formed 88 Broadway Family LP (the Tenant under this Lease) to serve as the developer for the Project.

**F.** On or about July 1, 2017, Port, MOHCD and Tenant entered into an Agreement On Term Sheet And Port Transaction Documents For The Implementation Of 88 Broadway Project On Seawall Lot 322-1 at Broadway and Front Streets, San Francisco to set forth the process, terms, and conditions upon which the parties to that agreement would negotiate terms for the transaction documents for the pre-development phase and development and operation of the proposed Project ("**Negotiation Agreement**") including terms for an option agreement and a long-term ground lease with the Port as well as other related agreements and documents to which the Tenant and Port are parties (collectively, the "**Transaction Documents**"). The term of the Negotiation Agreement is coterminous with the term of the Predevelopment MOU. Both the

Negotiation Agreement and Predevelopment MOU will terminate on the commencement date of this Lease.

**G.** The Project includes developing the Premises with up to 120-130 affordable rental family housing units, ground floor retail/commercial space of less than 5,000 square feet each, other ancillary uses and open space consisting of two mid-block passages to allow for neighborhood passage to the Northeast Waterfront and public art (the “**Initial Improvements**”) as further described in the Project Description/Scope of Development attached hereto as **Exhibit B**.

**H.** Concurrently with its development of the Project, Tenant intends to construct or cause construction of an estimated 50 to 55 units of senior housing at 735 Davis Street (“**Davis Street Project**”), which is a property adjacent to the Premises and controlled by MOHCD. The Davis Street Project is not subject to the provisions of this Agreement.

**I.** MOHCD will finance a portion of the development costs of the Project, including pre-development costs pursuant to that certain Loan Agreement dated May 12, 2017 between MOHCD and Tenant. MOHCD and Port entered into a Memorandum of Understanding (the “**Development MOU**”) under which MOHCD will, prior to execution of the ground lease, pay Port the fair market value of the Premises as appraised based on its value for its highest and best use without restriction no more than ninety (90) days prior to ground lease execution. In exchange for such fair market value payment, the Port will impose restrictions limiting the Premises to affordable housing uses for the term of the ground lease. Rent under this Lease shall be twenty thousand dollars (\$20,000) per year plus a share of any cash flow generated by any commercial uses, which is the fair market value of the leasehold interest with the affordable housing restrictions imposed. The Development MOU will replace the Predevelopment MOU and the Development MOU will have a term concurrent with the term of this Lease. Given MOHCD’s financial commitments to the Project and because it is the City agency responsible for matters relating to affordable housing, including compliance with laws governing affordable housing, this Lease is subject to MOHCD’s consent and MOHCD will assist Port with certain enforcement activities and will have an opportunity to cure certain tenant defaults as provided in this Lease.

**J.** Tenant intends to develop the Project with tax-exempt bonds, 4% Low Income Housing Tax Credits, San Francisco Federal Home Loan Bank Affordable Housing Program funding, City financing through MOHCD and other sources, if necessary.

**K.** City has been advised that State Legislation can be read as placing certain restrictions on uses of the Property other than certain types of housing units (AB 2649; § 5). The City is currently seeking legislation, which would not become operative until January 1, 2019 at the soonest, to explicitly exempt from the restrictions other types of housing units and uses ancillary to the provision of affordable housing, such that the Project could include Middle Income Households.

**L.** The Planning Department reviewed the Project combined with the adjacent Davis Street Project and issued a Preliminary Mitigated Negative Declaration (2017-007850ENV) on October 25, 2017. The Mitigated Negative Declaration became final on March 9, 2018. The Mitigation Measures and Improvement Measures in the Final Mitigated Negative Declaration will be enforceable conditions of the Mitigation Monitoring and Reporting Program which will be incorporated into the lease.

**M.** As required by Assembly Bill 2649, which authorized Port to submit to the procedures set forth in the Planning Code for obtaining a Certificate of Appropriateness or comparable determination, on April 4, 2018, the Historic Preservation Commission adopted a Certificate of Appropriateness with conditions by Motion No.0335 for the Project.

**N.** On May 3, 2018, the Director of the SF Planning Department adopted the Final Mitigated Negative Declaration and authorized the Project and the Davis Street Project pursuant

to its authorization under SF Planning Code Section 315 and found that, on balance, the Project is consistent with the City's General Plan.

**O.** On [\_\_\_\_\_], 2018, by Resolution No. XX-XX, the Port Commission adopted the Final Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program; and, among other things: approved an option agreement for the Premises ("**Option Agreement**") setting forth the specific terms and conditions under which Port and Tenant would enter into a ground lease, including the conditions for exercising the option and for execution and delivery of a ground lease and a form of ground lease ("**Form Ground Lease**"); approved the schematic design for the Project attached hereto as *Exhibit C* ("**Schematic Design**"); made findings that the Project is consistent with the State Legislation; and authorized the Executive Director to seek necessary approvals from the Board of Supervisors and the California State Lands Commission.

**P.** On [\_\_\_\_\_], 2018, by Resolution No. XX-XX, the Board of Supervisors confirmed the Port Commission's trust-related findings and approved the Form of Ground Lease and adopted the Mitigation Monitoring and Reporting Program.

**Q.** On [\_\_\_\_\_], 2018, as required by and in accordance with the State Legislation, State Lands made a favorable Consistency Determination, lifted the Public Trust use restrictions, and made the required findings and approved the form of ground lease and the consideration to be received by the Port under the ground lease and the Development MOU, which consideration from MOHCD limits the Property to affordable housing uses.

**R.** On or about [date], 2018, Tenant and Port entered into the Option Agreement. On or about [date], Tenant exercised its option. The Parties have finalized this Lease based on the Form of Ground Lease with no material changes and all conditions to close escrow on this Lease have been satisfied or waived and the Parties now desire to enter into this Lease upon all of the terms and conditions hereof.

NOW THEREFORE, in consideration of the mutual promises and covenants, the purposes stated in the above Recitals, and other for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Port and Tenant enter into this Lease on the following terms and conditions.

### **1. RECITALS**

The foregoing recitals are true and correct and are incorporated herein by this reference as if fully set forth herein.

### **2. DEMISE.**

In consideration of the agreements, terms and conditions to be performed by Tenant in this Lease, Port does hereby lease to Tenant, and Tenant does hereby hire and take from Port, that certain real property located in the City and County of San Francisco, as legally described in *Exhibit A-1* and depicted on the Site Plan attached as *Exhibit A-2* comprised of a rectangular parcel of approximately 37,810 square feet of paved land located at the northeast corner of Front and Broadway Streets (Assessor Parcel Number 0140- 007) also known as Seawall lot 322-1 (the "**Real Property**"), together with all improvements now located on the Real Property and all the rights and privileges appurtenant to the Real Property and owned by Port, and the Improvements to be hereafter constructed on the Real Property (subject to Section 16.1 (Title to Improvements)), for the Permitted Uses (the "**Premises**").

### **3. KEY LEASE TERMS.**

In the event of any conflict or inconsistency between the Key Lease Terms set forth in this Section and any other provision of this Lease, the provisions of this *Section 2* (Key Lease Terms) will control.

<i>Landlord's Address:</i>	Port of San Francisco Pier 1 San Francisco, California 94111 Attention: Director of Real Estate  Telephone: (415) 274-0400 Facsimile: (415) 274-0494
<i>Tenant's Address:</i>	88 Broadway Family LP, a California limited partnership 600 California Street, Suite 900 San Francisco, CA 94108
<i>Contact Information for Tenant's Agent for Service of Process (including address):</i>	Rebecca V Hlebasko 88 Broadway Family LP, a California limited partnership 600 California Street, Suite 900 San Francisco, CA 94108 Telephone: 415-989-1111 x7075 Facsimile: 415-498-4898
<i>Commencement Date; Expiration Date:</i>	<p>This Lease will become effective as of the Close of Escrow (“<b>Commencement Date</b>”) and shall expire on the date that is fifty-seven (57) years from the Commencement Date. Promptly following the Commencement Date, Port and Tenant shall execute a Commencement Date and Expiration Date Memorandum substantially in the form attached hereto as <b>Exhibit D</b>, confirming the actual Commencement Date, Anniversary Date and Expiration Date, but either party's failure to do so shall not affect such dates.</p> <p>The Parties agree that, upon Port’s issuance of a Certificate of Final Completion and Occupancy for the Residential Portion of the Building as provided in <b>Section 14.9</b> (Certificate of Final Completion and Occupancy), the Expiration Date will be automatically extended to the date that is fifty-seven (57) years from the date of the Certificate of Final Completion and Occupancy for the Residential Portion of the Building without further action by the Parties. Promptly following the Port’s issuance of the Certificate of Final Completion and Occupancy for the Residential Portion, Port and Tenant shall execute a revised Commencement Date and Expiration Date Memorandum substantially in the form attached hereto as <b>Exhibit D</b>, confirming the revised Anniversary Date and Expiration Date, and a Lease Memorandum substantially in the form attached hereto as <b>Exhibit E</b>, confirming the extended Expiration Date, but either party's failure to do so shall not affect the extended Expiration Date.</p> <p>In no event shall the Term (including the Extended Term) extend beyond December 31, 2105.</p>
<i>Extension Term:</i>	As provided by and subject to <b>Section 6.1(a)</b> (Option to Extend Term), Tenant, in its sole discretion, shall have one (1) option to

	extend (“ <b>Extension Option</b> ”) the Term for eighteen (18) years (“ <b>Extended Term</b> ”).
<i>Initial Improvements:</i>	As further described in the Project Description/Scope of Development attached hereto as <i>Exhibit B</i> and the Construction Documents, Tenant shall construct the Initial Improvements (sometimes referred to herein as the “ <b>Building</b> ”) in accordance with the dates specified in the Schedule of Performance, attached hereto as <i>Exhibit F</i> .
<i>Permitted Use and Occupancy Restrictions:</i>	<p>The Premises shall be used solely for the construction and operation of the Improvements with the following uses:</p> <p><b>(A) Residential Units:</b> One Hundred Twenty-Four (124) units of affordable rental housing with One Hundred Three (103) units restricted for Low Income Households and Twenty-one (21) units restricted for Moderate Income Households, plus one manager’s unit (collectively, the “<b>Residential Portion</b>”). Notwithstanding the foregoing, in the event state law is amended, the Residential Portion may consist of a maximum of five (5) units for Middle Income Households, a maximum of sixteen (16) for Moderate Income Households, a minimum of ninety eight (98) units for Low Income Households, and a minimum of five (5) units for Extremely Low Income Households. Changes to the levels of affordability of Residential Portion as provided in this Section are prohibited without MOHCD’s prior written approval.</p> <p>For purposes of this Lease, the Residential Portion will include residential units in the Ground Floor Units, if any, and common areas, service areas for loading, building services and Building Systems regardless of whether such areas also service the Ground Floor Units.</p> <p>Upon the Completion of construction, one hundred percent (100%) of the Residential Units (except for the manager’s unit) must be occupied or held vacant and available for rental by Extremely Low Income Households, Low Income Households, Moderate Income Households, and Middle Income Households (if permitted by Law). In addition, if Tenant obtains a LOSP contract, Tenant will set aside specific Low Income Household units for homeless households as defined by the Department of Homelessness and Supporting Housing or other referring agency providing funding for such units. Residential Units must be occupied and rented in accordance with all applicable restrictions imposed by this Lease.</p> <p><b>(B) Ground Floor Unit #1:</b> approximately 5,000 square feet of space on the ground floor for planned initial use as a restaurant or café open to the public or other trust-consistent uses subject to Port’s approval in its sole and absolute discretion, after consultation with State Lands as to consistency with the Public Trust, if such consultation is determined to be necessary by Port; and</p>

	<p><b>(C) Ground Floor Unit #2:</b> approximately 4,300 square feet of space on the ground floor to be used for: (i) affordable housing as defined in Assembly Bill 2649 (Chapter 757) (2012), as may be amended; or (ii) trust-consistent maritime, public space, retail, commercial or other trust-consistent uses subject to Port’s approval in its sole and absolute discretion, after consultation with State Lands as to consistency with the Public Trust, if such consultation is determined to be necessary by Port.</p> <p>(collectively, and for convenience of reference in this Lease only, the uses under (B) and (C) are referred to herein as “<b>Ground Floor Units</b>”).</p>
<i>No Market Rate Housing:</i>	<p>The Residential Portion shall be used by Tenant and any Transferee, Lender, Subsequent Owner, or any other party solely for the Permitted Uses for the Residential Portion as set forth above. Any other use of the Residential Portion is prohibited.</p> <p>The income limits for households set forth in this Lease apply at initial occupancy by a Residential Occupant. Tenant shall not be obligated to terminate the tenancy of any Residential Occupant due to an increase in the household’s income, even if such Residential Occupant no longer qualifies as an Extremely Low Income, Low Income, Moderate Income or Middle Income Household and the Residential Occupant’s continued occupancy will not be a default of this Lease.</p>
<i>Transfers:</i>	<p>This Lease is personal to Tenant and all Transfers are prohibited except in accordance with <b>Section 26</b> (Transfers). Port and MOHCD hereby acknowledge the Leasehold Mortgages evidencing initial Project financing as set forth in the Development Budget previously approved by the City under the Option Agreement.</p>
<i>Subdivision:</i>	<p>With ninety (90) days’ prior written notice to Port, Tenant may elect to subdivide the Real Property into two or more (air space) parcels for purposes of legally dividing the real property (a “<b>Subdivision</b>”). Tenant shall be solely responsible for all required approvals and costs of such Subdivision. Except as otherwise provided by this Lease or with Port’s written approval in its sole discretion, a subdivided parcel may be not Transferred. Subleasing of a subdivided parcel is permitted as specified in <b>Sections 26</b> (Transfers). In connection with a Subdivision, Port agrees that it will consent to reasonable and customary covenants, conditions and restrictions governing the Building, provided that they are materially consistent with this Lease, Port’s authority as trustee under the Burton Act and the favorable Consistency Determination made by the Port Commission and State Lands in the Resolutions referenced in <b>Recitals O</b> and <b>Q</b> or required to be made hereafter, and do not increase Port’s liability as reasonably determined by Port.</p>



<p><i>Leasehold Financing and Other Restrictions:</i></p>	<p>Under no circumstances will Tenant place or suffer to be placed any lien or encumbrance on Port's fee interest in the Premises. Port will not subordinate its interest in the Premises nor its right to receive rent to any Lender. As provided in this Lease, including without limitation <b>Section 34</b> (Leasehold Mortgage), project financing from institutional lenders, governmental entities, nonprofits and other lenders may be secured by Tenant's Leasehold Estate or a Subleasehold Estate and Port will consent to reasonable provisions in lease riders and/or affordability covenants/restrictions required to receive public financing if such riders and covenants (including tax credits, and state grants or loans) are approved by MOHCD, provided that such riders and covenants are materially consistent with this Lease, Port's authority as trustee under the Burton Act and the favorable Consistency Determination made by the Port Commission and State Lands in the Resolutions referenced in <b>Recitals O</b> and <b>Q</b> or required to be made hereafter, and do not increase Port's liability as reasonably determined by Port.</p>
<p><i>Rent:</i></p>	<p>Rent shall consist of the following: (i) rent in an amount of twenty thousand dollars (\$20,000) per year commencing on the date of the Certificate of Final Completion and Occupancy for the Residential Portion of the Building and subject to escalation as provided in <b>Section 7.1</b> ("<b>Base Rent</b>"); plus, (ii) for any Retail Sublease, Retail Rent as described in <b>Section 7.2</b> (Retail Rent); plus, (iii) for any other sublease, Excess Rent as described in <b>Section 7.3</b> (Excess Rent); plus (v) Participation Rent as described in <b>Section 26.11</b> (Participation in Sale).</p>
<p><i>Security Deposit:</i></p>	<p>Ten Thousand Dollars (\$10,000)</p>
<p><i>Management Plan:</i></p>	<p>All Permitted Uses must be performed in compliance with the City-approved Management Plan, which will include rules, policies and procedures for the day-to-day operation of Premises, including the childcare center (if any), building management, leasing procedures, marketing, and reporting requirements attached hereto as <b>Exhibit G</b> and hereby incorporated.</p> <p>City may, from time to time, review Tenant's Management Plan and make recommendations for revisions. All revisions to the Management Plan, whether initiated by City or Tenant, are subject to Tenant's, Port's and MOHCD's approval.</p>
<p><i>Property Management:</i></p>	<p>The Parties agree that Tenant contract with a manager to manage and operate the Project (each, a "<b>Property Manager</b>"). City understands and agrees that The John Stewart Company, a California corporation will act as the initial Property Manager for the Building. Subsequent Property Managers are subject to City's consent in its reasonable discretion. Tenant's contract with a Property Manager shall not be deemed a Transfer or Sublease hereunder; each Property Manager will be Tenant's</p>

	<p>Agent. The Property Manager shall be subject to all terms and conditions of this Lease, including without limitation, the requirement to provide insurance coverage. A breach by a Property Manager constitutes a breach by Tenant. Tenant is solely responsible for ensuring that the Property Manager is aware of and comply with all of the applicable provisions of this Lease and Tenant acknowledges that Tenant shall be subject to default and termination provisions under this Lease if a Property Manager fails to comply with applicable terms and conditions of this Lease.</p>
<i>Surrender:</i>	<p>At the end of the Lease Term, Tenant shall surrender the Premises as a single parcel and all structures, buildings, and appurtenances on the Premises must be repurposed, modified or removed including any necessary restoration or remediation to facilitate Public Trust uses, if so specified by Port in its sole discretion in its Notice of Removal under <b>Section 16.2</b> in a manner that otherwise allows compliance with state law, including Section 9 of AB 2797 (as may be amended).</p>
<i>Development Projects:</i>	<p>SFPUC North Shore Force Main Rehabilitation Project; SWL 323 - 324 Teatro Hotel project; Water Emergency Transportation Agency Downtown Ferry Terminal Project at The Ferry Building; and the Seawall Earthquake Safety Project</p>
<i>Mitigation Measures and Improvement Measures Monitoring and Reporting Program ("MMRP"):</i>	<p>In order to mitigate any potential significant environmental impacts of the project, Tenant agrees that its development and operation will be in accordance with the MMRP attached as <b>Exhibit H</b> and fully incorporated herein. Tenant is responsible for implementation and compliance with all required measures relating to Tenant's activities. As appropriate, in addition, Tenant will incorporate the MMRP into any contract for the development and/or operation of the Premises. Failure to comply with the requirements of this Section shall be a default of this Lease.</p>
<i>Good Neighbor Policies:</i>	<p>Tenant, any Property Manager and all Subtenants will be required to abide by Port's and City's Good Neighbor Policies as such policies may be adopted and amended from time to time. Good Neighbor Policies in effect as of the Commencement Date are attached hereto as <b>Exhibit I</b>. City will provide written notice of any new or revised Good Neighbor Policies. Any such policies shall be uniformly applied to similar or related types of Port tenants/Permitted Uses.</p>
<i>Prior License:</i>	<p>The Parties agree that as of the Commencement Date, License No. 16358, dated February 6, 2018 for reference purposes (the "<b>Prior License</b>"), between Tenant and Port is hereby terminated; provided, however, that the Parties shall continue to be liable for any obligations under the Prior License which have accrued prior to the date of termination and any obligations which by their terms survive the termination or expiration of the Prior License.</p>

<i>Tenant's Agents:</i>	Unless otherwise specified in this Lease, the Parties acknowledge and agree that, Tenant may, in the ordinary course of business, perform its obligations under this Lease through contractors, Subtenants and others in each case acting as an Agent of Tenant. Each of Tenant's Agents performing Tenant's obligations under this Lease shall be subject to all terms and conditions of this Lease and a breach caused by Tenant's Agent constitutes a breach by Tenant subject to default and termination provisions under this Lease.
<i>Utility Corridor Serving Davis Street Project:</i>	The Permitted Use may include construction and operation of a subsurface utility corridor located directly underneath the North/South mid-block passage open space that services the Building and the adjacent Davis Street Project. Any utility corridor and appurtenances thereto shall be an Improvement under this Lease and subject to all the terms and conditions of this Lease. Notwithstanding any other provision of this Lease, Port agrees that it will not require the removal or relocation of the utilities in the utility corridor during any time that the Building (including the North/South mid-block passage open space) remains on the Premises and the utilities continue to serve the Building.
	[Placeholder to add new Laws and City Requirements effective prior to the Commencement Date of this Lease].
<i>Lease Prepared By:</i>	Ricky Tijani, Planning and Development

#### 4. MOHCD ROLE AND OBLIGATIONS

**4.1. MOHCD's Consent.** This Lease and all amendments hereto are subject to MOHCD's consent in its sole discretion. MOHCD will assist Port with the following duties and responsibilities under this Lease.

##### **4.2. Coordination of Management Roles.**

(a) As between Port and MOHCD, MOHCD shall have primary monitoring, managerial and administrative authority with respect to the provisions of **Section 11** (Housing Requirements) of this Lease. MOHCD shall have primary approval rights over any changes Tenant wishes to make to the number of units designated for Low Income and Moderate Income households or any modification to the levels of affordability of Residential Portion. Port shall have primary monitoring managerial and administrative authority with respect to all other provisions. Port and MOHCD will work in good faith to consult with the other on all managerial, administrative and enforcement issues.

(b) MOHCD shall recommend approval of a Property Manager selected by Tenant and shall be primarily responsible for monitoring and reviewing the Property Manager's performance with respect to the provisions of **Section 11** (Housing Requirements) of this Lease.

(c) As Port's agent, MOHCD shall have the same rights of entry and inspection as Port under this Lease.

**4.3. MOHCD's Right to Pay Taxes and Impositions.** Unless Tenant is exercising its right to contest the Imposition of a tax under **Section 8.2** (Contests), if Tenant fails to pay and

discharge any imposition (including fines, penalties and interest) prior to delinquency, MOHCD at its sole option, may (but is not obligated to) pay or discharge the same; provided that prior to paying any such delinquent Imposition, MOHCD shall give Tenant written notice specifying a date that is at least ten (10) days following the date such notice is given after which MOHCD intends to pay such Impositions. If Tenant fails, on or before the date specified in such notice, either to pay the delinquent Imposition or to notify MOHCD that it is contesting such Imposition, then MOHCD may thereafter pay such Imposition, and the amount so paid by MOHCD (including any interest and penalties thereon paid by MOHCD), together with interest computed from the date MOHCD makes such payment, shall be payable by Tenant to Port as Additional Rent.

**4.4. MOHCD's Right to Cure Tenant's Default.** MOHCD, at any time after Tenant commits a default, may, at MOHCD's sole option, cure the default at Tenant's cost and Port agrees to accept such cure as if performed by Tenant. If MOHCD at any time, by reason of Tenant's default, undertakes any act to cure or attempt to cure such default that requires the payment of any sums, or otherwise incurs any costs, damages, or liabilities (including without limitation, attorneys' fees), all such sums, costs, damages or liabilities paid by MOHCD shall be due immediately from Tenant to MOHCD at the time the sum is paid, and if paid by Tenant at a later date shall bear interest at the Interest Rate. Tenant shall Indemnify the Indemnified Parties against any Claims in connection with MOHCD's cure or attempts to cure under this Section.

**4.5. MOHCD Consent to Transfers of the Residential Portion and Leasehold Mortgages.** Prior to seeking Port's consent and as a condition of Port's consent, Tenant shall obtain MOHCD's written consent to any Transfer of the Residential Portion under **Section 26.1** (Transfers) or any Leasehold Mortgage under **Section 34** (Leasehold Mortgage).

**4.6. Port is Landlord.** Nothing in this Lease is intended to grant MOHCD the rights or responsibilities of a lessor under this Lease, Laws or in equity. No action by MOHCD shall be binding upon Port with respect to Tenant or any provision of this Lease. Notwithstanding anything to the contrary, Port shall be ultimately responsible for all administration and enforcement of this Lease including without limitation, granting the Extension Term (if any), declaring an Event of Default, determining the adequacy of and accepting a cure of an Event of Default, exercising remedies, providing consent and exercising all other rights, duties and responsibilities of the lessor under this Lease.

## **5. PREMISES; CONDITION.**

**5.1. Consistency With State Legislation/Mandatory Uses .** Tenant acknowledges that the Premises is subject to the Public Trust and State Legislation and that, as a pre-condition of Port's execution of this Lease, the Port Commission and State Lands made a favorable Consistency Determination. The Parties further agree that Port may withhold its consent with respect to any change in any Permitted Uses if such changes would result in a violation of Port's authority as trustee under the Burton Act, or run contrary to the State Legislation or the favorable Consistency Determination made by the Port Commission or State Lands in the Resolutions referenced in **Recitals O** and **Q** or required to be made hereafter, as determined by Port in its sole discretion.

**5.2. Restrictions on Encumbering Port's Reversionary Interest.** Tenant may not enter into agreements granting licenses, easements or access rights over the Premises if the same would be binding on Port's reversionary interest in the Premises, or obtain changes in applicable land use laws or conditional use authorizations or other permits for any uses not provided for hereunder, in each instance without Port's prior written consent, which consent may be withheld in Port's sole discretion. The Parties recognize that for Tenant to carry out the Permitted Uses, it may be necessary or desirable to obtain additional use, zoning, regulatory or land use approvals or conditional use authorization relating to the Premises. Port agrees, from time to time, to reasonably cooperate with Tenant, at no out of pocket cost to Port, in pursuing such regulatory

approvals or authorizations, including, but not limited to, executing documents, applications or petitions relating thereto, subject to the limitations of *Section 13.2* (Regulatory Approvals).

**5.3. Title Exceptions and Defects.** The interests granted by Port to Tenant pursuant to this Lease are subject to (i) the matters reflected in *Exhibit J* (the “Permitted Title Exceptions”), (ii) the rights of Port reserved under this Lease, and (iii) other matters as Tenant will cause or suffer to arise subject to the terms and conditions of this Lease. Port will have no liability to Tenant in the event any defect exists in Port's title to the Premises as of the Commencement Date and no such defect will be grounds for a termination of this Lease by Tenant. Tenant's sole remedy with respect to any such existing title defect will be to obtain compensation by pursuing its rights against any title insurance company or companies issuing title insurance policies to Tenant.

**5.4. Subsurface Mineral Rights.** Under the terms and conditions of Article 2 of the Burton Act, the State has reserved all subsurface mineral deposits, including oil and gas deposits, on or underlying the Premises. In accordance with the provisions of Sections 2 and 3.5(c) of the Burton Act, Tenant 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 Leasehold Estate or the use of the Premises, including the ability of the Premises to support the Improvements, but provided further that, without limiting any remedies the Parties may have against the State or other parties, any such disturbance or interference that causes damage or destruction to the Premises will be governed by *Section 23* (Damage or Destruction). Port will have no liability under this Lease arising out of any exercise by the State of such mineral rights (unless the State has succeeded to Port's interest under this Lease, in which case such successor owner may have such liability).

**5.5. Proximity of Development Projects.** Tenant acknowledges that during the Term, a Port program or project and/or the Development Project(s) listed in in *Section 2* (Key Lease Terms) are scheduled to be, or may be, constructed on property in the vicinity of the Premises. Tenant is aware that construction of the Development Projects and other construction projects of Port tenants, licensees or occupants within or in the vicinity of the Premises and the activities associated with such construction may generate adverse impacts on construction of the Improvements, use and/or operation of the Premises after construction, or may result in inconvenience to or disturbance of Tenant and its Agents and Invitees. Impacts may include increased vehicle and truck traffic, traffic delays and re-routing, loss of street and public parking, dust, dirt, construction noise, and visual obstructions. Tenant hereby waives any and all Claims against the Indemnified Parties arising out of any inconvenience or disturbance to Tenant, its Agents or Invitees arising out of such inconvenience or disturbance.

**5.6. No Light, Air or View Easement.** This Lease does not include any air, light, or view easement. Any diminution or shutting off of light, air or view by any structure which may be erected on lands near or adjacent to the Premises shall in no way affect this Lease or impose any liability on City, entitle Tenant to any reduction of Rent, or affect this Lease or Tenant's obligations hereunder in any way.

**5.7. Unique Nature of Premises.**

Tenant acknowledges that: (a) the Premises is located in the immediate vicinity of the waterfront and the Seawall, which Seawall is in need of repair and presents increased risk of damage to property and injury or death to persons from seismic events; (b) Port's regular maintenance may involve activities, such as pile driving, that create noise and other effects not normally encountered in locations elsewhere in San Francisco due to the unique nature of the Premises; and (c) the Premises is located over fill and subject to liquefaction during a seismic event and presents an increased risk of damage to property and injury or death to persons from seismic events.

**5.8. Seawall.** The City is engaged in an effort to prepare for a major earthquake and to create more resilient City infrastructure. As part of this effort, Port is developing a plan to strengthen the Northern Waterfront Seawall which stretches from Fisherman's Wharf to Mission Creek ("Seawall") to maintain viability of Port's operations, increase protection of Port and City assets, and enhance life safety in the face of degradation, flooding, earthquakes, climate change, and security hazards. The Seawall was constructed over 100 years ago within the Bay and supports reclaimed land, or fill, and as a result is more vulnerable to seismic risk. Earthquake performance of reclaimed land is an issue for coastal communities worldwide. *The Seawall Earthquake Vulnerability Study of the Northern Waterfront Seawall, San Francisco, California July 2016*. Tenant agrees that its waiver of Claims set forth in **Section 25** (Indemnity and Exculpation) is given with full knowledge of the direct or indirect, known or unknown, and foreseeable or unforeseeable losses and claims (including the potential additional risks of injury or death to persons or damage to property) due to the Seawall's condition or the proximity of the Premises to the Bay and the Seawall. Tenant represents and warrants to Port that Tenant has received and reviewed the disclosures regarding the Seawall in **Section 5.8** (Seawall) including *The Seawall Earthquake Vulnerability Study of the Northern Waterfront Seawall, San Francisco, California July 2016* and information on the Port's website and the FEMA disclosure notice attached as **Schedule 2**.

**5.9. As-Is Condition.** Tenant acknowledges and agrees that Tenant is familiar with the Premises, the Premises is being leased and accepted in its "as-is" condition, without any preparation, improvements or alterations by Port without representation or warranty of any kind, and subject to all applicable Laws governing their use, occupancy and possession. Tenant acknowledges that it has been afforded a full opportunity to inspect Port's records relating to conditions of the Premises. Port makes no representation or warranty as to the accuracy or completeness of any matters contained in such records and Tenant is not relying on any such information. All information contained in such records is subject to the limitations set forth in this Section. Tenant further represents and warrants to Port that Tenant has investigated and inspected, either independently or through agents of Tenant's own choosing, the condition of the Premises and its suitability for Tenant's business and intended use including (i) its quality, nature, adequacy and physical condition and functional aspects; (ii) its quality, nature, adequacy, and physical, geotechnical and environmental conditions (including Hazardous Materials conditions, including the presence of asbestos or lead, with regard to soils and any groundwater); (iii) its suitability for the Improvements; (iv) its zoning, land use regulations and other Laws governing use of or construction; and (v) all other matters of material significance affecting the Premises and its use and development under this Lease. Tenant specifically acknowledges and agrees that neither City, Port nor any of their agents have made, and Port hereby disclaims, any representations or warranties, express or implied of any kind, concerning the rentable area of the Premises, the physical or environmental condition of the Premises, the present or future suitability of the Premises for Tenant's business, any compliance with laws or applicable land use or zoning regulations, any matter affecting the use, value, occupancy or enjoyment of the site, or any other matter whatsoever relating to the Premises, including, without limitation, any implied warranties of merchantability or fitness for a particular purpose.

**5.10. Release and Waiver.** As part of its agreement to accept the Premises in their "As Is With All Faults" condition, Tenant, 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 Tenant 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 development of the Improvements, the Permitted Uses, (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 sole gross negligence of or intentionally harmful acts committed solely by Port or City.

**5.11. Accessibility Inspection Disclosure.** California law requires commercial landlords to disclose to tenants whether the property being leased has undergone inspection by a Certified Access Specialist (“CASp”) to determine whether the property meets all applicable construction-related accessibility requirements. The law does not require landlords to have the inspections performed. Tenant is hereby advised that the Premises has not been inspected by a CASp and Port has no obligation, liability, or responsibility to make any repairs or modifications to the Premises in order to comply with accessibility standards. The following disclosure is required by law:

“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.”

**5.12. Port’s Rights Regarding Premises.** Port shall have the full right and authority to make, revoke, impose, and amend any Good Neighbor Policies and/or any Rules and Regulations pertaining to and reasonably necessary for the proper use, operation and maintenance of retail and public-serving operations and activities at the Premises. Tenant acknowledges receipt of a copy of the Port’s current Restaurant Rules and Regulations attached hereto as **Exhibit K** and agrees to abide by them, as applicable. Port will provide Tenant with written notice of any new or revised Rules and Regulations applicable to the Project and any such Rules and Regulations shall be uniformly applied to similar or related types of Port tenants/Permitted Uses. Tenant 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 Tenant to any abatement or diminution of Rent.

**5.13. Flood Risk and Sea Level Rise.** Tenant shall incorporate Flood Protection Measures into its site and building designs, particularly civil engineering designs to protect the Premises and Improvements from flooding or water inundation from sea level rise and take all other measures appropriate to proactively address risks related to flood and water inundation from sea level rise.

(a) **Flood Protection Measures.** In addition to Tenant’s obligations to comply with Laws and to repair and maintain the Premises including the Improvements if, at any time during the Term of this Lease, and subject to compliance with CEQA, the Chief Harbor Engineer acting in his/her regulatory capacity as the Port’s chief building official in accordance with applicable Laws determines that there is a need for **Flood Protection Measures** (as defined below) at the Premises or proximate to the Premises to protect the Premises from a significant risk of flooding or other damage resulting from climate change or sea level rise, in order to protect public health and safety (“**CHE Determination**”), Tenant shall be responsible at no cost to Port for permitting, constructing and implementing any such Flood Protection Measures in the manner described in this Section. Tenant understands and agrees that it will not receive or seek rent credits or other compensation or consideration for any Flood Protection Measures. Port and Tenant agree that neither a CHE Determination nor a Threat Determination (as defined below) under this **Section 5.13** (Flood Risk and Sea Level Rise) that identifies a bona fide code violation or condition requiring Flood Protection Measures shall be a Taking for purposes of this Lease.

“**Flood Protection Measures**” may include without limitation (1) temporary public access closures, sandbagging or similar temporary measures to minimize the risks associated with flooding; (2) waterproofing or relocation of utility infrastructure from subsurface areas to minimize the risk of water or wastewater infiltration; and/or (3) short perimeter flood walls or similar measures to address more frequent and serious flooding. For purposes of this section, and without affecting Tenant’s other obligations under this Lease, Flood Protection Measures do not include raising first floor elevations or regional improvements such as breakwater or levee improvements which the Parties acknowledge may be necessary to protect the City from sea level rise, but are beyond the scope of this Lease.

(b) CHE Determination Notice. Promptly following a CHE Determination, Port will deliver to Tenant notice of the CHE Determination (“**CHE Determination Notice**”). The CHE Determination Notice will include a description of the need for required Flood Protection Measures and a timeline for Tenant to submit for the CHE’s approval, in his or her sole discretion, a conceptual level scheme of the planned measures along with a schedule for completing design, securing all Regulatory Approvals and completing construction (“**Flood Protection Plan**”). The CHE has the sole discretion to approve or disapprove the final designs and implementation of any Flood Protection Measures to be constructed within Port’s jurisdiction (including the Premises). Within sixty (60) days of receiving such plan, the CHE will review and either approve the plan or request revisions to the plan. If revisions are required, Tenant will promptly revise the Flood Protection Plan and re-submit to the CHE for his or her review and approval. Tenant will continue to revise and re-submit until the CHE approves the Flood Protection Plan, as revised; provided, however, Tenant must have obtained the CHE’s approval of a Flood Protection Plan (the “**Approved Flood Protection Plan**”) within the time period set forth in the CHE Determination Notice.

(c) If Tenant fails to implement any required Flood Protection Measures or the Approved Flood Protection Plan within the time required in the CHE Determination, Port shall provide Tenant with thirty (30) days written notice and the right to cure such failure. If Tenant fails to cure within the 30-day period, Port shall have the right but not the obligation to implement the measure(s) on Tenant’s behalf following an additional thirty (30) days’ written notice of Port’s intent to do so (unless such failure to cure gives rise to an emergency which creates an imminent danger to public health or safety as determined by the CHE) and Tenant shall reimburse Port for its actual costs.

(d) Limitations; Waiver. Tenant's obligation hereunder in connection with the Flood Protection Measures shall include, without limitation, the obligation to make substantial or structural repairs and alterations to the Premises regardless of, among other factors, the relationship of the cost of curative action to the Rent under this Lease, the length of the then remaining Term hereof, the relative benefit of the repairs to Tenant or Port, the degree to which curative action may interfere with Tenant's use or enjoyment of the Premises, or the likelihood that the Parties contemplated the particular Flood Protection Measures involved. Further, no occurrence or situation arising during the Term, nor any present or future Law or circumstance, whether foreseen or unforeseen, and however extraordinary, shall relieve Tenant of its obligations hereunder, nor give Tenant any right to terminate this Lease in whole or in part or to otherwise seek redress against Port except with respect to Tenant’s right to terminate under the terms and conditions specified in *Section 23* (Damage and Destruction) and *Section 24* (Condemnation). Without waiving the right to terminate as provided in *Section 23* (Damage and Destruction) and *Section 24* (Condemnation), Tenant waives any rights now or hereafter conferred upon it by any existing or future Law to terminate this Lease, to receive any abatement, diminution, reduction or suspension of payment of Rent, or to compel Port to make any repairs to comply with any such Laws or on account of any such occurrence or situation.

If the CHE determines that there is a need for Flood Protection Measures or makes a Threat Determination as described in this Section, the rights and obligations of the Parties shall be as set forth in this Section. Accordingly, Port and Tenant each hereby waive the provisions of



Sections 1932(2) and 1933(4) of the California Civil Code and Sections 1265.110, 1265.120, 1265.130, and 1265.140 of the California Code of Civil Procedure as such sections may from time to time be amended, replaced, or restated. Notwithstanding the prior sentence, Port and Tenant do not intend to waive their rights under **Section 23** (Damage and Destruction) and **Section 24** (Condemnation) in the event of damage, destruction or a Taking.

## **6. TERM.**

**6.1. Initial Term.** The effectiveness of this Lease will commence on the Commencement Date and will expire on the Expiration Date (unless earlier terminated in accordance with the terms of this Lease (“**Initial Term**”).

If Port is unable to deliver possession of the Premises to Tenant on or before the Commencement Date, then the validity of this Lease shall not be affected thereby and Port shall not be liable to Tenant for any Claims resulting therefrom, and Tenant waives all provisions of any Laws to the contrary.

**(a) Option to Extend Term.** Subject to Tenant’s compliance with **Section 6.1(b)** (Conditions to Extend), Tenant may extend the Term of this Lease for the Extended Term on and subject to all of the terms and conditions of this Lease, except that Tenant will have no further right to extend the Term beyond the Extended Term. Notwithstanding any other provision of this Lease, the Extended Term shall expire on the earlier of: (i) the date that is eighteen (18) years after the Expiration Date of the Initial Term; or (ii) December 31, 2105. In the event that Tenant properly and timely extends the Term of this Lease as set forth in this **Section 6.1(a)**, the word “**Term**” as used in this Lease will be deemed to mean the Term as extended by the Extended Term. All other terms will remain unchanged.

**(b) Conditions to Extend.** In order for Tenant to extend the Term for the Extended Term, all of the following conditions must be satisfied

**(i)** Tenant must provide written notice to Port of its intention to extend the Term no later than two (2) years but no earlier than three (3) years prior to the expiration of the Initial Term along with the most recent Capital Needs Assessment report, which notice will be irrevocable by Tenant (“**Extension Notice**”);

**(ii)** the Chief Harbor Engineer has reviewed the condition of the Premises (including the Improvements thereon) including the effects of sea level rise, the condition of the Seawall, and any anticipated improvements to mitigate the impact of sea level rise or the potential failure of, or damage to, the Seawall in the event of a major seismic event, and is reasonably satisfied that, in his or her best professional judgement such conditions on the Premises and the City’s waterfront will not materially and adversely affect public health and safety or increase the potential for Claims against Port or the City during the Extended Term.

**(iii)** There is no uncured Tenant Event of Default or Unmatured Tenant Event of Default at the time of the giving of the Extension Notice; and

**(iv)** There is no uncured Tenant Event of Default or Unmatured Tenant Event of Default at the commencement of the Extended Term.

**(c) Failure to Meet Conditions.**

**(i)** If, under (a)(ii) above, the Chief Harbor Engineer identifies conditions that could materially and adversely affect public health and safety during the Extended Term or increase the potential for Claims against Port or the City during the Extended Term, he or she will do so in writing and Tenant will have a reasonable amount of time to present to Port a written plan to address such conditions through Improvements to the Premises or other verifiable measures. Port, in its sole discretion, may extend the deadlines for the Extension Notice in **Section 6.1(b)** (Conditions to Extend) in order for the Parties to agree on proposed measures to address health and safety issues during the Extended Term. If, despite

Tenant's proposal, the Chief Harbor Engineer determines that conditions would still exist that could materially and adversely affect public health and safety or increase the potential for Claims against Port or the City during the Extended Term, the Extension Option will be null and void and this Lease will terminate on the Expiration Date.

(ii) If Tenant fails to provide a timely Extension Notice or if there is uncured Tenant Event of Default or Unmatured Tenant Event of Default at the time of the giving of the Extension Notice or an uncured Tenant Event of Default or Unmatured Tenant Event of Default at the commencement of the Extended Term, Port may, in its sole discretion, elect in writing to (A) provide Tenant with an opportunity to cure such defect; (B) waive such defect; or (C) reject Tenant's exercise of the Extension Option, whereupon the Extension Option shall be null and void and the Term shall expire on the original Expiration Date as if Tenant had never exercised the Extension Option.

**6.2. Port's Termination Right.** Port has the right to terminate this Lease if the Chief Harbor Engineer, acting in his/her regulatory capacity as the Port's chief building official in accordance with applicable provisions of the Port Building Code relating to unsafe buildings and structures determines, in his or her sole and absolute discretion, that the use or condition of the structures, substructure or utilities of the Improvements are unsafe and would create a serious and imminent hazard to human life, safety of health of the occupants or other persons under the provisions of Section 102A of the 2010 Port Building Code or successor provisions of similar import relating to unsafe buildings (subject to Tenant's right to correct any notices of violation under the applicable provisions of the Port Building Code and subject to any due process rights afforded under Section 102A of the 2010 Port Building Code or successor provisions of similar import). Port may exercise this right without liability or expense, provided that Port provides Tenant with no less than one hundred eighty (180) days' prior written notice of termination (or any shorter notice period that the CHE in his or her sole and absolute discretion determines is justified under Section 102A of the 2010 Port Building Code or successor provisions of similar import given the risk of hazard) and Port determines in good faith that, due to the unsafe conditions, the Improvements cannot be used for the Permitted Uses under this Lease. Tenant shall be required to surrender possession of the Premises by the end of the notice period.

For a period ending fifteen (15) calendar days after receipt of Port's notice of termination under this Section, Tenant may request Port's consent, in Port's sole and absolute discretion, to allow Tenant to make the repairs required by Port in accordance with this Lease and any additional conditions reasonably imposed by Port. If Port consents in writing, Port's notice of termination will be deemed rescinded and of no further effect.

No occurrence or situation arising during the Term, nor any present or future Law or circumstance, whether foreseen or unforeseen, and however extraordinary, shall relieve Tenant of its obligations under this Lease, nor give Tenant any right to terminate this Lease in whole or in part or to otherwise seek redress against Port except with respect to Tenant's right to terminate under the terms and conditions specified in **Section 23** (Damage and Destruction) and **Section 24** (Condemnation). Without waiving the right to terminate as provided in **Section 23** (Damage and Destruction) and **Section 24** (Condemnation), Tenant waives any rights now or hereafter conferred upon it by any existing or future Law to terminate this Lease, to receive any abatement, diminution, reduction or suspension of payment of Rent, or to compel Port to make any repairs to comply with any such Laws or on account of any such occurrence or situation.

**6.3. Waiver of Relocation Benefits.** To the extent allowed by applicable Law, Tenant 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, except as specifically provided in this Lease.

## **7. RENT.**

**7.1. Base Rent.** Commencing on the date of the Certificate of Final Completion and Occupancy for the Residential Portion of the Building and continuing throughout the Term, Tenant shall pay to Port the Base Rent set forth in the Basic Lease Information. Tenant shall make the first payment of Base Rent on the date of the Certificate of Final Completion and Occupancy for the Residential Portion of the Building and thereafter shall pay the Base Rent, in advance, on or before the first day of each Lease Year throughout the Term including any Extension Term without proration for any period of less than a full Lease Year. The Base Rent shall be adjusted on each fifth (5th) Anniversary Date ("**Rent Adjustment Date**") to equal the greater of the (i) Base Rent in effect prior to the Rent Adjustment Date; or (ii) the Base Rent in effect prior to the Rent Adjustment Date multiplied by the percentage change in the AMI as between: (1) the AMI on the Commencement Date and (2) the AMI on the Rent Adjustment Date for the first rent adjustment and (1) the AMI on the prior Rent Adjustment Date and (2) the AMI on the current Rent Adjustment Date for all subsequent rent adjustments.

**7.2. Retail Rent.** The Parties acknowledge that Tenant plans to sublease one or both Ground Floor Units to a single commercial management entity that will in turn sublease the units to one or more retail operators. The intent of the Parties is for Port to receive thirty percent (30%) of net revenues from the income Tenant or the subtenant commercial management entity receives from each retail operation. In order to retain flexibility for Tenant to manage the Lease and to avoid doubt about payments to Port, in this *Section 7.2*, the single commercial management entity shall be referred to as "**Commercial Subtenant**" and each retail operator subtenant shall be referred to as a "**Retail Subtenant**." Each of these entities are "Subtenants" as otherwise defined in this Lease. As used in this *Section 7.2*, Ground Floor Units mean Ground Floor Units being used for Retail operations.

(a) Tenant shall pay or shall cause a Commercial Subtenant or a Retail Subtenant to pay annual rent to Port in an amount equal to thirty percent (30%) of Net Revenues from any Retail Subtenant ("**Retail Rent**").

(b) For purposes of determining Retail Rent, the following definitions apply:

(i) "**Debt Service**" means annual debt service on any loans obtained by a Commercial Subtenant or a Retail Subtenant (to the extent that Commercial Subtenant or Retail Subtenant has actually paid such debt) from non-Affiliates and secured in whole or in part by the applicable relevant subleasehold (Ground Floor Unit) which Port and Tenant agree shall not exceed the prevailing market rate loan to value ratio at the time of the making of such loan unless otherwise agreed to in advance by Port in writing ("**Leasehold Loans**") and on loans for core, shell and tenant improvements to the relevant Ground Floor Unit ("**New Capital Loans**"), including in each case, without limitation, interest, amortization of principal, and all financing costs, points and fees actually paid by Tenant during such period (but excluding interest based on revenue generated by, profits from, or appreciation of the subleasehold).

(ii) "**Net Revenues**" means the gross amount paid by a Retail Tenant to Commercial Subtenant or to Tenant on an annual basis, subject to the following deductions and no other deductions: (i) Debt Service and (ii) Operating Expenses.

(iii) "**Operating Expenses**" means annual operating expenses or costs incurred by Tenant and Commercial Subtenant in connection with a Ground Floor Unit and/or allocated to a Ground Floor Unit in a given year, which expenses or costs includes:

(1) property taxes and assessments allocated or imposed on the Ground Floor Unit except as paid by the Commercial Subtenant;

(2) property management fees and reimbursements, in amounts that are commercially reasonable and consistent with similar first-class properties within the City;

(3) premiums for property damage and liability insurance;

- (4) utility services not paid for directly by Commercial Subtenant, including water, sewer, and trash collection;
- (5) maintenance and repair, including common area maintenance charges;
- (6) any annual license, permitting, or certificate of occupancy fees required for operation of the Ground Floor Unit;
- (7) security services;
- (8) advertising and marketing costs;
- (9) fees, costs, and expenses that may be due under covenants, conditions and restrictions governing operation and maintenance of the Improvements;
- (10) cash deposited into reserves for capital replacements, in commercially reasonable amounts, of the Ground Floor Unit or as required by covenants, conditions and restrictions;
- (11) cash deposited into an operating reserve, in commercially reasonable amounts for the Ground Floor Unit or as required by covenants, conditions and restrictions;
- (12) cash deposited into other reserve accounts as required by Lenders or investors;
- (13) legal fees;
- (14) other reasonable and customary operating costs reasonably necessary to operate, market, repair, and maintain a Ground Floor Unit as a first-class commercial establishment; and
- (15) extraordinary expenses approved by the Port, which approval shall not be unreasonably withheld or delayed; and
- (16) Subletting Expenses amortized on a straight-line basis over the term of the sublease with the Commercial Subtenant.

(c) The Parties acknowledge that some Retail Subleases, such as a sublease to an operator of a childcare center, may not generate Net Revenues that would be subject to revenue sharing, and in that case, such Subleases will not be subject to **Sections 7.2** or **Section 7.3** which require the payment of Rent to Port; provided however that Port retains its right to audit all such uses to confirm that any such Sublease does not generate Net Revenues.

(d) Retail Rent shall be determined and paid for each year within one hundred eighty (180) days after the end of the prior Lease Year, except that in the event this Lease expires or terminates on a day other than the last day of a Lease Year, Retail Rent for such Lease Year shall be determined and paid within one hundred eighty (180) days after such expiration or termination date. At the time of paying the Retail Rent, Tenant shall furnish a complete statement (the "**Annual Retail Rent Statement**") in a form approved by Port. Each Annual Retail Rent Statement shall set forth in reasonable detail the calculation and deductions used to calculate Net Revenues for such immediately preceding Lease Year, as applicable and a computation of the Retail Rent for the immediately preceding calendar Lease Year, as applicable.

(e) Each Annual Retail Rent Statement shall be certified as accurate, complete and current by an independent certified public accounting firm acceptable to Port in its sole discretion. Any balance owing to Port must be submitted with any Annual Retail Rent Statement showing an underpayment of Retail Rent. At Port's option, overpayments may be refunded, applied to any other amount then due under the Lease and unpaid, or applied to Rent due at the

first opportunity following delivery of any Annual Retail Rent Statement showing an overpayment.

(f) If Tenant fails to (i) pay the Retail Rent on the date due as provided above; or (ii) submit the Annual Retail Rent Statement therewith (even if the statement indicates that Retail Rent is not due, such failure in each instance shall be subject to a Late Charge. Tenant shall also pay any costs including attorneys' fees incurred by Port by reason of such failure. Additionally, if Tenant fails to deliver any Annual Retail Rent Statement within the time period set forth in this **Section 7.2** (irrespective of whether any Retail Rent is actually paid or due to Port) and such failure continues for three (3) days after the date Tenant receives (or refuses receipt of) written notice of such failure from Port, Port shall have the right, among its other remedies under this Lease, to employ a certified public accountant to make such examination of Tenant's Books and Records (and the Books and Records of any other occupant of the Ground Floor Units) as may be necessary to certify the amount of Tenant's Net Revenues for the period in question and the certification so made shall be binding upon Tenant and Tenant shall promptly pay to Port the total reasonable cost of the examination, together with the full amount of Retail Rent due and payable for the period in question, including any Late Charge. Tenant acknowledges that late submittal of the Annual Retail Rent Statement and late payment of Retail Rent will cause Port increased costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. The Parties agree that the charges set forth in this Section represent a fair and reasonable estimate of the cost that Port will incur by reason of Tenant's lateness.

(g) Acceptance by Port of any monies paid to Port by Tenant or a Subtenant as Retail Rent as shown by any Annual Retail Rent Statement, shall not be an admission of the accuracy of said Annual Retail Rent Statement or the amount of such Retail Rent payment.

**7.3. Excess Rent.** In addition to Retail Rent for Retail Subleases, Tenant shall pay to Port as Excess Rent immediately upon receipt an amount equal to fifty percent (50%) of sublease rent and any other sums paid or payable to Tenant under a Sublease other than a Retail Sublease described under **Section 7.2**, including subleases for wireless communications sites, licensing, indoor and internet-based advertisements and any other sublease, but excluding subleases serving the Residential Occupants such as laundry leases that do not require Port's consent under **Section 26(ii)**. In determining Excess Rent, Tenant may deduct Operating Expenses related to the specific space being subleased from the gross sublease revenue received by Tenant. Tenant shall report Excess Rent in a form approved by Port subject to the provisions of **Sections 7.2(f)** and **7.2(g)** for failure to submit such reports and amounts.

**7.4. Payment by Subtenant.** Port agrees to accept Retail or Excess Rent payments directly from a Subtenant on behalf of Tenant and Tenant agrees that a breach by a Subtenant constitutes a breach by Tenant (subject to the cure provisions under this Lease).

**7.5. Books and Records.** Tenant shall keep (and shall cause its Subtenants to keep) at the Premises at all times during the Term complete and accurate Books and Records that contain all information required to permit Port to verify Rent due to Port under this Lease in accordance with generally accepted accounting practices consistently applied with respect to all operations on the Premises and shall retain such Books and Records until the later of (i) four (4) years after the end of each Lease 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 regarding the Rent payable hereunder, until such audit or controversy is concluded even if such audit period extends beyond the expiration or earlier termination of the Lease (the "**Audit Period**").

**7.6. No Joint Venture.** Port's receipt of Retail Rent or Excess Rent shall be deemed strictly as rental and nothing herein shall be construed to create the legal relation of a partnership or joint venture between Port and Tenant.

**7.7. Audit.**

(a) Tenant agrees to make its Books and Records and to cause its Subtenants to make its Books and Records available to Port, or to any City auditor, or to any auditor or representative designated by Port or City (hereinafter collectively referred to as "**Port Representative**"), upon no less than fifteen (15) business days prior written notice to Tenant, for the purpose of examining said Books and Records to determine the accuracy of Tenant's reporting and payment of Rent for a period not to exceed the Audit Period. Tenant shall cooperate with the Port Representative during the course of any audit, provided however, such audit shall occur at Tenant's business office, or at such other location in San Francisco where the Books and Records are kept, and no books or records shall be removed by Port Representative without the prior express written consent of Tenant (provided, however, copies may be made by the Port Representative on site), and once commenced, with Tenant's cooperation, such audit shall be diligently pursued to completion by Port within a reasonable time of its commencement, provided that Tenant makes available to the Port Representative all the relevant Books and Records in a timely manner. If an audit is made of Tenant's Books and Records and Port claims that errors or omissions have occurred, the Books and Records shall be retained by Tenant and made available to the Port Representative until those matters are expeditiously resolved with Tenant's cooperation. Upon completion of the audit, Port shall promptly deliver a copy of the audit report to Tenant.

(b) If an audit reveals that Tenant or its Subtenant has understated Rent due for said Audit Period, Tenant shall pay Port, promptly upon demand, the difference between the amount Tenant has paid and the amount it should have paid to Port, plus interest at the Interest Rate from the date of the error in the payment. If an audit reveals that Tenant or its Subtenant has overstated its Rent for said Audit Period, Tenant or its Subtenant shall be entitled to a credit against rent next owed equal to the difference between the amount paid and the amount it should have paid to Port. If Tenant or its Subtenant understates its Rent for any Audit Period by three percent (3%) or more, Tenant or its Subtenant shall pay the cost of the audit. A second understatement within any three (3) Lease Year period of the first such understatement shall be considered an Event of Default.

**7.8. Default Interest.** Any Rent, if not paid within five (5) days following the due date and any other payment due under this Lease not paid by the applicable due date, shall bear interest from the due date until paid at the Interest Rate. However, interest shall not be payable on Late Charges incurred by Tenant nor on other amounts to the extent this interest would cause the total interest to be in excess of that which an individual is lawfully permitted to charge. Payment of interest shall not excuse or cure any default by Tenant. Tenant shall also pay any costs, including attorneys' fees incurred by Port by reason of Tenant's failure to pay Rent or other amounts when due under this Lease.

**7.9. Late Charges/Habitual Late Payer.** Tenant acknowledges that late payment by Tenant to Port of Rent or other sums due under this Lease will cause Port increased costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Accordingly, if Tenant fails to pay Rent on the date due, such failure shall be subject to a Late Charge at Port's discretion. Tenant shall also pay any costs including attorneys' fees incurred by Port by reason of Tenant's failure to timely pay Rent. Additionally, in the event Tenant is notified by Port that Tenant is considered to be a Habitual Late Payer, Tenant shall pay, as Additional Rent, an amount equal to Fifty Dollars (\$50.00) (as such amount may be adjusted from time to time by the Port Commission) upon written notification from Port of Tenant's Habitual Late Payer status. The Parties agree that the charges set forth in this Section represent a fair and reasonable estimate of the cost that Port will incur by reason of any late payment. Such charges may be assessed without notice and cure periods and regardless of whether such late payment results in an Event of Default. Payment of the amounts under this Section shall not excuse or cure any default by Tenant.

**7.10. Returned Checks.** If any check for a payment for any Lease obligation is returned without payment for any reason, Tenant shall pay, as Additional Rent, an amount equal

to Fifty Dollars (\$50.00) (as such amount may be adjusted from time to time by the Port Commission) and the outstanding payment shall be subject to a Late Charge as well as interest at the Interest Rate.

**7.11. Net Lease.** It is the purpose of this Lease and intent of Port and Tenant that all Rent is absolutely net to Port, so that this Lease yields to Port the full amount of Rent at all times during the Term, without deduction, abatement or offset. Under no circumstances, whether now existing or hereafter arising, and whether or not beyond the present contemplation of the Parties is Port expected or required to incur any expense or make any payment of any kind with respect to this Lease or Tenant's use or occupancy of the Premises. Without limiting the foregoing, Tenant is solely responsible for paying each item of cost or expense of every kind and nature whatsoever, the payment of which Port would otherwise be or become liable by reason of Port's interest in the Premises, any rights or interests of Port in or under this Lease, or the ownership, leasing, operation, management, maintenance, repair, rebuilding, remodeling, use or occupancy of the Premises, or any portion thereof. No occurrence or situation arising during the Term, or any Law, whether foreseen or unforeseen, and however extraordinary, relieves Tenant from its liability to pay all of the sums required by any of the provisions of this Lease, or otherwise relieves Tenant from any of its obligations under this Lease, or gives Tenant any right to terminate this Lease in whole or in part. Tenant waives any rights now or hereafter conferred upon it by any Law to terminate this Lease or to receive any abatement, diminution, reduction or suspension of payment of such sums, on account of any such occurrence or situation, provided that such waiver will not affect or impair any right or remedy expressly provided Tenant under this Lease.

**7.12. Additional Charges.** Without limiting Port's other rights and remedies set forth in this Lease, at law or in equity, in the event Tenant fails to submit to the appropriate party, on a timely basis, the items identified in **Sections: 18.1** (Utilities), **21.3** (Tenant's Environmental Condition Notification Requirements), **21.6**. (Storm Water Pollution Prevention), **36.1(d)** (CMD Form), and **42.1** (Estoppel Certificate by Tenant) or to provide evidence of the required insurance coverage described in **Section 22** below, then upon written notice from Port of such failure, Tenant shall pay, as Additional Rent, an amount equaling One Hundred Dollars (\$100.00). In the event Tenant fails to provide the necessary document within the time period set forth in the initial notice and Port delivers to Tenant additional written notice requesting such document, then Tenant shall pay to Port, as Additional Rent, an amount equaling One Hundred Fifty Dollars (\$150.00) for each additional written notice Port delivers to Tenant requesting such document. The parties agree that the charges set forth in this **Section 7.12** (Additional Charges) represent a fair and reasonable estimate of the administrative cost and expense which Port will incur by reason of Tenant's failure to provide the documents identified in this **Section 7.12** (Additional Charges) and that Port's right to impose the foregoing charges shall be in addition to and not in lieu of any and all other rights under this Lease, at law or in equity. By signing this Lease, each party specifically confirms the accuracy of the statements made in this **Section 7.12** (Additional Charges) and the reasonableness of the amount of the charges described in this **Section 7.12** (Additional Charges).

## **8. TAXES AND ASSESSMENTS; CONTESTS.**

### **8.1. Payment of Taxes and Other Impositions.**

(a) **Payment of Taxes.** Unless exempt and subject to Tenant's rights under **Section 8.2** (Contests), Tenant shall pay to the proper authority prior to delinquency, all Impositions levied, assessed, confirmed or imposed on the Premises, on any of the Improvements or Personal Property located on the Premises (excluding the personal property of any Subtenant whose interest is separately assessed), on Tenant's Leasehold Estate (but excluding any such taxes separately assessed, levied, or imposed on any Subtenant), or on any use or occupancy of the Premises hereunder, to the full extent of installments or amounts payable or arising during the Term whether in effect at the Commencement Date or which become effective thereafter.

(b) Acknowledgment of Possessory Interest. Unless exempt and subject to Tenant's rights under **Section 8.2** (Contests), Tenant specifically recognizes and agrees that this Lease creates a possessory interest which is subject to taxation, and that this Lease requires Tenant to pay any and all possessory interest taxes levied upon Tenant's interest pursuant to an assessment lawfully made by the County Assessor. Tenant further acknowledges that any Transfer or Sublease permitted under this Lease and any exercise of any option to renew or extend this Lease may constitute a change in ownership, within the meaning of the California Revenue and Taxation Code, and therefore may result in a reassessment of any possessory interest created hereunder in accordance with applicable Law.

(c) Reporting Requirements. San Francisco Administrative Code Sections 23.38 and 23.39 (or their successors) require that Port report certain information relating to this Lease, and the creation, renewal, extension, assignment, sublease, or other transfer of any interest granted hereunder, to the County Assessor within sixty (60) days after any such transaction. Within thirty (30) days following the date of any transaction that is subject to such reporting requirements, Tenant shall provide such information as may be requested by Port to enable Port to comply with such requirements.

(d) Prorations. All Impositions imposed for the tax year in which the Commencement Date occurs or during the tax year in which this Lease terminates shall be apportioned and prorated between Tenant and Port on a daily basis.

(e) Proof of Compliance. Within thirty (30) days following Port's written request, Tenant shall deliver to Port copies of official receipts of the appropriate taxing authorities, or other proof reasonably satisfactory to Port, evidencing the timely payment of such Impositions.

**8.2. Contests.** Tenant shall have the right to contest the amount, validity or applicability, in whole or in part, of any Imposition, mechanics' lien, or encumbrance (including any arising from work performed or materials provided to Tenant or any Subtenant to improve all or a portion of the Premises) by appropriate proceedings conducted in good faith and with due diligence, at no cost to City, provided that, prior to commencement of such contest, Tenant notifies City of such contest. Tenant shall notify City of the final determination of such contest within fifteen (15) days after such determination. Nothing in this Lease shall require Tenant to pay any Imposition, mechanics' lien, or encumbrance so long as Tenant contests the validity, applicability or amount of such Imposition, mechanics' lien, or encumbrance in good faith, and so long as it does not allow the portion of the Premises affected by such Imposition, mechanics' lien, or encumbrance to be forfeited to the entity levying such Imposition, mechanics' lien, or encumbrance as a result of its nonpayment. If any Law requires, as a condition to such contest, that the disputed amount be paid under protest, or that a bond or similar security be provided, Tenant shall comply with such condition as a condition to its right to contest. Tenant shall be responsible for the payment of any interest, penalties or other charges that may accrue as a result of any contest, and Tenant shall provide a statutory lien release bond or other security reasonably satisfactory to City in any instance where Port's interest in the Premises may be subjected to such lien or claim. Tenant shall not be required to pay any Imposition, mechanics' lien, or encumbrance being so contested during the pendency of any such proceedings unless payment is required by the court or agency conducting such proceedings. City, at its own expense and at its sole option, may elect to join in any such proceeding whether or not any Law requires that such proceedings be brought by or in the name of an owner of the Premises. Except as provided in the preceding sentence, neither MOHCD nor Port shall be subjected to any liability for the payment of any fines, penalties, costs, expenses or fees, including attorneys' fees and costs, in connection with any such proceeding. Without limiting **Section 25** (Indemnity and Exculpation), Tenant shall Indemnify the Indemnified Parties for all Claims resulting from Tenant's contest of any Imposition.



## 9. REQUIRED FINANCIAL ASSURANCES

**9.1. Sufficient Capital.** Tenant shall submit to Port evidence satisfactory to Port that Tenant has sufficient equity capital and commitments for construction and permanent financing, and/or such other evidence of capacity to proceed with the construction of the Initial Improvements and any Subsequent Construction in accordance with the dates specified in the applicable Schedule of Performance. City hereby acknowledges that as of the Commencement Date, Tenant has provided City with sufficient evidence to satisfy this requirement.

### 9.2. Security Deposit.

(a) Tenant shall pay to Port upon execution of this Lease, the Security Deposit, in cash, in the sum specified in **Section 2** (Key Lease Terms), as security for the faithful performance by Tenant of all terms, covenants and conditions of this Lease. Tenant agrees that Port may (but shall not be required to) apply the Security Deposit in whole or in part to (a) pay any sum due to Port under this Lease; (b) compensate Port for any expense incurred or damage caused by Tenant, its Agents or Invitees; (c) cure any default by Tenant; or (d) cure, or attempt to cure, any failure of Tenant to perform any other covenant, term or condition contained herein. Tenant shall immediately upon demand pay Port a sum equal to the portion of the Security Deposit expended or applied by Port. Port shall not be required to keep the Security Deposit separate from its general funds, and Tenant shall not be entitled to any interest on the Security Deposit. Nothing contained in this Section shall in any way diminish or be construed as waiving any of Port's other remedies set forth in this Lease or provided by law or equity.

(b) Tenant hereby waives the provisions of California Civil Code Section 1950.7 and/or any successor statute, it being expressly agreed that Port may apply all or any portion of the Security Deposit in payment of any and all sums reasonably necessary to compensate Port for any other loss or damage, foreseeable or unforeseeable, caused by the act or omission of Tenant or any Agent or Invitee of Tenant, and that following a default by Tenant, all or any portion of the Security Deposit may be retained by Port following a termination of this Lease and applied to future damages, including damages for future Rent, pending determination of the same.

## 10. PERMITTED USES.

**10.1. Permitted Use and Occupancy Restrictions.** The Premises shall be used and occupied only for the Permitted Use specified in in **Section 2** (Key Lease Terms) and for no other purpose. Tenant acknowledges that that a prohibition on the change in use contained in this Section is expressly authorized by California Civil Code section 1997.230 and is fully enforceable.

**10.2. Prohibited Use.** Tenant 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 Lease, are strictly prohibited and are considered Prohibited Uses:

(a) any activity, or the maintaining of any object, which is not within the Permitted Use or is inconsistent with the favorable Consistency Determination;

(b) any activity, or the maintaining of any object, which will prevent Tenant from maintaining the insurance coverages required by **Section 22** (Insurance) of this Lease;

(c) any activity which constitutes waste or nuisance, including, but not limited to, the preparation, manufacture or mixing of anything that might emit any objectionable odors, noises or lights onto adjacent properties, or the use of loudspeakers or sound or light apparatus which can be heard or seen outside the Premises;

(d) any activity which will in any way injure, obstruct or interfere with the rights of owners or occupants of adjacent properties, including, but not limited to, rights of ingress and egress;

(e) 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;

(f) any vehicle and equipment maintenance, including but not limited to, fueling, changing oil, transmission or other automotive fluids;

(g) except in connection with Construction of the Initial Improvements or any Subsequent Construction or repair and maintenance activities and in strict compliance with any building permit, the storage of any and all excavated materials, including but not limited to, dirt, concrete, sand, asphalt, and pipes;

(h) except in connection with Construction of the Initial Improvements or any Subsequent Construction or repair and maintenance activities and in strict compliance with any building permit, the storage of any and all aggregate material, or bulk storage, such as wood or of other loose materials;

(i) the washing of any vehicles or equipment; or

(j) other Prohibited Uses identified in *Section 2* (Key Lease Terms), if any.

**10.3. Notice of Prohibited Use Charge.** In the event Port determines after inspection of the Premises that Prohibited Uses are occurring on the Premises, then Tenant shall immediately cease the Prohibited Use and shall pay to Port, as Additional Rent, an amount equaling Two Hundred Dollars (\$200.00) upon delivery of written notice to Tenant to cease the Prohibited Use ("Notice to Cease Prohibited Use"). In the event Port determines in subsequent inspection(s) of the Premises that Tenant has not ceased the Prohibited Use, then Tenant shall pay to Port, as Additional Rent, an amount equaling Three Hundred Dollars (\$300.00) for each additional Notice to Cease Prohibited Use delivered to Tenant. The parties agree that the charges associated with each inspection of the Premises 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 of the Premises and Tenant's failure to comply with the applicable Notice to Cease Prohibited Use and that Port's right to impose the foregoing charges shall be in addition to and not in lieu of any and all other rights under this Lease, at law or in equity. By signing this Lease, 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.

**10.4. Operating Standards.** Following completion of the Initial Improvements, Tenant shall maintain and operate the Premises, or cause the Premises to be maintained and operated, in a manner consistent with this Lease and otherwise consistent with the maintenance and operation of a first-class mixed use residential/retail project located in San Francisco. Tenant shall be exclusively responsible, at no cost to Port, for the management and operation of the Premises. In connection with managing and operating the Premises, Tenant shall provide (or require others to provide), services as necessary and appropriate to the uses to which the Project are put, including as applicable (a) repair and maintenance of the Premises and Improvements; (b) utility and telecommunications (including internet/Wi-Fi) services to the extent, if any, customarily provided by equivalent projects located in San Francisco; (c) cleaning, janitorial, pest extermination, recycling, composting, and trash and garbage removal; (d) landscaping and grounds keeping; (e) security services with on-site personnel for the Premises; and (f) sufficient lighting at night for pedestrians along pathways.

**10.5. Continuous Operations.** Tenant will make commercially reasonable efforts to (a) fully lease the Ground Floor Units within twelve (12) months after completion of the Initial

Improvements and (b) to continue to lease the Ground Floor Units throughout the Term. Notwithstanding the forgoing, Port acknowledges and agrees that Tenant shall not have any obligation to enter into a sublease for the Ground Floor Units if any subtenant, use, or terms of a sublease are not commercially reasonable. In addition, without limiting the forgoing, Tenant may cease operations of a Ground Floor Unit for any reasonably necessary time period due to the following causes or in the following circumstances: (a) if a Ground Floor Unit becomes untenable due to Casualty, or (b) as may be necessary in connection with performing repairs or upgrades to the Ground Floor Unit.

**10.6. *Restaurant/Retail Businesses Open to the General Public.*** Throughout the Term, any visitor-serving business, restaurant and/or retail operation on the Premises must be open to the general public and operated in a manner consistent with such establishments on Port lands in the Northern Waterfront.

**10.7. *Flags.*** Throughout the Term, if any flagpole is erected on any portion of the Premises, a Port flag shall fly on each such flagpole ("**Flagpoles**"). Port shall provide the Port flag to Tenant. Tenant shall promptly, at no charge, install, raise, lower and remove Port flags at Port's request. The dimensions of Port flags shall be similar to the dimensions of Port flags flown on the roofs of Port buildings in the Northern Waterfront. Tenant also may use the Flagpoles to fly a flag on each Flagpole, provided that such flag must be placed beneath the Port flag and Port must first approve the dimensions, color, text, design, and materials for such flag. If Port determines that Tenant's response to Port's request to raise or lower Port flags is inadequate, then at Port's election, Port shall exercise its access rights to the Flagpoles to adjust the Port flags accordingly.

**11. HOUSING REQUIREMENTS.** Tenant covenants and agrees for itself, and its successors and assigns to or of this Lease, that with respect to the Residential Portion:

**11.1. *Occupancy.*** Tenant will make good faith efforts to fully lease the Residential Units within nine (9) months after completion of the Initial Improvements.

**11.2. *Non-Discrimination.*** Tenant shall not discriminate against or segregate any person or group of persons on account of race, color, creed, religion, ancestry, national origin, sex, gender identity, marital or domestic partner status, sexual orientation or disability (including HIV or AIDS status) in the sale, lease, rental, sublease, transfer, use, occupancy, tenure or enjoyment of the Premises, or any part thereof, nor shall Tenant itself or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy, of Residential Occupants, subtenants or vendees on the Premises, or any part thereof, except to the extent permitted by law or required by funding source. Tenant shall not discriminate against Residential Occupants or potential Residential Occupants with certificates or vouchers under the Section 8 program or any successor rent subsidy program.

**11.3. *Non-Discriminatory Advertising.*** All advertising for housing (including signs) for sublease of the whole or any part of the Premises shall include the legend "Equal Housing Opportunity" in type or lettering of easily legible size and design, or as required by Law.

**11.4. *Local Hiring.*** In the selection of all contractors and professional consultants for the Initial Improvements and any Subsequent Construction as required by Laws, Tenant must comply with the City's procurement requirements and procedures as described in the MOH Contracting Manual and with the requirements of Chapter 14B of the San Francisco Administrative Code ("**LBE Ordinance**") according to the procedures established by the City's Human Rights Commission. The Project is subject to the requirements of Section 3 of the Housing and Community Development Act of 1968 and of the San Francisco Section 3 program. Federal Section 3 requirements state that contracts and opportunities for job training and employment be given, to the greatest extent feasible, to local low-income residents. Local residents for this project are San Francisco residents. In addition, this project will be required to

comply with hiring requirements as incorporated into the local Section 3 program and in conjunction with the City's low-income hiring requirements pursuant to San Francisco's First Source Hiring Ordinance (San Francisco Administrative Code Chapter 83). The goals for hiring of Section 3-eligible workers on the project will be 30% of new hires, moving towards a goal of 30% of total work hours.

The provisions set forth above apply to the Project if federal funds are being used. If no federal funds are being used, then the Local Hiring provisions set forth in **Section 36.19** will apply.

**11.5. City Preference Programs .** To the extent permitted by Law, Tenant agrees to comply with the requirements of the City's current housing preference programs, as amended from time to time; provided, however, that such requirements will apply only to the extent permitted by the requirements of non-City funding approved by the City for the Project.

**11.6. Equal Opportunity Marketing Plan.** With respect to the Residential Portion, Tenant shall submit a Fair Housing Marketing Plan or shall cause a Fair Housing Marketing Plan to be submitted to be approved by the MOHCD which approval shall not be unreasonably withheld, conditioned or delayed. Any Fair Housing Marketing Plan must follow the City's marketing requirements for such plans.

**11.7. Lead Based Paint.** Tenant agrees to comply with the regulations set forth in 24 CFR Part 35 and all applicable rules and orders issued thereunder which prohibit the use of lead-based paint in certain residential structures undergoing federally assisted construction and require the elimination of lead-based paint hazards.

**11.8. City Deemed Beneficiary of Covenants.** In amplification, and not in restriction, of the provisions of the preceding subsections, it is intended and agreed that the City shall be deemed beneficiary of the agreements and covenants provided in this **Section 11** (Housing Requirements) for and in its own right and also for the purposes of protecting the interests of the community and other parties, public or private, in whose favor or for whose benefit such agreements and covenants have been provided. Such agreements and covenants shall run in favor of the City for the entire period during which such agreements and covenants shall be in force and effect, without regard to whether the City has at any time been, remains, or is an owner of any land or interest therein to, or in favor of, which such agreements and covenants relate. The City shall have the right, in the event of any breach of any such agreements or covenants, in each case, after notice and the expiration of cure periods, to exercise all the rights and remedies and to maintain any actions at law or suits in equity or other proper proceedings to enforce the curing of such breach of covenants, to which it or any other beneficiaries of such agreements or covenants may be entitled.

**11.9. Annual Income Computation And Certification.** Ninety (90) days after recordation of a Certificate of Final Completion and Occupancy by the Tenant for the Initial Improvements, and not later than December 31<sup>st</sup> of each year thereafter, Tenant will furnish to MOHCD a list of the persons who are Residential Occupants of the Building, the specific unit which each person occupies, the household income of the Residential Occupants of each unit, the household size and the rent being charged to the Residential Occupants of each unit along with an income certification, in the form set forth in **Exhibit L**, for each Residential Occupant. In addition, each Residential Occupant must be required to provide any other information, documents or certifications deemed necessary by MOHCD to substantiate the Occupant's income. If any state or federal agency requires an income certification for Residential Occupants containing the above-referenced information, MOHCD agrees to accept such certification in lieu of **Exhibit L** as meeting the requirements of this Lease. In addition to such initial and annual list and certification, Tenant agrees to provide the same information and certification to MOHCD regarding each Residential Occupant not later than twenty (20) business days after such Residential Occupant commences occupancy.

## **12. COMPLIANCE WITH LAWS AND REGULATIONS.**

Tenant, at Tenant's sole cost and expense, promptly shall comply with all applicable Laws relating to or affecting the condition, use or occupancy of the Premises and shall comply with all Laws relating to Tenant's specific use of the Premises in effect either at the time of execution of this Lease or which may hereafter be in effect at any time during the Term, whether or not the same are now contemplated by the parties.

The parties acknowledge and agree that Tenant's obligation to comply with all Laws as provided herein is a material part of the bargained for consideration under this Lease. Tenant's obligation under this *Section 12* shall include, without limitation, the responsibility of Tenant to make substantial or structural repairs and Alterations to the Premises, regardless of, among other factors, the relationship of the cost of curative action to the Rent under this Lease, the length of the then remaining Term hereof, the relative benefit of the repairs to Tenant or Port, the degree to which the curative action may interfere with Tenant's use or enjoyment of the Premises, the likelihood that the parties contemplated the particular Laws involved, and whether the Laws involved are related to Tenant's particular use of the Premises. No occurrence or situation arising during the Term, nor any present or future Law, whether foreseen or unforeseen, and however extraordinary, shall relieve Tenant of its obligations hereunder, nor give Tenant any right to terminate this Lease in whole or in part or to seek redress against Port, except to the extent Tenant may have remedies against Port pursuant to this Lease or applicable Law. Tenant waives any rights now or hereafter conferred upon it by any existing or future Law to terminate this Lease, to receive any abatement, diminution, reduction or suspension of payment of Rent, or to compel Port to make any repairs to comply with any such Laws, on account of any such occurrence or situation.

## **13. PORT ACTING AS OWNER OF PROPERTY; REGULATORY APPROVALS .**

**13.1. *Port Acting as Owner of Property.*** Tenant understands and agrees that Port is entering into this Lease in its capacity as a landowner with a proprietary interest in the Premises and not as a Regulatory Agency of the City with certain police powers. By entering into this Lease, Port is in no way modifying or limiting the obligation of Tenant to obtain any required Regulatory Approvals from Regulatory Agencies (including the Port), and to cause the Premises to be used and occupied in accordance with all Laws and required Regulatory Approvals. Examples of Port actions as a Regulatory Agency include Port issuance of building and other construction-related permits and the Chief Harbor Engineer's actions to protect public health and safety.

### **13.2. *Regulatory Approvals.***

The parties recognize that for Tenant to carry out the Permitted Uses, it may be necessary or desirable to obtain additional use, zoning, regulatory or land use approvals or conditional use authorization relating to the Premises that may require Regulatory Approvals, including Regulatory Approvals issued by Port in its capacity as a Regulatory Agency. Port agrees, from time to time, to reasonably cooperate with Tenant, at no out of pocket cost to Port, in pursuing such additional approvals, including, but not limited to, executing documents, applications or petitions relating thereto. All costs associated with applying for and obtaining any necessary Regulatory Approval shall be borne solely and exclusively by Tenant. Tenant shall be solely responsible for complying with any and all conditions imposed by Regulatory Agencies as part of a Regulatory Approval; provided, however, Tenant 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 other entitlement, or if the conditions or restrictions it would impose could affect use or occupancy of the Building or Port's interest in the Premises or would create obligations on the part of Port (whether on or off of the Premises) to perform or observe, unless in each instance Port has previously approved such conditions in writing, in Port's sole and absolute discretion.

Any fines or penalties imposed as a result of the failure of Tenant to comply with the terms and conditions of any Regulatory Approval shall be promptly paid and discharged by Tenant, and City shall have no liability, monetary or otherwise, for any fines and penalties. To the fullest extent permitted by Law, Tenant agrees to Indemnify City, Port and their Agents from and against any Claim which City may incur as a result of Tenant's failure to obtain or comply with the terms and conditions of any Regulatory Approval.

Without limiting the terms and conditions of Sections 13.1 (Port Acting as Owner) and 13.2 (Regulatory Approvals), by signing this Lease, Tenant agrees and acknowledges that (i) City has made no representation or warranty that Regulatory Approvals can be obtained, (ii) although Port and MOHCD are agencies of the City, neither Port nor MOHCD has any authority or influence over any Regulatory Agency responsible for the issuance of such required Regulatory Approvals, (iii) Port is entering into this Lease in its capacity as a landowner with a proprietary interest in the Premises and not as a Regulatory Agency of the City with certain police powers, and (iv) Tenant is solely responsible for obtaining any and all required Regulatory Approvals whether needed as of the Commencement Date or at any time during the Term. Accordingly, Tenant understands that there is no guarantee, nor a presumption, that any required Regulatory Approvals will be issued by the appropriate Regulatory Agency and Port's and MOHCD's status as agencies of the City shall in anyway limit the obligation of Tenant to obtain approvals from any Regulatory Agencies (including Port) that have jurisdiction over the Premises or Tenant's activities thereon. Tenant hereby releases and discharges City from any liability relating to the failure of any Regulatory Agency (including Port) from issuing any required Regulatory Approval.

#### **14. INITIAL IMPROVEMENTS.**

##### **14.1. *Tenant's Construction Obligations; Construction Documents***

(a) Construction Documents. Tenant must Construct or cause to be Constructed all of the Initial Improvements in compliance with the Construction Documents developed and approved under the Option Agreement within the times and in the manner set forth in this *Section 14* (Initial Improvements).

(b) Permits. Tenant will apply for all necessary permits for Construction directly with the applicable Regulatory Agency. Tenant will bear all risk of delay due to its submission of an incomplete or insufficient permit application.

(c) Standards. All Construction must be performed by duly licensed and bonded contractors or mechanics and shall be diligently, commenced and Completed within the time frames in the Schedule of Performance or otherwise agreed by the parties, and in accordance with good construction and engineering practices and applicable Laws. Tenant shall undertake commercially reasonable measures in accordance with good construction practices to minimize damage or disruption caused by such work (including to areas surrounding the Premises), minimize risk of injury to members of the general public, and to make adequate provision for the safety of persons affected by any Construction. Dust, noise and other effects of the Construction shall be controlled in accordance with any applicable dust control ordinance and by commercially reasonable methods customarily used to control deleterious effects associated with construction projects in populated or developed urban areas. Tenant shall make adequate provision for the safety of all persons affected by the Construction, and Tenant shall undertake commercially reasonable measures in accordance with good construction practices to: (i) minimize damage, disruption, or inconvenience caused by the Construction, (ii) minimize the risk of injury or damage to the Premises and the surrounding property, or the risk of injury or death to members of the public and (iii) make adequate provision for the safety of all Persons affected by the Construction. Tenant shall Complete all Construction free of claims, demands, actions and liens for labor, materials or equipment furnished for the construction, and shall be performed in accordance with the Project Requirements. In addition, Tenant shall comply with the applicable provisions of the MMRP.

(d) Costs; Private Development. Tenant shall bear all of the costs of Construction. Without limiting the foregoing, Tenant shall be responsible for performing all Premises preparation work necessary for construction of the Initial Improvements. Such preparation of the Premises shall include, among other things, asbestos and lead abatement investigation required for development or operation of the Initial Improvements, all structure and substructure work, disabled access improvements and public access improvements and tenant improvements.

(e) Utilities. Tenant, at its sole expense, shall arrange for the provision and construction of all on-Premises utilities necessary to use the Premises for the Permitted Use. Tenant and Port shall coordinate, if necessary, with respect to installation of any off-Premises utility infrastructure and design of the Initial Improvements, including providing advance notice of trenching requirements, and coordinate any modification of utilities to any adjacent Port tenants or uses.

(f) Risk Management. At no cost to City, Tenant will comply with all provisions of any risk management plan, including requirements to notify all site users, compliance with risk management measures during construction, and to inspect, document and report site conditions to Port annually.

(g) Extensions by Port. Upon the request of Tenant, Port's Executive Director may, by written instrument, extend the time within which Tenant must perform under the Schedule of Performance under conditions as she or he determines appropriate, provided, however, that any such extension or permissive curing of any particular default will not operate to relieve Tenant of its obligations to pay Rent or release any of Tenant's obligations nor constitute a waiver of Port's rights with respect to any other term, covenant or condition of this Lease or otherwise effect the time with respect to the extended date or other dates for performance hereunder.

(h) Construction Security. Prior to commencing Construction, Tenant shall provide to Port, at Tenant's sole cost and expense either: (1) one or more payment and performance bonds issued by a responsible surety company licensed to do business in the State and in form acceptable to Port from Tenant's contractors naming Port as co-obligee in a principal amount no less than one hundred ten percent (110%) of the estimated cost of the Initial Improvements; or (2) an alternative security mechanism in form, substance and amount satisfactory to Port and approved by the City's Risk Manager in writing in his or her sole discretion to ensure completion of such Improvements and to protect Port against any liability for mechanics' and materialmen's liens, and stop notices (such as a personal completion guaranty, a letter of credit in a form and issued by an acceptable institution or placement of funds in an escrow account with joint escrow instructions acceptable to both Parties). Notwithstanding the foregoing, the Parties agree that the following will constitute an acceptable alternative security mechanism with respect to the Initial Improvements: (a) each of Bridge Housing Corporation and the John Stewart Company provide to Port a binding completion guaranty for the Construction in a form acceptable to Port and City's Risk Manager; (b) Tenant's general contractor demonstrates to the reasonable satisfaction of Port and the City's Risk Manager that it has the financial capacity to complete the Construction project pursuant to the terms and conditions of the construction contract; and (c) Tenant's general contractor obtains commercially reasonable insurance, in coverages and amounts acceptable to Port and the City's Risk Manager such as subguard insurance to insure performance of its subcontractors.

(i) Return of Premises. If this Lease terminates as a result of an Event of Default by Tenant before Completion of the Initial Improvements, Tenant shall, at its sole expense and as promptly as practicable, return the Premises to Port in a safe condition, and unless otherwise requested by Port, shall promptly remove all Improvements, loose building materials and debris present at the Premises resulting from Tenant's construction activities. In the event that Tenant is required to return the Premises as aforesaid, Tenant shall obtain those

permits customary and necessary to enter upon the Premises in order to complete such work and shall otherwise comply with applicable Law. In such event, Port shall cooperate with Tenant in Tenant's efforts to obtain such permits, provided that Port will not be required to expend any money or undertake any obligations in connection therewith. The provisions of this Section shall survive any termination of the Lease.

**14.2. Changes; Submission of Documents; Port Review.**

(a) **Changes in Final Construction Documents.** Tenant will not make or cause to be made any material or substantial changes to any Port-approved (including under the Option Agreement) aspect of the Construction Documents or a Required Element without Port's express written approval. Port will determine if any change is material or substantial which determination shall be conclusive at or before the bi-weekly meetings held under the Option Agreement immediately following Tenant's proper submission of the change or, if such meetings are no longer being conducted, as promptly as reasonably possible, but in no event later than thirty (30) days of proper submission by Tenant. If Tenant has properly submitted each set of the applicable Construction Documents and Port fails to meet such time frame, then Tenant may submit a written notice to Port requesting Port's approval or disapproval. The notice must display prominently in at least 16 point font on the envelope enclosing such request and on the first page of such request, substantially the following: **"APPROVAL REQUEST FOR CONSTRUCTION DOCUMENTS OF 88 BROADWAY PROJECT. IMMEDIATE ATTENTION REQUIRED; FAILURE TO RESPOND WITHIN TEN (10) BUSINESS DAYS WILL RESULT IN THE REQUEST BEING DEEMED APPROVED."** If Port fails to respond within such ten (10) day period, such changes will be deemed approved. All changes to the Construction Documents must be consistent with the Secretary's Standards, and with all other Laws as determined by Port in the exercise of its reasonable discretion. Any changes that Port determines are not material or substantial will be deemed approved. Except by mutual agreement with Tenant, Port will not disapprove or require changes subsequently in, or in a manner that is inconsistent with, matters that it has approved previously. If there is a disagreement between Port and Tenant as to whether or not a matter contained in a particular submittal has been approved previously or whether Port is acting in a manner that is inconsistent with matters that it approved previously, Port's reasonable judgment will apply in resolving the disagreement.

Notwithstanding any other provision of this Lease to the contrary, Port's approval of changes to the Schematic Design and the site plan in the respective forms attached hereto is in no manner intended to, and will not, evidence or be deemed to evidence Port's approval of changes to the Construction Documents in its regulatory capacity.

(b) **Timing of Port Disapproval/Conditional Approval and Tenant Resubmission.** If Port disapproves changes to the Construction Documents in whole or in part, Port in the written disapproval will state the reason or reasons for such disapproval and may recommend changes and make other recommendations. If Port conditionally approves the changes in the Construction Documents in whole or in part, the conditions will be stated in writing and a time will be stated for satisfying the conditions. Tenant will resubmit as expeditiously as possible. Tenant may continue making resubmissions until the earlier of (i) approval of the submissions, or (ii) the later of (x) the time specified in any conditional approval, or (y) the date specified in the Schedule of Performance, as either may be extended.

**14.3. Progress Meetings/Consultation.** During the Construction of the Initial Improvements, City staff and Tenant agree to hold periodic progress meetings, as needed considering Tenant's progress, to coordinate the preparation of, submission to, and review by Port of Construction Documents, changes thereto and the Construction process, including occasional attendance by City at on-site construction meetings. Additionally, Tenant shall provide Port with at least two (2) business days advance notice of any on-site mock-ups, on-site trial installations, and in-plant visual mock-ups (if any). Port staff and Tenant (and its applicable



consultants) agree to communicate and consult informally as frequently as is reasonably necessary to assure that the formal submittal of any Construction Documents to Port can receive prompt and speedy consideration. Tenant will keep Port reasonably informed of all meetings taking place in connection with Construction and will give Port the opportunity to attend and participate in such meetings. Port may, but is not obligated to, have one or more individuals present on the Premises at any time and from time to time during Construction, to observe the progress of Construction and to monitor Tenant's compliance with this Lease.

#### **14.4. Submittals after Completion.**

(a) Record Drawings. Tenant shall furnish Port Record Drawings of the Improvements Constructed on, in, under and around the Premises within the timeframe set forth in the Schedule of Performance in electronic format as (1) full-size scanned TIF files, and (2) AutoCAD files of the completed and updated Construction Documents, as further described below. As used in this Section, "**Record Drawings**" means drawings, plans and surveys showing Improvements as built on the Premises and prepared during the course of Construction. If Tenant fails to provide Record Drawings to Port within such period of time, Port shall give written notice to Tenant requesting such Record Drawings, and if Tenant has not provided the Record Drawings within One Hundred Eighty (180) days after Tenant's receipt of such notice from Port, Port shall have the right, but not the obligation, to cause the preparation of the Record Drawings by an architect of Port's choice, at Tenant's cost.

(b) Record Drawing Requirements. Record Drawings must be based on no less than 24" x 36", with mark-ups neatly drafted to indicate modifications from the original design drawings, scanned at 400 dpi. Each drawing must have a Port-assigned number placed onto the title block prior to scanning.

(c) AutoCAD Requirements. The AutoCAD files must be contained in Release 2006 or a later version, and drawings must be transcribed onto a compact disc(s) or DVD(s), as requested by Port. All X-REF, block and other referenced files shall be coherently addressed within the environment of the compact disc. Discs containing files that do not open automatically without searching or reassigning X-REF addresses will be returned for reformatting.

(d) Port reserves the right to revise the format of the required submittals set forth in this section as technology changes and new engineering/architectural software is developed.

#### **14.5. Insurance Requirements.**

After five (5) days' written notice to Tenant, City has the right, but not the obligation, to obtain, and thereafter continuously to maintain, any insurance required by this Lease that Tenant fails to obtain or maintain, and to charge the cost of obtaining and maintaining that insurance to Tenant; provided, however, if Tenant reimburses City for any premiums and subsequently provides such insurance satisfactory to City, then City agrees to cancel the insurance it obtained and to credit Tenant with any premium refund less any other costs incurred by City resulting from Tenant's failure to obtain or maintain the required insurance.

#### **14.6. Construction Barriers; Signs.**

(a) Construction Fencing and Barriers. Tenant will provide appropriate construction fencing and barriers on-site during the period of Construction, to the extent required by applicable building and/or health and safety codes. Tenant will obtain a building permit from Port prior to the placement of any such construction fencing and/or barrier on Port property.

(b) Construction Signs. Tenant will provide appropriate construction Signs and post the Signs on-site during the period of Construction. The size, design, color, dimensions, text, materials, location, and method of installation of such Signs on Port property must be submitted to Port for approval prior to installation.

**14.7. Construction Staging.** During Construction of the Initial Improvements, Tenant will use the portions of the Premises as staging areas for construction laydown and parking, construction equipment, and related materials, as reasonably determined by Tenant. Port will have no responsibility for providing additional areas for construction staging.

**14.8. Exterior Improvements.** Tenant acknowledges that any changes to the Exterior Improvements not otherwise approved in Construction Documents will need Port's prior approval before installation, which may require, in Port's sole discretion, review by the WDAC. Tenant will provide to Port the size, design, color, dimensions, text, materials, location, and method of installation of the Exterior Improvements to enable Port to evaluate the proposed request for approval; provided, however, any Signs requiring Port's prior approval under **Section 16.4** (Signs) will be approved as set forth in **Section 16.4** (Signs).

**14.9. Certificate of Final Completion and Occupancy .**

**(a) Certificate of Final Completion and Occupancy; Issuance Process.**

**(i)** Other than in connection with the Construction of the Initial Improvements, Tenant may not occupy or use the Premises or any portion thereof where a temporary or final certificate of occupancy has not been issued. Port will issue a Certificate of Final Completion and Occupancy for the Residential Portion of the Building and may issue a separate documentation of Completion, such as a sign off on a job card, certificate(s) of completion or occupancy for the other portions of the Improvements (collectively, "**other evidence of Completion**")

**(ii)** Issuance of the Certificate of Final Completion and Occupancy or other evidence of Completion does not relieve Tenant or any other Person from any and all requirements or conditions of any Regulatory Approval of any Regulatory Agency to occupancy of the Building or other Improvement. Tenant will comply with all such requirements or conditions separately.

**(b) Condition to Issuance.** If there remain (i) uncompleted customary punch list items; (ii) landscaping (to the extent (i) and (ii) are subject to Port's approval); (iii) exterior finishes (to the extent Tenant can demonstrate to Port's reasonable satisfaction that such finishes would be damaged during the course of later construction of interior improvements) or (collectively, "**Deferred Items**"), Port may reasonably condition issuance of a Certificate of Final Completion and Occupancy or other evidence of Completion upon provision of construction security consistent with **Section 14.1(h)** (Construction Security) The obligations set forth in this **Section 14.9(b)** (Condition to Issuance) survive the expiration or earlier termination of this Lease.

**(c) Definition of Completed and Completion.** For purposes of issuance of the Certificate of Final Completion and Occupancy for the Residential Portion or other evidence of Completion for other parts of the Building in accordance with the provisions of **Section 14.9(a)** above, "**Completed**" and "**Completion**" mean (i) completion by Tenant of all aspects of the Initial Improvements on the Premises, free of any mechanics' and materialmen's liens and all in accordance with the approved Construction Documents, the Scope of Development, and Laws, (ii) issuance of applicable certificates of completion, together with completion of all improvements which are required under conditions of any Regulatory Approvals needed for Construction of the Initial Improvements, (iii) no uncured Tenant Event of Default or Unmatured Tenant Event of Default exists, and (iv) Tenant has paid all development exaction fees required to be paid that are due and payable. With respect to the Initial Improvements, the Parties agree that Completion or Completed will not include build out of the Ground Floor Units beyond the "cold shell" of such units.

**(d) Form and Effect of Certificate.**

(i) Form of Certificate. The Certificate of Final Completion and Occupancy for the Residential Portion will be in a form that permits it to be recorded in the Official Records. For purposes of this Lease, the Certificate of Final Completion and Occupancy will be a conclusive determination of Completion of the Residential Portion of Initial Improvements (except for completion of Deferred Items).

(ii) Effect. Except as set forth in the Certificate of Final Completion and Occupancy for the Residential Portion, any other Certificate of Occupancy and any other evidence of Completion, Port's issuance of a Certificate of Completion will constitute conclusive evidence (except for the Deferred Items) that Tenant has satisfied all its construction obligations under this Lease with respect to the Initial Improvements; provided however, that such certificates shall not constitute evidence of compliance with or satisfaction of any obligation of Tenant to any Lender, or any insurer of a mortgage, securing money loaned to finance the construction or any part thereof.

(iii) If Port refuses or fails to issue the Certificate of Final Completion and Occupancy for the Residential Portion, any other Certificate of Occupancy and or other evidence of Completion, Port shall within ten (10) business days of Tenant's written request provide Tenant with a written statement specifying the reasons for Port's refusal or failure to do so identifying the items Tenant shall complete or requirements it shall satisfy in order to obtain the Certificates.

(iv) Promptly upon the issuance of the Certificate of Final Completion and Occupancy for the Residential Portion, Tenant shall record such approved certificate in the Official Records and provide Port and MOHCD with a copy of the recorded Certificate of Final Completion and Occupancy.

**14.10. Project Materials.** If this Lease terminates for any reason (other than a Port Event of Default) before Completion of the Initial Improvements, Tenant will within thirty (30) days after written demand from Port and without cost to Port, (i) deliver to Port any and all copies of studies, applications, reports, permits, plans, architectural drawings, test results, and similar work product regarding the physical condition of the Real Property, and any existing Construction Documents in the possession of Tenant, or its Agents, architects, engineers, or consultants (or if not in the foregoing parties' possession, reasonably obtainable by Tenant), or prepared for Tenant, including electronic or AutoCAD files (collectively, the "**Project Materials**"), and (ii) provided Tenant is authorized to do so and subject to the rights of Lenders, assign to Port (x) all of Tenant's existing rights and interest in the Project Materials, and (y) all of Tenant's rights under any Regulatory Approval; provided, however, in each case without any representation or warranty, express or implied, by Tenant, as to the sufficiency, accuracy, completeness or compliance with Laws or any other matter whatsoever. Port may use the Project Materials for any purpose whatsoever relating to the Premises, without cost or liability therefor to Port or any other Person; provided, however, that, Port will release Tenant and Tenant's Agents, assignees, subtenants, affiliates, contractors, architects, engineers and other consultants from any Claims arising out of Port's use of such Project Materials and Construction Documents except to the extent such person is retained by Port to complete construction and they agree to such continued liability. Tenant will use commercially reasonable efforts to include in all contracts and authorizations for services pertaining to the planning and design of the Initial Improvements, an express agreement by the person performing such services that Port may use such Project Materials as provided in this Section without compensation or payment from Port in the event such Project Materials are delivered to Port under the provisions of this Section, provided that Port agrees (i) not to remove the name of the preparer of such Project Materials without the preparer's written permission, or (ii) to remove the name of the preparer of such Project Materials at the preparer's written request. If a third-party (i.e. non-Port or non-City party or a party that is not the Project Material author) seeks to obtain and use the Project Materials assigned to Port, then such third-party will be required to negotiate appropriate and reasonable compensation to the Project Material author for the incremental value of the Project

Material. The provisions of this *Section 14.10* (Project Materials) will survive the expiration or earlier termination of this Lease.

## **15. SUBSEQUENT CONSTRUCTION.**

### **15.1. *Port's Right to Approve Subsequent Construction.***

(a) Construction Requiring Port's Approval in Port's Sole Discretion. Tenant shall have the right at its sole cost and expense, during the Term to perform Subsequent Construction in accordance with the provisions of this Section, provided that Tenant shall not do any of the following without Port's prior approval, which approval may be withheld by Port in its sole discretion:

- (i) Change in the density of development from that which existed upon the completion of construction of the Initial Improvements
- (ii) Construct additional buildings or other additional structures;
- (iii) Increase the bulk or height of any Improvements beyond the bulk or height approved for the Initial Improvements;
- (iv) Rehabilitate or Restore any of the Improvements (except as otherwise required under *Section 23.3* (Tenant's Obligation to Restore) or as otherwise allowed pursuant to *Section 15.2*);
- (v) Change the Project's open space in a manner that would adversely affect access to, or materially change the use or appearance of such open space;
- (vi) Materially alter the Building Systems, structural integrity or exterior architectural design of any Improvements (other than changes reasonably required to conform to changes in applicable Law);
- (vii) Change the colors or materials of the exterior façades of the buildings and the Exterior Improvements approved by Port, unless materials originally installed are not reasonably available or do not meet current code requirements, and Tenant uses materials of equal quality, durability, design standards, and appearance to the materials originally installed, as determined by Port.

(b) Construction Requiring Port's Reasonable Approval. For any Subsequent Construction (other than a Minor Alteration) that is not described in *Section 15.1(a)* (Construction Requiring Port's Approval in Port's Sole Discretion), Port's prior approval shall be required, which approval shall not be unreasonably withheld.

(c) Subsequent Construction will be subject to the terms and conditions set forth in *Sections 14.1(c) - 14.1(h)*; and *14.2 - 14.8*.

(d) Notice by Tenant and Schematic Drawings. Before commencing any Subsequent Construction that requires Port's approval, Tenant shall notify Port of such planned Subsequent Construction. Schematic drawings shall accompany such notice. Port may waive the submittal requirement of schematic drawings if it determines in its sole discretion that the scope of the Subsequent Construction does not warrant such initial review. Within twenty (20) days after receipt of such notice from Tenant, Port shall approve or disapprove any such Subsequent Construction and inform Tenant whether in Port's sole discretion, design review of the proposed Subsequent Construction by WDAC is necessary. If Port determines that design review by WDAC is necessary, then the period to approve or disapprove the proposed Subsequent Construction shall be extended by a reasonable time necessary to obtain WDAC's review and recommendation of the proposed Subsequent Construction.

(e) Regulatory Approvals. Tenant acknowledges that Port's approval of Subsequent Construction (or the fact that Tenant is not required to obtain Port's approval) does not alter Tenant's obligation to obtain all required Regulatory Approvals from Regulatory

Agencies, including, where applicable, from Port itself in its regulatory capacity.

**15.2. Minor Alterations.** Provided the following are not otherwise subject to Port's approval under *Section 15.1(a)*, Port's approval shall not be required for: (a) the installation, repair or replacement of furnishings, fixtures, equipment or decorative improvements within the interior of the Building in the normal course of operation of a housing development, (b) recarpeting, repainting the interior of the Building or similar alterations, or (c) any other Subsequent Construction costing less than Fifty Thousand Dollars (\$50,000) individually or Two Hundred Thousand Dollars in the aggregate (\$200,000) (collectively, "**Minor Alterations**").

**15.3. Port Approval of Construction Documents.** Port shall approve or disapprove subsequent Construction Documents submitted to it for approval within sixty (60) days after submission. Any disapproval shall state in writing the reasons for disapproval. If Port notifies Tenant that the subsequent Construction Documents are incomplete, such notification shall constitute a disapproval of such Construction Documents. If Port disapproves the Construction Documents and Tenant revises or supplements, as the case may be, and resubmits such Construction Documents for Port's approval, Port shall review the revised or supplemented Construction Documents to determine whether the revisions or supplements satisfy the objections or deficiencies cited in Port's previous notice of rejection, and Port shall approve or disapprove the revisions or supplements to the Construction Documents within thirty (30) days after resubmission. If Port fails to meet such time frame, then Tenant may submit a written notice to Port requesting Port's approval or disapproval. The notice must display prominently in at least 16 point font on the envelope enclosing such request and on the first page of such request, substantially the following: "**APPROVAL REQUEST FOR CONSTRUCTION DOCUMENTS OF 88 BROADWAY PROJECT. IMMEDIATE ATTENTION REQUIRED; FAILURE TO RESPOND WITHIN TEN (10) BUSINESS DAYS WILL RESULT IN THE REQUEST BEING DEEMED APPROVED.**" If Port fails to respond within such ten (10) day period, such changes will be deemed approved. If Tenant desires to make any change to the final subsequent Construction Documents after Port's approval, then Tenant shall submit the proposed change to Port for its reasonable approval. Port shall notify Tenant of its approval or disapproval of the requested change within thirty (30) days after submission to Port and Port's failure to respond in such time frame is subject to Tenant's repeat request as above. Any disapproval shall state, in writing, the reasons therefor. Notwithstanding any of the foregoing to the contrary, if Port determines that the proposed subsequent Construction must be approved by the City's Environmental Review Officer, any approval provided by Port will be subject to obtaining approval from the City's Environmental Review Officer, and the time periods set forth above for Port to reject, approve or conditionally approve the submissions will be extended as necessary to obtain said approval or disapproval.

**15.4. Subsequent Construction.**

(a) Commencement of Subsequent Construction. Tenant shall not commence any Subsequent Construction until the following conditions have been satisfied or waived by Port:

(i) Port shall have approved the final subsequent Construction Documents (other than for Minor Alterations); and

(ii) Tenant shall have obtained and paid for all Regulatory Approvals necessary to commence such construction in accordance with *Section 13* (Port Acting as Owner);

(b) Rights of Access. During any period of Subsequent Construction, Port (in its proprietary capacity) and its Agents shall have the right to enter areas in which Subsequent Construction is being performed, upon reasonable prior written notice during customary construction hours, subject to the rights of Residential Occupants and other Subtenants, to inspect the progress of Subsequent Construction; provided, however, that Port and its Agents

shall conduct their activities in such a way as to minimize interference with Tenant and its operations to the extent feasible. Nothing in this Lease, however, shall be interpreted to impose an obligation upon Port to conduct such inspections or impose any liability in connection therewith.

## **16. IMPROVEMENTS AND ALTERATIONS.**

**16.1. Title to Improvements.** During the Term, Tenant shall own title to all of the Improvements, including the Initial Improvements, all Subsequent Construction (if any) and all appurtenant fixtures, machinery and equipment installed on the Premises by or on behalf of Tenant. It is the intent of the Parties that this Lease and the Lease Memorandum will create a constructive notice of severance of the Improvements from the land. As further consideration of Port entering into this Lease and subject to the rights of any Lenders, at the expiration or earlier termination of this Lease, unless Port, in its sole discretion, has notified Tenant that Tenant must remove such Improvement(s) under **Section 16.2** (Removal of Improvements), title to the Improvements, including appurtenant fixtures (but excluding trade fixtures and Personal Property of Tenant or its Subtenants including without limitation the Personal Property of Residential Occupants), will vest in Port without further action of any party, and without compensation or payment to Tenant. Tenant and its Subtenants shall have the right at any time during the Term, to remove Personal Property from the Premises; provided, however, that if the removal of Personal Property causes damage to the Premises, Tenant shall promptly cause the repair of such damage at no cost to Port. Notwithstanding the foregoing, if requested by Port, upon expiration or earlier termination of this Lease, Tenant will execute and deliver to Port an acknowledged and good and sufficient grant deed conveying to Port Tenant's fee interest in the Improvements.

Except as provided herein with respect to the payment of Rent, City acknowledges and agrees that Tenant shall have the exclusive right to deduct, claim, retain and enjoy any and all rental income appreciation, gain, depreciation, amortization and tax credits for federal and state tax purposes relating to all Improvements and any and all additions thereto, substitutions therefor, fixtures therein and other property relating thereto.

**16.2. Removal of Improvements.** At least One Hundred Eighty (180) days prior to the Expiration Date or earlier termination of this Lease, Port, in its sole discretion, may provide a Notice of Removal specifying the Alterations and Improvements and Personal Property as defined in this Lease or as may be specifically provided in the relevant permits or plans approved by Port, which Tenant shall be required to repurpose, modify, remove and relocate and/or demolish and remove from the Premises in accordance with **Section 33** (Surrender and Quitclaim). Any such modification or removal is subject to the requirements of this Section, including the requirement to obtain a Port building or similar permit. If termination of this Lease is the result of loss or destruction of the Premises or any Improvements thereon, Port shall deliver the Notice of Removal to Tenant within a reasonable time after the loss or destruction. Tenant shall be obligated at its own expense to remove all Alterations or Improvements and Personal Property specified in the Notice of Removal. Tenant shall establish and fund a reserve account to finance its obligations to carry out the requirements set forth in Port's Notice of Removal ("**Reserve Account**"). By the Anniversary Date, the amount in the Reserve Account shall be no less than [Two Million Three Hundred Thousand dollars (\$2,300,000)] escalated annually by three percent (3%). Tenant shall deposit all Net Sale Proceeds attributable to the Residential Portion into the Reserve Account until the Reserve Account is fully funded. Tenant shall promptly repair, at its own expense, in good and workmanlike fashion any damage occasioned thereby. If Tenant fails to complete any required modification, demolition and/or removal on or before the termination of this Lease, Port may perform such modification, removal and/or demolition at Tenant's expense, and Tenant shall reimburse Port within three (3) business days after demand therefor.

Notwithstanding Tenant's obligation to comply with the Notice of Removal, if there is a more cost effective alternative to the actions required by the Notice of Removal, Tenant's obligation for payment (as distinct from Tenant's obligation to comply with the Notice of Removal) shall be to fund the most cost effective alternative. In the event Port and Tenant cannot mutually agree upon the most cost effective alternative, after good faith efforts to resolve any disputed estimates or amounts, such dispute shall be determined in the manner provided in *Section 23.7* (Arbitration of Disputes).

**16.3. *Removal of Non-Permitted Improvements.*** If Tenant constructs any Alterations or Improvements without Port's prior written consent or without complying with this Section, then, in addition to any other remedy available to Port, Port may require Tenant to remove, at Tenant's expense, any or all such Alterations or Improvements and to promptly repair, at Tenant's expense and in good workmanlike fashion, any damage occasioned thereby. Tenant shall pay to Port all special inspection fees as set forth in any applicable building code, standard or regulation, including, without limitation, the Port Building Code, for inspection of work performed without required permits. The foregoing obligation of Tenant to reimburse Port for all cost and expenses incurred by Port in connection with Tenant's failure to comply with the provisions of this Section shall survive the expiration or earlier termination of this Lease.

**16.4. *Signs.*** Tenant shall not install business signage, awnings or other exterior decoration or notices on the Premises without Port's prior written consent. Any sign that Tenant 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, and building permit requirements, and Tenant shall obtain all Regulatory Approvals required by such Laws. Port makes no representation with respect to Tenant's ability to obtain such Regulatory Approval. Tenant, at its sole cost and expense, shall remove all signs placed by it on the Premises at the expiration or earlier termination of this Lease.

**16.5. *Port's Alterations.*** Port reserves the right at any time to make alterations, additions, repairs, deletions or improvements to any Port property adjacent to the Premises ("**Port Work**"). Port shall use commercially reasonable efforts to conduct any of the foregoing activities in a manner that, to the extent reasonably practicable, will minimize inconvenience or disturbance to Tenant; Port will have no obligation to minimize inconvenience or disturbance to Tenant for Port Work when the Port Work is necessary, in Port's sole and absolute discretion, to maintain Port property in safe, hazard-free condition. In no event will inconvenience or disturbance caused by Port Work constitute an actual or constructive eviction of Tenant, entitle Tenant to any abatement or diminution of Rent, or otherwise relieve Tenant from any of its obligations under this Lease. Tenant hereby waives any and all Claims against Port, City and their Agents arising out of any inconvenience or disturbance occasioned by Port Work.

## **17. MAINTENANCE AND REPAIRS.**

**17.1. *Tenant Maintenance and Repair Obligations.*** Throughout the Term, Tenant will maintain and repair, at no cost to Port, the Premises and all Improvements thereon in condition and repair as is appropriate to maintain a first-class mixed use residential/retail project located in San Francisco and in compliance with all applicable Laws and the requirements of this Lease. Tenant will with reasonable promptness make (or cause others to make) all necessary or appropriate repairs, renewals and replacements, whether structural or non-structural, interior or exterior, ordinary or extraordinary, foreseen or unforeseen. Tenant will make such repairs with materials, and quality of workmanship, comparable to that as originally installed as part of the Initial Improvements, or, if not commercially available, with materials at least equal in quality, appearance and durability to the materials repaired, replaced or maintained. All such repairs and replacements made by Tenant will be at least equivalent in quality, appearance, public safety, and durability to and in all respects consistent with the Improvements installed at the time of issuance of the relevant Certificate of Final Completion and Occupancy.

Tenant shall not make, nor cause or suffer to be made, any repairs or other work for which a permit is required by any applicable building code, standard or regulation, including, without limitation, the Port Building Code or of any rule or regulation of Port without first obtaining Port's prior written consent and a permit therefor.

In the event that damage or deterioration to the Premises or any portion thereof or any other area which is Tenant's obligation to maintain results in the same not meeting the standard of maintenance required by Port for such uses as Tenant is making of the Premises or such other applicable standard, then Tenant shall have the independent responsibility for, and shall promptly undertake, maintenance or repair and complete the same with due diligence.

**17.2. Capital Needs Assessment Report.** Every five (5) years beginning on the fifth anniversary date of the issuance of the Certificate of Completion for the Residential Portion, Tenant shall deliver to Port a Capital Needs Assessment report (“CNA”) for the Improvements. The CNA must conform to MOHCD’s guidance for CNAs, be in a form acceptable to Port, and must, at a minimum, contain the following information and comply with the following standards

- (a) basic property information, including at a minimum parcel size, number of buildings and units, unit mix, unit square footages and building area;
- (b) a narrative description of the Premises and its Improvements, including the building type, construction materials, major systems and interior/exterior finishes;
- (c) a description of the current conditions, expected useful lives of all building elements/systems/finishes including of the foundation, structures and substructure, and all utilities systems serving the Improvements, an estimate of the remaining useful life of existing systems and recommendations for further investigation by engineers or construction specialists, if necessary;
- (d) relevant photographs of various areas of the Improvements that show building elements and systems and current conditions that require repair, replacement, upgrade or improved maintenance;
- (e) a list of the immediate physical needs and estimated cost to address them, as well as a 20-year replacement reserve analysis, each provided in unprotected, Microsoft Excel financial spreadsheet documents; and
- (f) an explanation of cost estimating methodologies and assumptions of construction cost inflation.

If Port reasonably believes the CNA does not adequately describe the condition and integrity of the listed items or the timing of required repairs, then Port shall notify Tenant of such deficiency and Tenant shall revise the CNA to address Port's concerns within the timeframe specified by Port. If Tenant fails to provide the required CNA or a revised CNA to Port within the timeframe specified by Port, Port after giving thirty (30) days’ notice to Tenant shall have the right, but not the obligation, to cause the preparation of a CNA by a team of construction professionals of Port's choice, at Tenant's sole cost. Tenant shall perform the repairs or improvements recommended in the CNA within the timeframe set forth in the CNA or as agreed by Port in its sole discretion.

In addition to the preparation and delivery of CNA to Port in accordance with this Section, if any CNA or similar facilities condition report is prepared by or on behalf of Tenant in connection with any Refinancing, Transfer, or for any other reason or purpose, Tenant will promptly provide Port with a copy of such report.

**17.3. City's Right to Inspect.** Without limiting *Section 32 below*(Entry On Premises), Port and MOHCD may make periodic inspections of the Premises and other areas for which Tenant has obligations and may advise Tenant when maintenance or repair is required, but such right of inspection shall not relieve Tenant of its independent responsibility to maintain such



Premises, Improvements and other areas as required by this Lease in a condition as good as, or better than, their condition at the Commencement Date, excepting ordinary wear and tear.

**17.4. Port's Right to Repair.** In the event Tenant fails to maintain or to promptly repair any damage as required by this Lease, Port may repair the same at Tenant's sole cost and expense and Tenant shall immediately reimburse Port therefore. In the event Tenant fails to maintain and repair the Premises, the foundation, the structural integrity of the Improvements, the roofs, and Building Systems, Port may repair the same at Tenant's cost and expense and Tenant will reimburse Port therefor as provided in this *Section 17.4* (Port's Right to Repair). Except in the event of an emergency, Port will first provide no less than fifteen (15) days prior notice to Tenant before commencing any maintenance to or repair on the Premises ("**Port's Repair Notice**"). If Tenant does not commence maintenance or repair or provide assurances reasonably satisfactory to Port that Tenant will commence maintenance or repair within such fifteen (15) day period, then Port may proceed to take the required action. If Port elects to proceed with such repair or maintenance, then promptly following completion of any work taken by Port pursuant to this *Section 17.4*, Port will deliver a detailed invoice of the work completed, the materials used and the costs relating thereto. Tenant also will pay to Port an administrative fee equal to ten percent (10%) of the total "**hard**" costs of the work. "**Hard**" costs include the cost of materials and installation, but exclude any costs associated with design, such as architectural fees. Tenant will pay to Port the amount set forth in the invoice within thirty (30) days after delivery of Port's invoice.

Tenant will pay to Port, as Additional Rent, an amount equaling Two Hundred Dollars (\$200), which amount will be increased by One Hundred Dollars (\$100.00) on each ten (10) year Anniversary Date, upon delivery of Port's Repair Notice. In the event Port determines during subsequent inspection(s) that Tenant has failed to so maintain the Premises in accordance with this *Section 17*, then Tenant will pay to Port, as Additional Rent, an amount equaling Three Hundred Dollars (\$300), which amount will be increased by One Hundred Dollars (\$100.00) on each ten (10) year Anniversary Date, for each additional Maintenance Notice, if applicable, delivered by Port to Tenant following each inspection. The Parties agree that the charges associated with each inspection of the Premises and delivery of each Maintenance Notice 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 and issuance of each Maintenance Notice. Tenant's failure to comply with the applicable Maintenance Notice and Port's right to impose the foregoing charges is in addition to and not in lieu of any and all other rights and remedies of Port under this Lease, at law or in equity. The amounts set forth in this *Section 17.4* (Port's Right to Repair) are due within five (5) days following delivery of the applicable Maintenance Notice.

## **18. UTILITIES AND SERVICES.**

**18.1. Utilities.** Tenant agrees and acknowledges that Port, in its proprietary capacity as owner of the Premises and landlord under this Lease, will not provide any utility services to the Premises or any portion of the Premises. Tenant, at its sole expense, must (i) arrange for the provision and construction of all on-site and off-site utilities necessary to construct, operate and use the Improvements and any other portion of the Premises for their intended use, (ii) be responsible for contracting with, and obtaining, all necessary utility and other services, as may be necessary and appropriate to the uses to which all of the Improvements and the Premises are put (it being acknowledged that City (including its SFPUC) is the sole and exclusive provider to the Premises of certain public utility services), and (iii) maintain and repair all utilities serving the Premises to the point provided by the respective utility service provider (whether on or off the Premises). Tenant will purchase all electrical service (to the extent not provided by a Renewable Energy System, if any) for the Improvements and the Premises from SFPUC unless SFPUC determines that such service is not feasible for the Premises. Tenant also must coordinate with the respective utility service provider with respect to the installation of utilities, including providing advance notice to appropriate parties of trenching requirements.

Tenant will pay or cause to be paid as the same become due, all deposits, charges, meter installation fees, connection fees and other costs for all public or private utility services at any time rendered to the Premises or any part of the Premises, and will do all other things required for the maintenance, repair, replacement, and continuance of all such services. Tenant agrees, with respect to any public utility services provided to the Premises by City, that no act or omission of City in its capacity as a provider of public utility services, will abrogate, diminish, or otherwise affect the respective rights, obligations and liabilities of Tenant and Port under this Lease, or entitle Tenant to terminate this Lease or to claim any abatement or diminution of Rent. Further, Tenant covenants not to raise as a defense to its obligations under this Lease, or assert as a counterclaim or cross-claim in any litigation or arbitration between Tenant and Port relating to this Lease, any Claims arising from or in connection with City's provision (or failure to provide) public utility services, except to the extent to preserve its rights hereunder that failure to raise such claim in connection with such litigation would result in a waiver of such claim. The foregoing will not constitute a waiver by Tenant of any claim it may now or in the future have (or claim to have) against any such public utility provider relating to the provision of (or failure to provide) utilities to the Premises.

**18.2. Services.** Tenant 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 Tenant, including, without limitation, garbage and trash collection, janitorial service and extermination service.

**18.3. Energy Consumption.** Not later than two (2) years from the date of issuance of the Certificate of Final Completion and Occupancy for the Residential Portion, Tenant shall obtain energy efficiency audits and annually measure and disclose energy performance, in accordance with the standards of the San Francisco Environment Code Chapter 20: Existing Commercial Buildings Energy Performance. These requirements are necessary to comply with the Energy Performance, Data Checklist, and Facility Summary requirements set forth in the California Code of Regulations, Title 20, Division 2, Chapter 4, Article 9, Section 1680.

## **19. ROOFTOP EQUIPMENT.**

**19.1. Renewable Energy System.** Tenant may install or cause to be installed on the roof(s) of the Improvements, a renewable energy system, using sources such as solar (photovoltaic or solar thermal power), wind, or biofuel power for the generation and delivery of electrical energy to the Premises (a “Renewable Energy System”) upon the prior consent of Port, which consent will not be unreasonably withheld. If excess energy is available from the Renewable Energy System, then such excess energy may be used by Port or City without cost to Tenant. Prior to commencing installation of any Renewable Energy System, Tenant must obtain all required permits and Regulatory Approvals. Unless approved as part of the Initial Improvements, the design, construction and installation of any Renewable Energy System will be done in accordance with *Section 15* (Subsequent Construction).

**19.2. Other Rooftop Equipment.** Tenant shall not install any equipment (including any satellite dish or wireless communication site or equipment) on the roof of the Building without first obtaining Port's review and approval and all required Regulatory Approvals. Tenant shall provide to Port the size, location, dimensions, design, color, text (if any), screening, materials, reflectivity, and method of installation of the rooftop equipment to enable Port to evaluate the proposed rooftop equipment.

**19.3. Wireless Communications Equipment.** Any Sublease by Tenant of any portion of the Premises to a personal wireless services provider will be subject to (i) Port's prior written approval in its sole discretion; (ii) all Regulatory Approvals; (iii) the provisions, terms and conditions of *Section 26* (Transfers); and the provisions of *Section 7.3* (Excess Rent) regarding payment of Rent.

**19.4. City Rooftop Equipment.** Tenant agrees, at the request of City, to permit City to install, at City's sole cost, equipment reasonably required for Port's or City's operations including

City's emergency communications systems on the roof. City shall be permitted access to the areas on the roof where any such installation is made, as necessary for the installation, repair, maintenance, and replacement thereof. Any access, interruptions or disturbance for the foregoing purposes shall be temporary only. The Parties will cooperate in connection with the location and operation of any City equipment and the location and operation of Tenant's equipment so as to minimize interference.

## **20. LIENS.**

Tenant shall keep the Premises free from any liens arising out of any work performed, materials furnished or obligations incurred by Tenant or its Agents. Tenant shall notify Port promptly of any lien or encumbrance, of which Tenant has knowledge and which has been recorded against or attached to the Improvements or Tenant's Leasehold Estate hereunder whether by act of Tenant or otherwise. In the event that Tenant shall not, within twenty (20) days following the imposition of any such lien, cause the same to be released of record, Port shall have, in addition to all other remedies provided by this Lease or by Law, the right but not the obligation to cause the same to be released by such means as it shall deem proper, including without limitation, payment of the claim giving rise to such lien. All sums paid by Port for such purpose, plus interest at the Interest Rate, and all reasonable expenses incurred by Port in connection therewith (including, without limitation, reasonable attorneys' fees) shall be payable to Port by Tenant upon demand. Port shall have the right to post on the Premises any notices that Port may deem proper for the protection of Port and the Premises, from mechanics' and materialmen's liens. Tenant shall give to Port at least fifteen (15) days' prior written notice of commencement of any Alteration, repair or construction on the Premises. Tenant agrees to Indemnify Port, City and their respective Agents from and against any Claims for mechanic's, materialmen's or other liens in connection with any Alterations, repairs or construction on the Premises, or materials furnished or obligations incurred by or for Tenant.

## **21. HAZARDOUS MATERIALS.**

**21.1. Requirements for Handling.** Neither Tenant nor its Agents or Invitees may Handle or permit any other person to Handle any Hazardous Material in, on, under or about the Premises or other Port property, subject only to the following exceptions, provided that Handling is at all times in full compliance with all Environmental Laws: (a) Handling of Hazardous Materials as permitted by Regulatory Approval; (b) during construction activities, Handling of Hazardous Materials in limited amounts customarily used in connection with construction; and (c) janitorial and office supplies in limited amounts customarily used for general office, housing and/or retail purposes.

**21.2. Tenant Responsibility.** Tenant 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 use and occupancy of the Premises, each of them:

(a) will not permit any Hazardous Materials to be present in, on, under or about the Premises or other Port property except as to Handling as permitted under **Section 21.1** (Requirements for Handling);

(b) will not cause or permit any Hazardous Material Condition, except as to Handling as permitted under **Section 21.1** (Requirements for Handling); 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 other Port property, or in the operation of any vehicles or vessels used in connection with the Premises in violation of any Environmental Laws.

### **21.3. Tenant's Environmental Condition Notification Requirements.**

**(a)** Tenant must notify Port immediately, 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 Tenant learns or has reason to believe Hazardous Materials were Released or, except as allowed under *Section 21.1* (Requirements for Handling), Handled, in, on, or about the Premises, other Port property, or the environment, or from any vehicles or vessels that Tenant or its Agents or Invitees use during Tenant's occupancy of the Premises, 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)** Tenant must notify Port immediately, 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, or about the Premises, other Port property, or the environment, or from any vehicles or vessels Tenant, or its Agents and Invitees uses during Tenant's occupancy of the Premises that Tenant 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 Tenant or its Agents or Invitees receives from any Environmental Regulatory Agency;

**(iii)** Any other Environmental Regulatory Action that is instituted or threatened by any Environmental Regulatory Agency against Tenant or its Agents or Invitees and that relates to the Release or Handling of Hazardous Materials, in, on, or about the Premises, other Port property, or the environment, or from any vehicles or vessels Tenant, or its Agents and Invitees uses during Tenant's occupancy of the Premises;

**(iv)** Any Hazardous Material Claim that is instituted or threatened by any third party against Tenant or its Agents or Invitees and that relates to the Release or Handling of Hazardous Materials, in, on, or about the Premises, other Port property, or the environment, or from any vehicles or vessels Tenant, or its Agents and Invitees uses during Tenant's occupancy of the Premises; and

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

**(c)** Tenant must notify Port of any meeting, whether conducted face-to-face or telephonically, between Tenant and any Environmental Regulatory Agency regarding an Environmental Regulatory Action. Port will be entitled to participate in any such meetings at its sole election in a manner consistent with Tenant's and the Environmental Regulatory Agency's needs.

**(d)** Tenant must notify Port of any Environmental Regulatory Agency's issuance of an Environmental Regulatory Approval. Tenant'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, Tenant 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 Pollution Control and Countermeasure Plan." Tenant must provide Port with copies of any of the documents within the scope of this section upon Port's request.

**(e)** Tenant must provide Port with copies of all communications with Environmental Regulatory Agencies and all non-privileged communications with other persons regarding potential or actual Hazardous Material Claims arising from Tenant's or its Agents' or Invitees' operations at the Premises. Upon Port's request, Tenant must provide Port with a log of

all communications withheld under a claim of privilege that specifies the parties to and subject of each withheld communication.

(f) Port may from time to time request, and Tenant 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.

#### **21.4. Requirement to Remediate.**

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

(i) After notifying Port in accordance with *Section 21.3(a)* (Tenant's Environmental Condition Notification Requirements), Tenant must Remediate at its sole cost in compliance with all Environmental Laws and this Lease, any Hazardous Material Condition occurring during the Term or while Tenant or its Agents or Invitees otherwise occupy any part of the Premises. Tenant 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 Port, in its sole discretion.

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

(iii) If Environmental Laws governing Remediation require a remedial action plan, Tenant must provide a draft of its plan to Port in a timely manner for Port's comment and approval before submittal to the appropriate Environmental Regulatory Agency, and Port will respond in a manner that meets the needs of Tenant and the Environmental Regulatory Agencies. Tenant shall submit to Port any final remedial action plan.

(iv) In all situations relating to Handling or Remediating Hazardous Materials, Tenant must take all actions that are reasonably necessary in Port's sole 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 Tenant or its Agents or Invitees Exacerbate the Hazardous Material Condition, Tenant will not be obligated to Remediate any Hazardous Material Condition: (i) caused or Exacerbated solely by Port or its Agents during Tenant's occupancy of the Premises; or (ii) arising before the Commencement Date or the date of Tenant's first use of the Premises, whichever is earlier (each an "Excluded Condition").

**21.5. 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 32* (City's Entry on Premises). Port's failure to inspect or obtain samples or to detect conditions attributable to Tenant'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 Tenant's responsibility under this Lease.

#### **21.6. Storm Water Pollution Prevention.**

(a) Tenant 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, including filing a Notice of Intent to be covered, developing and implementing a site-specific Storm Water Pollution Prevention Plan ("SWPPP"), and conducting storm water monitoring and reporting. Tenant's SWPPP and a copy of a Notice of Intent for Tenant's Premises must be submitted to Port's Real Estate Division before beginning operations on the Premises.

(b) In addition to requiring compliance with the permit requirements under Subsection (a), Tenant shall 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 Design Guidelines, subject to review and permitting by the Port's Engineering Division.

**21.7. Presence of Hazardous Materials.** California Law requires landlords to disclose to tenants the presence or potential presence of certain Hazardous Materials. Accordingly, Tenant 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 lead and formaldehyde. Further, the Hazardous Materials described in the reports listed in *Schedule 3* copies of which have been delivered to or made available to Tenant are known to be present on the property. By execution of this Lease, Tenant acknowledges that the notice set forth in this section satisfies the requirements of California Health and Safety Code Section 25359.7 and related Laws. Tenant must disclose the information contained in this *Section 21.7* (Presence of Hazardous Materials) to any subtenant, licensee, transferee, or assignee of Tenant's interest in this Lease. Tenant also acknowledges its own obligations pursuant to California Health and Safety Code Section 25359.7 as well as the penalties that apply for failure to meet such obligations.

**21.8. Survival.** Tenant's obligations under *Section 21* (Hazardous Materials) shall survive the expiration or earlier termination of this Lease.

## 22. INSURANCE.

**22.1. Required Insurance Coverage.** Tenant, at its sole cost and expense, shall maintain, or cause to be maintained, throughout the Term, the following insurance:

(a) **General Liability Insurance.** Comprehensive or commercial general liability insurance, with limits not less than Two Million dollars (\$2,000,000) each occurrence combined single limit and Four Million dollars (\$4,000,000) aggregate. Such insurance shall include coverage for bodily injury and property damage, Abuse and Molestation coverage, contractual liability, independent contractors, broad form property damage, personal injury, liquor liability, products and completed operations, fire damage and legal liability with limits not less than One Hundred Thousand Dollars (\$100,000), and explosion, collapse and underground (XCU) coverage during any period in which Tenant is conducting any activity on or Alteration or Improvement to the Premises with risk of explosion, collapse, or underground hazards. This policy must also cover non-owned and for-hire vehicles and all mobile equipment or unlicensed vehicles, such as forklifts. The use of excess or umbrella coverage shall be acceptable to meet the requirements of this *Section 22.1(a)*.

(b) **Automobile Liability Insurance.** Comprehensive or business automobile liability insurance with limits not less than \$1,000,000 each occurrence combined single limit for bodily injury and property damage, including coverages for owned and hired vehicles and for employer's non-ownership liability, which insurance shall be required if any automobiles or any other motor vehicles are operated in connection with Tenant's activity on the Premises or the Permitted Use.

(c) **Workers' Compensation; Employer's Liability.** Worker's Compensation Insurance in statutory amounts, 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. In the event Tenant is self-insured for the insurance required pursuant to this *Section 22.1(c)* (Workers'

Compensation; Employer's Liability), it shall furnish to Port a current Certificate of Permission to Self-Insure signed by the Department of Industrial Relations, Administration of Self-Insurance, Sacramento, California.

(d) Construction Activities. At all times during any period of Tenant's construction of Improvements or Alterations subject to **Section 16** (Improvements and Alterations),

(i) Tenant shall require Tenant's contractor to maintain (a) commercial general liability insurance with limits of not less than Five Million Dollars (\$5,000,000) combined single limit for bodily injury and property damage (including personal injury and death), and contractor's protective liability; and products and completed operations coverage in an amount not less than Five Hundred Thousand Dollars (\$500,000) per incident, Ten Million Dollars (\$10,000,000) in the aggregate; (b) comprehensive automobile liability insurance with a policy limit of not less than Two Million Dollars (\$2,000,000) each accident for bodily injury and property damage, providing coverage at least as broad as the Insurance Services Office (ISO) Business Auto Coverage form covering Automobile Liability, "**any auto**", and insuring against all loss in connection with the ownership, maintenance and operation of automotive equipment that is owned, hired or non-owned; (c) Worker's Compensation in statutory amounts, including Employers' Liability coverage with limits not less than One Million Dollars (\$1,000,000) each accident, injury, or illness.

(ii) In addition, Tenant shall carry "**Builder's All Risk**" insurance on a form reasonably approved by City, 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.

(e) Property Insurance; Earthquake and Flood Insurance. Tenant shall maintain broad form property insurance policies, including vandalism and malicious mischief, and earthquake, subject to provisions of **Section 22.6(c)** (As to Earthquake insurance) and flood, subject to the provisions of **Section 22.6(d)** (As to Flood insurance only), in an amount not less than one hundred percent (100%) of the then-current full replacement cost of the Improvements and other property being insured pursuant thereto (including building code upgrade coverage) and including coverage for loss of rental income due to an uninsured peril for 12 months.

(f) Builders Risk Insurance. At all times during construction prior to completion of the Initial Improvements, and during any period of Subsequent Construction costing more than Five Hundred Thousand Dollars (\$500,000), which amount will be increased by Five Hundred Thousand dollars (\$500,000) on each Periodic 10-Year Adjustment Date, Tenant will maintain, or require to be maintained, on a form reasonably approved by Port, builders risk insurance (or its equivalent for any Subsequent Construction). Tenant is solely responsible for payment of any deductibles required under this policy. Such builders risk insurance also will extend to cover soft costs and loss of business income for any delayed completion period as caused by any of the perils or hazards set forth in and required to be insured pursuant to **Section x**, for a delay period of not less than two (2) years with a limit of not less than One Million Dollars (\$1,000,000). If available at commercially reasonable rates, such builders risk insurance also will extend to cover the peril of terrorism.

(g) Contractor's Pollution Legal Liability Insurance. Tenant will cause to be maintained during the period of construction of the Initial Improvements and during any periods of Subsequent Construction, that could reasonably be anticipated to involve a Release of Hazardous Materials on or about the Premises, Contractor's Pollution Legal Liability Insurance for any and all Claims caused by pollution conditions, that are sudden, accidental or gradual, resulting from the contractor's operations, or for which contractor is legally liable, in connection with the construction of the Initial Improvements or Subsequent Construction, whether such operations be by Tenant or Tenant's contractors, subcontractors, consultants or suppliers of the

contractor. The foregoing policy will contain minimum liability limits of Five Million Dollars (\$5,000,000) per occurrence and Five Million Dollars (\$5,000,000) in the aggregate with a deductible not to exceed Two Hundred Fifty Thousand Dollars (\$250,000). The foregoing policy will at a minimum contain coverage for or be specifically endorsed to include coverage for pollution conditions resulting in, arising from or in connection with: (i) bodily injury (including death), property damage and environmental cleanup costs (on-site and off-site) resulting from construction of the Initial Improvements or any Subsequent Construction; (ii) the use or operation of motor vehicles (whether owned, non-owned or leased) in connection with construction of the Initial Improvements or any Subsequent Construction, including transportation of any Hazardous Materials to or from the Premises, including any interim or temporary storage or transfer sites (such transportation coverage will also include loading/unloading of materials); (iii) claims by third parties (other than a disposal site owner) for bodily injury or property damage arising from any disposal location or facility, both final and temporary, to which any waste that is generated in connection with the construction of the Initial Improvements or any Subsequent Construction under this Lease or in connection with any Remediation obligation of Tenant pursuant to **Section 21** (Hazardous Materials) is delivered; all such disposal locations/facilities, both final and temporary, will be scheduled to the foregoing policy as Non-Owned Disposal Sites for coverage under such policy. The foregoing policy will be written on an occurrence form and be in effect during the construction periods described above, or, if not available on an occurrence form, then on a claims-made form. If the foregoing policy is written on a claims made form, then the foregoing policy will be maintained for, or contain an extended reporting period of, at least five (5) years. The foregoing policy definition of “**Covered Operations**” or any other such designation of services or operations performed by Tenant’s contractors must include all work or services performed by Tenant’s contractors and their respective subcontractors, consultants, or suppliers

(h) **Boiler and Machinery Insurance.** Unless same is not included within Tenant's property insurance, Tenant shall maintain boiler and machinery insurance covering damage to or loss or destruction of machinery and equipment located on the Premises or in the Improvements that is used by Tenant for heating, ventilating, air-conditioning, power generation and similar purposes, in an amount not less than one hundred percent (100%) of the actual replacement value of such machinery and equipment.

(i) **Professional Liability.** Tenant shall require all providers of professional services, including architectural, design, engineering, geotechnical, and environmental professionals under contract with Tenant for the Initial Improvements or any Subsequent Construction to maintain professional liability (errors or omissions) insurance, with limits not less than \$2,000,000 for architects and \$1,000,000 for any other professionals for each claim and \$4,000,000 annual aggregate limit for architects and \$2,000,000 annual aggregate for any other professionals with respect to all professional services provided to Tenant therefor.

(j) **Crime policy.** Crime policy or fidelity bond covering Tenant's officers and employees against dishonesty with respect to funds provided by Port, in the amount of Seventy Five Thousand Dollars (\$75,000) each loss, with any deductible not to exceed Fifty Thousand Dollars (\$50,000) each loss.

(k) **Other Coverage.** Not more often than every year and upon not less than ninety (90) days prior written notice, Port may require Tenant to increase the insurance limits set forth above or to provide other coverage and/or different coverage amounts as may be required by Law, the City’s Risk Manager or as is generally required by owners of buildings similar in size, character, age and location as the Building with respect to risks comparable to those associated with the use of the Premises.

**22.2. Claims-Made Policies.** If any of the insurance required in **Section 22.1** above is provided under a claims-made form of policy, Tenant shall maintain such coverage continuously throughout the Term and without lapse for a period of three (3) years beyond the termination of



this Lease, to the effect that should occurrences during the Term give rise to claims made after termination of this Lease, such claims shall be covered by such claims-made policies.

**22.3. Annual Aggregate Limits.** If any of the insurance required in *Section 22.1* 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 shall be double the occurrence limits specified herein.

**22.4. Payment of Premiums.** Tenant shall pay the premiums for maintaining all required insurance.

**22.5. Waiver of Subrogation Rights.** Notwithstanding anything to the contrary contained herein, Port and Tenant (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 Lease 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 shall not affect the above waiver.

**22.6. General Insurance Matters.**

(a) All liability insurance policies required to be maintained by Tenant hereunder shall contain a cross-liability clause, shall name as additional insureds by written endorsement the "**City And County Of San Francisco, MOHCD; and the San Francisco Port Commission and their respective officers, directors, employees and agents,**" shall be primary and non-contributory to any other insurance available to the additional insureds with respect to claims arising under this Lease, and shall 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) Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions in excess of \$50,000 must be declared to and approved by City's Risk Manager. In the event deductibles or self-insured retentions are in excess of \$50,000, at the option of City's Risk Manager, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City and its commissioners, members, officers, agents, and employees; or the Tenant shall procure a financial guarantee satisfactory to the City's Risk Manager guaranteeing payment of losses and related investigations, claim administration and defense expenses.

(c) As to earthquake insurance:

(i) during construction of the Initial Improvements, such insurance shall be in an amount at least equal to the maximum amount as is available at rates that are commercially reasonable for owners or operators of comparable projects located in the City and County of San Francisco, from recognized carriers (with a deductible of up to but not to exceed five percent (5%) of the then-current, full replacement cost of the Improvements or other property being insured pursuant thereto (including building code upgrade coverage and without any deduction being made for depreciation).

(ii) from and after Completion of the Initial Improvements, such insurance shall be in an amount at least equal to One Hundred percent (100%) of the maximum probable loss that would be sustained by the Premises as a result of an earthquake measuring 8.0 on the Richter Scale, as determined not less frequently than every 5 years by the City's Risk Manager, but only at rates that are commercially reasonable for owners or operators of comparable projects located in the City and County of San Francisco.

(d) As to flood insurance only:

(i) During construction of the Initial Improvements, such insurance shall be in an amount at least equal to the maximum amount as is available at rates that are commercially reasonable for owners or operators of comparable projects located in the City and County of San Francisco, from recognized insurance carriers (with a deductible up to, but not to exceed fifteen percent (15%) of the then-current, full replacement cost of the Improvements or other property being insured pursuant thereto (including building code upgrade coverage and without any deduction being made for depreciation);

(ii) from and after Completion of the Initial Improvements, such insurance shall be in an amount at least equal to the amount available at rates that are commercially reasonable for owners or operators of comparable projects located in the City and County of San Francisco, from recognized insurance carriers, but only at rates that are commercially reasonable for owners or operators of comparable projects located in the City and County of San Francisco.

(e) All insurance policies required to be maintained by Tenant hereunder shall be issued by an insurance company or companies reasonably acceptable to City with an AM Best rating of not less than A-VIII and authorized to do business in the State of California. Tenant's compliance with this Section shall in no way relieve or decrease Tenant's liability under this Lease.

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

(g) Tenant shall 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, Tenant's broker shall complete the insurance questionnaire and submit all required documentation. Tenant shall, upon Port's request, promptly furnish Port with a complete copy of any insurance policy required hereunder.

(h) Right of City to Maintain Insurance. If Tenant has determined that obtaining earthquake or flood insurance prior to commencement of construction of the Initial Improvements pursuant to *Section 22.6(c)* (As to earthquake insurance) or (d) (As to flood insurance only) is not commercially reasonable, then Tenant will provide Port with such documents evidencing such determination. If at any time Tenant fails to maintain the insurance required pursuant to this *Section 22* (Insurance), or fails to deliver certificates and/or endorsements as required pursuant to this *Section 22* (Insurance) then, upon ten (10) days' written notice to Tenant, City may obtain and cause to be maintained in effect such insurance by taking out policies with companies satisfactory to Port. Within ten (10) days following demand, Tenant will reimburse City for all amounts so paid by City, together with all costs and expenses in connection therewith and interest thereon at the Default Rate.

(i) Insurance of Others. To the extent Tenant requires liability insurance policies to be maintained by Subtenants, contractors, subcontractors or others in connection with their use or occupancy of, or their activities in, on, under, around, or about the Premises, Tenant will require that such policies be endorsed to include the **CITY AND COUNTY OF SAN FRANCISCO, MOHCD, AND THE SAN FRANCISCO PORT COMMISSION AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS** as additional insureds. Notwithstanding the foregoing, Tenant will require all contractors and sub-

contractors performing work in, on, under, around, or about the Premises and all operators and Subtenants of any portion of the Premises to carry the following coverages: (i) commercial general liability with limits of no less than Two Million Dollars (\$2,000,000) per occurrence and Four Million Dollars (\$4,000,000) annual general aggregate, (ii) workers' compensation in amounts required by law, (iii) employer's liability coverage in an amount not less than One Million Dollars (\$1,000,000) per accident, per employee and policy limit for injury by disease, covering all employees employed at the Premises, (iv) automobile insurance in an amount not less than \$1,000,000 combined single limit covering use of owned, non-owned or hired vehicles utilized in the performance of work in, on, under, around, or about the Premises.

(j) Port Entitled to Participate. Except to the extent inconsistent with the terms of **Section 34** (Leasehold Mortgage), with respect to Real Property Insurance proceeds, Port is entitled to participate in and consent to any settlement, compromise or agreement with respect to any Claim in excess of Two Million Dollars (\$2,000,000), which amount will be increased by Five Hundred Thousand Dollars (\$500,000.00) on each ten (10) year Anniversary Date, covered by the insurance required to be carried hereunder; provided, however, that (i) Port's consent will not be unreasonably withheld, and (ii) no consent of Port will be required in connection with any such settlement, compromise or agreement concerning damage to all or any portion of the Improvements if Tenant will have agreed in writing to commence and complete Restoration.

(k) Release and Waiver. Each Party hereby waives all rights of recovery and causes of action, and releases the other Party from any liability, losses occasioned to the property of each such Party, which losses are of the type covered under the property policies required by this **Section 22**, or to the extent that such loss is reimbursed by an insurer.

(l) No Limitation. The Indemnification requirements under this Lease or any other Transaction Documents will not be limited by any insurance requirements set forth in any such documents.

## **23. DAMAGE OR DESTRUCTION.**

### **23.1. General; Notice; Waiver.**

(a) General. If at any time during the Term any damage or destruction occurs to all or any portion of the Premises including to the Improvements from fire or other casualty (each a "Casualty"), the rights and obligations of the Parties shall be as set forth in this Section.

(b) The provisions of this **Section 23** are subject to the rights of Lenders as provided in this Lease.

(c) Notice. If there is any Casualty (i) which could materially impair use or operation of any material portion of the Improvements for their intended purpose for a period of thirty (30) days or longer, or (ii) exceeds in an individual instance the amount of One Hundred Thousand Dollars (\$100,000), or an aggregate amount of Two Hundred Fifty Thousand Dollars (\$250,000), Tenant shall promptly, but not more than ten (10) days after the occurrence of any such Casualty, give written notice thereof to Port describing with as much specificity as is reasonable, the nature and extent of the damage from such Casualty ("**Casualty Notice**") then within ninety (90) days following Tenant's delivery to Port of the Casualty Notice or other such date as specified in **Section 23.4** (Tenant's Right to Terminate Due to Casualty), Tenant shall notify Port of Tenant's election to: (1) commence and complete Restoration of the Improvements, or (2) terminate this Lease subject to the conditions in **Section 23.4** (Tenant's Right to Terminate Due to Casualty).

(d) Waiver. The Parties intend that this Lease fully govern all of their rights and obligations in the event of any Casualty. Accordingly, Port and Tenant each hereby waive the provisions of Sections 1932(2), 1933(4), 1941 and 1942 of the California Civil Code, as such sections may from time to time be amended, replaced, or restated.

**23.2. No Release of Tenant's Obligations.** Except as set forth in **Section 23.4** (Tenant's Right to Terminate Due to Casualty), no Casualty shall permit Tenant to surrender this Lease or relieve Tenant from any Lease obligations. In the event of any damage or destruction to the Improvements that does not result in a termination of this Lease, and at all times before completion of Restoration, Tenant shall pay to Port all Rent at the times and in the manner described in this Lease. If this Lease does not terminate, proceeds of rental interruption or business interruption insurance shall be applied first to unpaid Rent due or coming due before completion of the Restoration and then to costs of Restoring the Premises with any remaining balance to be retained by Tenant.

**23.3. Tenant's Obligation to Restore.** Except in the event of an Uninsured Casualty or Insured Casualty for which Tenant elects to terminate this Lease under **Section 23.4** (Tenant's Right to Terminate Due to Casualty), if all or any portion of the Improvements are damaged or destroyed by Casualty, Tenant shall promptly (allowing for securing necessary Regulatory Approvals), commence and diligently Restore the Improvements to the condition they were in immediately before such Casualty in accordance with then applicable Laws (including any required code upgrades), subject to the availability of insurance proceeds and Force Majeure. All Restoration shall be performed in accordance with the requirements set forth in **Section 15** (Subsequent Construction) relating to Subsequent Construction and shall be at Tenant's sole expense. In connection with any Restoration, the Improvements may be redesigned, made larger or smaller, reconfigured, or otherwise modified, provided that the Improvements as so redesigned are at least equivalent in quality, appearance, public safety, and durability to and in all respects consistent with the Initial Improvements and affording similar public benefit as the original Project, subject to the Permitted Uses. If the Initial Improvements have not been completed at the time of the Casualty, Tenant shall mitigate any immediate or imminent threat to the public safety and welfare or damage to the environment, as determined by Port in its sole discretion.

If insurance proceeds are available for such Restoration and Tenant is obligated to Restore or elects to Restore, then subject to the rights of any Lender, Tenant shall have the right to negotiate an insurance settlement for claims in connection with such Restoration; provided the settlement of any insurance claims in excess of Two Million Dollars (\$2,000,000) shall be subject to the reasonable approval of Port.

**23.4. Tenant's Right to Terminate Due to Casualty.**

(a) **"Insured Casualty."** If, at any time during the Term, more than fifty percent (50%) of the Initial Improvements are destroyed by Casualty and if the insurance proceeds do not provide at least ninety percent (90%) of the funds necessary to accomplish Restoration of the Initial Improvements, then Tenant, with the written consent of Lenders, may terminate this Lease upon written notice to Port within six (6) months after the later of: (i) the date of such Casualty, or (ii) the date on which Tenant is notified of the amount of insurance proceeds available for Restoration. In the event Tenant is required or elects to restore the Initial Improvements, all proceeds of any policy of insurance required to be maintained by Tenant under this Lease shall, subject to any applicable rights of Lenders, be used by Tenant for that purpose and Tenant shall make up from its own funds or obtain additional financing as reasonably approved by Port any deficiency between the amount of insurance proceeds available for the work of restoration and the actual cost thereof.

(b) **"Uninsured Casualty"**. If, at any time during the Term, (i) more than fifty percent (50%) of the Initial Improvements are damaged or destroyed by Casualty; and (ii) the insurance proceeds do not provide at least ten percent (10%) of the funds necessary to accomplish the restoration, and (iii) in the reasonable opinion of Tenant, the undamaged portion of the Initial Improvements cannot be completed or operated on an economically feasible basis; and (iv) there is not available to Tenant any feasible source of third party financing for Restoration reasonably acceptable to Tenant; then Tenant may, with the written consent of each

Lender, terminate this Lease upon thirty (30) days written notice to Port. Any Casualty event not insured due to Tenant's failure to maintain the requisite insurance policies under **Section 22** (Insurance) shall not be considered an Uninsured Casualty. As to any Casualty caused by earthquake or flood, the amount of such policy deductible shall be deemed to be the lesser of the amount of the policy deductible for non-earthquake or flood damage under Tenant's property insurance policy maintained under **Section 22** (Insurance) as of the date of Casualty, or the actual amount of such policy deductible.

(c) In the event that Tenant terminates this Lease pursuant to this **Section 23.4** (Tenant's Right to Terminate Due to Casualty), all insurance proceeds and damages payable by reason of the Casualty shall be divided among Port, Tenant and Lenders subject to Lender's requirements or if no Lenders' requirements apply, in accordance with the provisions of **Section 23.4(d)** and Tenant shall notify Port promptly and not consent to any settlement or adjustment of an insurance award without Port's written approval, which approval shall not be unreasonably withheld or delayed.

(d) **Conditions to Termination.** As a condition precedent to Tenant's right to terminate this Lease, there shall be no uncured Tenant Event of Default and Tenant shall do all of the following:

(i) Pay to Port any Rent due and payable as of the proposed termination date;

(ii) Provide to Port the estimated cost of Restoration and the amount by which the estimated cost of Restoration exceeds insurance proceeds payable (or those insurance proceeds which would have been payable but for Tenant's failure to maintain insurance required to be maintained hereunder) plus the amount of any deductible; and

(iii) Upon receipt by Tenant of any insurance proceeds paid on account of such Casualty, pay or cause to be paid the following amounts in the following order of priority:

(1) First, to each Lender, in order of priority, a portion of the remaining casualty insurance proceeds arising out of or in connection with the Casualty in an amount not to exceed the aggregate amounts then owed to each such Lender;

(2) Second, to Port (or Tenant, if such work is performed by, or on account of, Tenant at its cost) for the actual costs incurred for any work required to alleviate any conditions caused by such Casualty that could cause an immediate or imminent threat to the public safety and welfare or damage to the environment, including any demolition or hauling of rubble or debris;

(3) Third, to Port for the value of Port's reversionary interest in the Premises and the Improvements (in their condition immediately prior to the Casualty event), as of the date the Term would have expired but for the Casualty; and

(4) Fourth, the remainder to Tenant.

(e) Upon termination in accordance with this Section, Tenant shall deliver possession of the Premises to Port and quitclaim to Port all right, title and interest in the Premises and in any remaining Improvements.

(f) In the event the Tenant terminates this Lease pursuant to this Section, then Tenant shall clean up and remove all debris from the Premises and adjacent and underlying property and leave the Premises in a clean and safe condition and in compliance with all Laws upon surrender, as described in **Section 23.4(d)(iii)(1)** (Conditions to Termination). If the proceeds of any insurance policy are insufficient to pay the clean-up and other costs described in **Section 23.4(d)(iii)(1)** (Conditions to Termination), Tenant shall have the obligation to pay the portion of such costs not covered by the insurance proceeds.

(g) If Tenant elects to terminate this Lease solely due to an Uninsured Casualty, then within sixty (60) days after Port's receipt of the Casualty Notice, Port may elect by giving written notice to Tenant, to continue this Lease and pay the amount to Tenant by which the cost of Restoration will exceed the net proceeds of any insurance proceeds (or which would have been payable but for Tenant's failure to maintain such insurance). If Port elects to continue this Lease as set forth in this Section, then notwithstanding Tenant's election to terminate this Lease, this Lease will not terminate and Tenant will be obligated to Restore the Premises in accordance with *Section 23.3* (Tenant's Obligation to Restore).

(h) Upon termination under this *Section 23.4* (Tenant's Right to Terminate Due to Casualty), the Parties shall be released thereby without further obligations to the other Party as of the effective date of such termination; provided, however, that the Indemnification provisions and any other provisions that explicitly survive expiration or earlier termination of this Lease shall survive any such termination. The rights of any Lender to a New Lease and any rights of Tenant or Port to receive insurance proceeds in accordance with the provisions of this Lease will survive the termination of this Lease.

**23.5. *Distribution Upon Lease Termination due to Default.*** If Tenant is obligated to and fails to Restore the Improvements as provided herein and commits a Tenant Event of Default in failing to Restore the Improvements and this Lease is thereafter terminated due to such Tenant Event of Default, all insurance proceeds held by Port, Tenant and any Lender, or not yet collected, shall be paid to and retained by Port, subject to the rights of Lenders, if any, under *Section 34* (Leasehold Mortgage).

**23.6. *Use of Insurance Proceeds.***

(a) Restoration. Except in the event of termination of this Lease in accordance with *Section 23.4* (Tenant's Right to Terminate Due to Casualty), all all-risk coverage insurance proceeds, earthquake and flood proceeds, boiler and machinery insurance proceeds, and any other insurance proceeds paid to Tenant by reason of Casualty (other than business or rental interruption insurance), must be used by Tenant for Restoration of the Premises except as specifically provided in this *Section 23*.

(b) Payment to Trustee. Except as otherwise expressly provided to the contrary in this *Section 23*, if Tenant Restores the Improvements and there is a Mortgage encumbering this Lease, then any insurer paying compensation in excess of One Million Dollars (\$1,000,000) under any all-risk or earthquake insurance policy required to be carried hereunder shall pay such proceeds to the Lender or an insurance trustee reasonably acceptable to Port designated by such Lender, in accordance with the Mortgage. If there is no Mortgage encumbering this Lease, then the insurance proceeds shall be paid to a trustee (which shall be a commercial bank or trust company, designated by Port within twenty (20) days after written request by Tenant, having an office in San Francisco). Unless agreed otherwise by the Parties, and subject to the requirements of Lender, the insurer shall pay insurance proceeds of One Million Dollars (\$1,000,000) or less directly to Tenant for purposes of Restoration in accordance with this Lease. If there is no Mortgage encumbering the Lease and a trustee is holding the proceeds, Port shall instruct the trustee to pay Tenant the cost of any emergency repairs necessitated by the Casualty event in advance of the actual Restoration within thirty (30) days after such request. If the funds are paid to a trustee in accordance herewith, the trustee shall hold all insurance proceeds in an interest-bearing federally insured account (with interest added to the proceeds). The trustee or Lender shall pay to Tenant, from time to time as the work of Restoration progresses, in amounts designated by certification by architects licensed to do business in the State, showing the application of such amounts as payment for such Restoration. Payment to Tenant shall not be construed as relieving Tenant from the necessity of promptly Restoring the Improvements in accordance with the terms of this Lease. Tenant shall pay all reasonable fees of the trustee, bank or trust company for its services. Provided that all Rent due and payable to Port has been paid and no uncured Tenant Event of Default (or unmatured Tenant

Event of Default) exists upon completion of the Restoration in accordance with the provisions of this **Section 23**, any excess insurance proceeds remaining with the trustee or Lender after completion of the Restoration of the Premises shall be paid to Tenant.

### **23.7. Arbitration of Disputes.**

(a) **Estimators.** In the event Port and Tenant cannot mutually agree upon the cost of Restoration (the "**Disputed Amount**") after good faith efforts to resolve the Disputed Amount, such dispute shall be determined in the manner provided in this **Section 23.7**. Either Party may invoke the provisions of this **Section 23.7** at any time there is a Disputed Amount by delivering written notice to the other Party ("**Arbitration Notice**"). Within twenty (20) business days after receipt of the Arbitration Notice, each Party shall designate, by written notice to the other Party, a professional cost estimator having at least ten (10) years' experience in estimating construction costs of major construction projects in Port lands, and who is competent, licensed, disinterested and independent (each an "**Estimator**"). Each Estimator shall make an independent determination of the Disputed Amount, in accordance with the provisions hereof. The Estimators may share and have access to objective information in preparing their estimates, but they will otherwise act independently. Each Estimator shall complete, sign and submit its written estimate of the cost of Restoration ("**Restoration Cost**") within fifteen (15) days after the appointment of the last Estimator unless the Parties agree to permit a longer period of time. If the higher estimate of the Restoration Cost is not more than ten percent (10%) of the lower estimate, the Restoration Cost shall equal the average of the two (2) determinations. If a Party fails to designate an Estimator within the twenty (20) day period, then the determination made by the sole Estimator shall control.

(b) **Arbitration.** If the higher estimate of the Restoration Cost is more than ten percent (10%) of the lower estimate, the Parties shall agree upon and appoint a third Estimator (the "**Arbitrator**") from the City's list of approved vendors (San Francisco Department of Real Estate) within thirty (30) days after the first two (2) determinations have been submitted to the Parties. The Arbitrator shall have the minimum qualifications set forth in **Section 23.7(a)** (Estimators), and also shall have experience acting as an arbitrator of disputes involving construction costs or construction disputes. The Parties agree to select the Arbitrator from the list of approved City vendors. Port shall provide a list of three (3) possible individuals from the approved City vendors and Tenant shall select one (1) to act as the Arbitrator. If the Parties do not appoint the Arbitrator within such thirty (30) day period, then either Party may apply to the American Arbitration Association, or any similar provider of professional commercial arbitration services, for appointment in accordance with the rules and procedures of such organization of an independent arbitrator meeting the foregoing qualifications. The Arbitrator shall consider the estimates submitted by the Estimators as well as any other relevant written evidence that the Parties may choose to submit. If a Party chooses to submit any such evidence, it shall deliver a complete and accurate copy to the other Party at the same time it submits the same to the Arbitrator. Neither Party shall conduct ex parte communications with the Arbitrator regarding the subject matter of the arbitration. Within fifteen (15) business days after his or her appointment, the Arbitrator shall make an independent determination of the Disputed Amount in the same manner as the Estimators as described above and shall determine the final Restoration Cost as follows:

(i) If the difference between the Disputed Amount determined by the Arbitrator and the amount determined by the Estimator appointed by Port is ten percent (10%) or less than the higher of the amount determined by the Arbitrator and the Estimator appointed by Port, then the Restoration Cost will be the average of those two values.

(ii) If the difference between the Disputed Amount determined by the Arbitrator and the amount determined by the Estimator appointed by Tenant is ten percent (10%) or less than the higher of the amount determined by the Arbitrator and the Estimator appointed by Tenant, then the Restoration Cost will be the average of those two values.

(iii) If neither of the conditions in subsections (i) or (ii) is met or if both of the conditions in subsections (i) and (ii) are met, then the Arbitrator's value will be deemed to be the final Restoration Cost.

(c) Conclusive Determination. Except as provided in California Code of Civil Procedure Section 1286.2 (as the same may be amended from time to time), the determination by the Estimators, or if applicable, the Arbitrator, shall be conclusive, final and binding on the Parties. Neither the Estimators, or if applicable, the Arbitrator shall have any power to modify any of the provisions of this Lease. Subject to the provisions of this *Section 23.7* (Arbitration of Disputes), the Parties will cooperate to provide all appropriate information to the Estimators and if applicable, the Arbitrator. The Estimators, and if applicable, the Arbitrator will each report their respective determinations in writing, supported by the reasons for the determination.

(d) Conduct of Arbitration Proceeding. Any arbitration proceeding conducted pursuant to this *Section 23.7* (Arbitration of Disputes) shall be subject to California Code of Civil Procedure Sections 1280 to 1294.2 (but excluding Section 1283.05 with respect to discovery), or successor Laws then in effect relating to arbitration generally. Any such proceeding shall be conducted in San Francisco.

(e) Fees and Costs; Waiver. Each Party shall bear the fees, costs and expenses of the Estimator it selects. The Parties shall share the fees, costs and expenses of the Arbitrator and the costs and expenses of the arbitration proceeding equally. The Parties waive any claims against the Estimator appointed by the other Party, and against the Arbitrator, for negligence, malpractice, or similar claims in the performance of the estimates or arbitration contemplated by this *Section 23.7* (Arbitration of Disputes).

(f) Arbitration of Disputes. With respect to the arbitration provided for in this *Section 23.7* (Arbitration of Disputes), the Parties agree as follows:

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISIONS IN THIS LEASE DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR BY JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT TO NEUTRAL ARBITRATION DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION.

Port's Initials \_\_\_\_\_ Tenant's Initials \_\_\_\_\_

Any judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction of such arbitration in accordance with the terms of this Lease. This arbitration provision does not affect the rights of either Party to seek confirmation, correction or vacation of the arbitration award pursuant to California Code of Civil Procedure Sections 1285 et seq.

## 24. CONDEMNATION

**24.1. General.** If during the Term, there is any Condemnation of all or any part of the Leasehold Estate is taken by Condemnation, the rights and obligations of the Parties shall be determined pursuant to this *Section 24* (Condemnation), subject to the rights of any Lender.



Accordingly, Tenant waives any right to terminate this Lease upon the occurrence of a partial condemnation under Sections 1265.120 and 1265.130 of the California Code of Civil Procedure, as those sections may from time to time be amended, replaced, or restated.

(a) Lender's Rights. The provisions of this *Section 24* are subject to the rights of Lenders as provided in this Lease.

(b) Notice. In case of the commencement of any proceedings or negotiations which might result in a Condemnation of all or any portion of the Leasehold Estate during the Term, the Party learning of such proceedings shall promptly give written notice of such proceedings or negotiations to the other Party. Such notice shall describe with as much specificity as is reasonable, the nature and extent of such Condemnation or the nature of such proceedings or negotiations and of the Condemnation that might result therefrom, as the case may be.

(c) Waiver. Except as otherwise provided in this Section, the Parties intend that the provisions of this Lease shall govern their respective rights and obligations in the event of a Condemnation. Accordingly, but without limiting any right to terminate this Lease in accordance with this Section, Tenant waives any right to terminate this Lease upon the occurrence of a Partial Condemnation under Sections 1265.120 and 1265.130 of the California Code of Civil Procedure, as such sections may from time to time be amended, replaced or restated.

**24.2. Total Condemnation.** If there is a Condemnation of the entire Leasehold Estate (a "**Total Condemnation**"), this Lease shall terminate as of the Condemnation Date. Upon such termination, except as otherwise set forth in this Lease, the Parties shall be released without further obligations to the other Party as of the Condemnation Date.

**24.3. Partial Condemnation.** If only a portion of the Leasehold Estate is taken by Condemnation ("**Partial Condemnation**"), this Lease shall remain in effect, except that Tenant may, with Lender's written consent, elect to terminate this Lease if, in Tenant's reasonable judgment, the remaining portion of the Improvements are rendered unsuitable for Tenant's continued use. If Tenant elects to terminate this Lease, Tenant must exercise its right to terminate pursuant to this paragraph by giving notice to Port within thirty (30) days after Port notifies Tenant of the nature and the extent of the taking and shall notify Port of the date of termination, which date shall not be earlier than thirty (30) days nor later than six (6) months after Tenant has notified Port of its election to terminate; except that this Lease shall terminate on the date the condemnor has the right to possession of the Premises if such date falls on a date before the date of termination as designated by Tenant. If Tenant does not terminate this Lease within such thirty (30) day notice period, this Lease shall continue in full force and effect.

In the event of a Partial Condemnation, if this Lease remains in effect, subject to the terms of a Leasehold Mortgage, Tenant may use the proceeds to pay costs of Restoration, in which case the portion of the Net Awards and Payments allocable to Restoration shall be payable to Tenant, Lenders, or trustee in accordance with the requirements governing payment of insurance proceeds set forth in *Section 23.4(d)(iii)* (Conditions to Termination).

**24.4. Award and Distribution.** Except as provided in *Sections 24.5* (Temporary Condemnation) and *24.6* (Relocation Benefits, Personal Property), awards and other payments to either Port or Tenant on account of a Condemnation, less costs, fees and expenses of either Port or Tenant (including reasonable attorneys' fees and costs) incurred in the collection thereof ("**Net Awards and Payments**") shall be allocated as follows:

(a) First, to each Lender, if any, in order of priority, for payment of all outstanding amounts of the loan secured by such Mortgage, together with its reasonable out of pocket expenses and charges in collecting the Net Awards and Payments, including without limitation, its reasonable attorneys' fees incurred in the Condemnation

(b) Second, to Port for the value of the condemned land only, subject to the particular uses of the Premises existing immediately prior to the Condemnation Date, and without reference to, or inclusion of Port's reversionary interest in the value of the Improvements (the "**Condemned Land Value**");

(c) Third, to Port for any accrued and unpaid Rent owed by Tenant to Port for periods prior to the Condemnation Date;

(d) Fourth, to Tenant in an amount equal to the value of Tenant's Leasehold Estate, not including the value of the Improvements on the Premises, for the remaining unexpired portion of the Term to the original scheduled Expiration Date; and

(e) Fifth, the balance of the Net Awards and Payment shall be divided proportionately between Port, for the value of Port's reversionary interest in the Improvements (based on the date the Term would have expired but for the event of Condemnation), and Tenant, for the value of the Improvements for the remaining unexpired portion of the Term to the original scheduled Expiration Date.

(f) Notwithstanding anything to the contrary set forth in this *Section 24* (Condemnation) any portion of the Net Awards and Payments which has been specifically designated by the condemning authority or in the judgment of any court to be payable to Port or Tenant on account of any interest in the Leasehold Estate or the Improvements separate and apart from the Condemned Land Value, the value of Port's reversionary interest in the Improvements, Tenant's Leasehold Estate, or the value of the Improvements on the Premises for the remaining unexpired portion of the Term, shall be paid to Port or Tenant, as applicable, as so designated by the condemning authority or judgment.

(g) Notwithstanding anything to the contrary set forth in this *Section 24* (Condemnation), in the event of a Condemnation resulting in the termination of this Lease, if required pursuant to the provisions of a Mortgage, all Net Awards and Payments shall be paid for the express benefit of Port to Lender holding a first lien encumbrance on Tenant's Leasehold Estate, provided that such Lender agrees to distribute the Net Awards and Payments pursuant to the allocation set forth in this *Section 24* (Condemnation).

**24.5. Temporary Condemnation.** If there is a Condemnation of all or any portion of the Leasehold Estate for a temporary period lasting less than the remaining Term, this Lease shall remain in full force and effect, there shall be no abatement of Rent, and the entire Award shall be payable to Tenant.

**24.6. Relocation Benefits, Personal Property.** Notwithstanding *Section 24.4*, Port shall not be entitled to any portion of any Net Awards and Payments payable in connection with the Condemnation of the Personal Property of Tenant or any of its Subtenants, or any moving expenses, loss of goodwill or business loss or interruption of Tenant, severance damages with respect to any portion of the Premises and Improvements remaining under this Lease, or other damages suffered by Tenant.

## **25. INDEMNITY AND EXCULPATION.**

**25.1. General Indemnity.** Tenant shall Indemnify Port, MOHCD, 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 shall 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 Tenant, or loss or damage to or destruction of any property occurring in, on or about the Premises, the Improvements or any other Port property, from any cause whatsoever, or (b) any default by Tenant in the observance or performance of any of the terms, covenants or conditions of this Lease, or (c) the use, occupancy, manner of use or occupancy, or condition of the Premises or the activities therein by Tenant, its Agents, or Invitees, or (d) any construction or

other work undertaken by Tenant on the Premises whether before or during the Term, or (e) any acts, omissions or negligence of Tenant, its Agents or Invitees, in, on or about the Premises or any other Port property.

**25.2. Hazardous Materials Indemnity.**

(a) In addition to its obligations under *Section 25.1* (General Indemnity), Tenant, for itself and on behalf of its Agents and Invitees, 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, and (ii) Tenant's Exacerbation of any Hazardous Material Condition. Notwithstanding the forgoing, Tenant shall have no have Indemnity obligation arising from an Excluded Condition.

(b) Tenant's obligation to Indemnify the Indemnified Parties includes: (i) costs incurred in connection with any Investigation or Remediation requested by City or required by any Environmental Regulatory Agency and to restore the affected area to its condition before the Release; (ii) damages for diminution in the value of the Premises; (iii) damages for the loss or restriction on use of rentable or usable space or of any amenity of the Premises; (iv) damages arising from any adverse impact on marketing the space; (v) sums paid in settlement of Claims, Hazardous Material Claims, Environmental Regulatory Actions, including fines and penalties; (vi) natural resource damages; and (vi) attorneys' fees, consultant fees, expert fees, court costs, and all other litigation, administrative or other judicial or quasi-judicial proceeding expenses. If City pays any costs within the scope of this section, Tenant must reimburse City for its costs, plus interest at the Interest Rate from the date City incurs each cost until paid, within three (3) business days after City's payment demand. Tenant's obligations hereunder shall survive the expiration or earlier termination of this Lease.

**25.3. Scope of Indemnities.** The Indemnification obligations of Tenant set forth in this Lease shall 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 Tenant set forth in this Lease shall 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 Lease. Except as specifically provided otherwise, the Indemnification obligations of Tenant set forth in this Lease shall exclude Claims resulting solely from the willful misconduct or gross negligence of the Indemnified Parties.

In addition to Tenant's obligation to Indemnify the Indemnified Parties, Tenant 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 Tenant set forth in this Lease, even if the allegations are or may be groundless, false or fraudulent. This Indemnification by Tenant shall begin from the first notice that any claim or demand is or may be made and shall continue at all times thereafter.

Without limiting Tenant's Indemnity obligations with respect to the Premises, Port agrees that Tenant's Indemnity for Claims relating to "other Port property" as set forth above in *Section 25.1(a)* and *Section 25.1(e)* applies only if such Claims arise directly or indirectly out of Tenant's, its Agent's or Invitee's acts, omissions or negligence.

**25.4. Exculpation and Waiver.** To the extent allowable by Law, Tenant, as a material part of the consideration to be rendered to City, 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 shall not be responsible for or liable to Tenant, and Tenant hereby assumes the risk of, and waives and releases the Indemnified Parties from all Claims 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 or any part of the Improvements adjacent to or connected with the Premises, (ii) theft, (iii) explosion, fire, steam, oil, electricity, water, gas or rain, pollution or contamination, (iv) stopped, leaking or defective Building Systems, (v) Building 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 City property for any cause arising at any time, (viii) alleged facts or circumstances of the process or negotiations leading to this Lease prior to the Commencement Date and (ix) inability to use all or any portion of the Premises due to sea level rise, and (x) any other acts, omissions or causes arising at any time and from any cause, in, on, under, or about the Premises including all claims for losses arising from the joint, concurrent, active or passive negligence of any of Indemnified Parties.

Tenant understands and expressly accepts and assumes the risk that any facts concerning the Claims released in this Lease 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 Lease shall remain effective. Therefore, with respect to the Claims released in this Lease, Tenant 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 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

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

**25.5. Insurance.** The Indemnification requirements under this Lease, or any other agreement between City and Tenant, will in no way be limited by any insurance requirements under any such agreements.

**25.6. Survival.** The provisions of *Section 25* (Indemnity and Exculpation) shall survive the expiration or earlier termination of this Lease.

## **26. TRANSFERS.**

Transfers in the form of Leasehold Mortgages shall be subject to the provisions of *Section 34* including Lenders and Permitted Limited Partners exercising their remedies as described in *Section 34*. Any other Transfer that does not comply with this *Section 26* (or *Section 34* with respect to Leasehold Mortgages) will constitute an incurable Event of Default and will be void as to City and this Lease. City's consent to one Transfer will have no effect with respect to any other Transfer. Notwithstanding any other provision of this Lease, Port acknowledges and agrees that leases, subleases, or occupancy agreements with (i) Residential Occupants of the Building and (ii) other Subleases customarily and exclusively serving the Residential Occupants such as laundry leases will not require Port consent, provided that, as to (ii) above, Tenant provide Port with reasonable advance written notice of each such Subleases and the material terms thereof and that Port can object if Port believes that consent to such Sublease is required under this Lease, in which case, Tenant shall seek Port's consent to such Sublease.

### **26.1. Transfer of the Residential Portion.**

(a) Except for Transfers under *Section 26.1(b)*, and subject to the rights of Lenders as set forth in *Section 34* (Leasehold Mortgage) and Permitted Limited Partners as set forth in *Section 28.4* (Rights of Permitted Limited Partner), Tenant must obtain Port's and MOHCD's prior written consent to any Transfer of any portion of the Residential Portion, which consent will not be withheld unreasonably. Without waiving or diminishing any obligation of

Tenant to Port under this Lease, any Transfer in the form of a Sale of the Residential Portion must comply with Section 10320(b)(2) of the TCAC regulations concerning transfer events and reinvestment into the project or if such provision of the TCAC regulations does not exist or is not applicable at the time of the Sale, then such comparable policy as determined by MOHCD. The Transferee shall assume all of Tenant's obligations under this Lease to the extent transferred. Tenant shall not seek Port's consent until it has obtained MOHCD's consent in writing.

(i) Tenant agrees that any of the following will be a reasonable basis for City to withhold its consent: (1) at the time Tenant requests consent, an Event of Default, or an event that with notice or the passage of time or both would constitute an Event of Default if not cured, has occurred and remains uncured; (2) the Transferee's financial condition is or may become insufficient to support all of the financial and other obligations of this Lease; (3) the Transferee's intended use of the Premises is inconsistent with this Lease, the Public Trust Determination or otherwise will affect any City interest materially and adversely; (4) the nature of the Transferee's use of the Premises would involve an increased risk of the Handling or Release of Hazardous Materials or of fire or other casualty; (5) the business reputation or character of the Transferee is not reasonably acceptable to City; or (6) the Transferee is not likely to conduct a business in the Premises of a quality substantially equal to Tenant's or otherwise reasonably acceptable to City. The Transferee shall assume all of Tenant's obligations under this Lease to the extent transferred.

(ii) At least ninety (90) days before a Transfer subject to this Section, Tenant must give City a Transfer Notice and the following information in writing: (A) the name, address, legal composition and ownership of the proposed Transferee; (B) financial statements for the three (3) years before the Transfer Date (or each year of the proposed Transferee's existence, if shorter) for the Transferee and for any other Person who will be liable for Tenant's obligations under this Lease or other reasonably adequate evidence that the proposed Transferee's financial condition and prospects are sufficient to support all of the financial and other obligations under the Lease or Sublease; (C) the Transferee's current financial statements; (iii) a copy of the proposed Transfer Agreement including all payments to be made or other consideration to be given in connection with the Transfer; and (D) the Transferee's completed pre-screening and leasing application. In addition, Tenant must provide: (1) any other information, documentation, or evidence that City requests to enable City to evaluate the Transfer and the Transferee; and (2) if any of the Transfer Terms are modified before the Transfer Date, a new Transfer Notice and all relevant documentation for any modified Transfer Terms. Until such time as Tenant has provided to Port all required information, Tenant's Transfer Notice will not be deemed to have been served or given. Tenant will immediately notify Port of any modifications to the proposed terms of the Transfer Agreement.

(iii) If City consents to the Transfer, Tenant must close the Transfer on the Transfer Terms stated in the Transfer Notice within ninety (90) days after Port notifies Tenant of Port's consent. If the Transfer Agreement does not close within the 90-day period, then City's consent will expire, unless Tenant gives City a new Transfer Notice, in which case City again will be entitled to exercise any of the options under this Section.

(b) Notwithstanding the foregoing, subject to the requirements of this *Section 26.1(b)*, the following Transfers are not subject to City's prior written consent or the requirements of this *Section 26*: (A) a Transfer of this Lease to an Affiliate of BRIDGE Housing Corporation or The John Stewart Company; (B) a Transfer to a Lender in connection with such Lender's exercise of its remedies against Tenant pursuant to *Section 34* (Leasehold Mortgage) and subject to the requirements of *Section 34* (Leasehold Mortgage); (C) a Transfer to a limited partnership or limited liability company formed for the tax credit syndication of the Project, whose managing general partner is an Affiliate of BRIDGE Housing Corporation and whose administrative general partner is an Affiliate of The John Stewart Company, and MOHCD has approved the Transferee in writing; (D) a Transfer to a limited liability company formed to lease or manage the Residential Portion in which Affiliates of BRIDGE and JSCo are members; (E) a

Transfer of the managing general partnership or its members interest to BRIDGE or an Affiliate of BRIDGE or to another nonprofit public benefit corporation approved in advance in writing by MOHCD; (G) a Transfer of the administrative general partner or its member's interest to JSCo or an Affiliate of JSCo or to another entity approved in advance in writing by MOHCD; (H) a Transfer of any general partnership interest to an Affiliate of the tax credit investor limited partner or a removal or replacement of a general partner of Tenant in accordance with the terms of the Tenant's limited partnership agreement; (I) a Transfer of any limited partnership or membership interest in Tenant to an investor under the tax credit syndication of the Project approved in writing by MOHCD; or (J) the grant or exercise of an option agreement between Tenant and Tenant's general partner or manager or any of its Affiliates in connection with the tax credit syndication of the Project where such agreement has been previously approved in writing by MOHCD.

Tenant may make a Transfer under this *Section 26.1(b)*, provided: (1) Tenant gives City written notice at least sixty (60) days prior to the proposed Transfer Date and provides copies of all documentation evidencing compliance with the conditions in this Section, including where required, MOHCD's written approval, unless such Transfer requires approval from the Citywide Affordable Housing Loan Committee; (2) at the time Tenant provides City with notice, no Event of Default or Unmatured Event of Default has occurred and remains uncured; (3) the proposed Transferee must have a net worth which is at least equal to the greater of Tenant's net worth as of the Commencement Date or Tenant's net worth as of the day prior to the effective date of the proposed transfer as evidenced to City's reasonable satisfaction; and (4) the proposed Transferee must operate the Project for the Permitted Use and no other purpose.

#### **26.2. Transfer of the Non-Residential Portion.**

(a) Except for Transfers under *Section 26.2(b)*, and subject to the rights of Lenders as set forth in *Section 34* (Leasehold Mortgage) and Permitted Limited Partners as set forth in *Section 28.4* (Rights of Permitted Limited Partner), Tenant must obtain Port's prior written consent to any Transfer of the Non-Residential Portion or portion thereof, which Port will not withhold unreasonably.

(i) At least sixty (60) days before a Transfer subject to this Section, Tenant must give Port a Transfer Notice including the information required under *Section 26.1(a)(ii)*. Until such time as Tenant has provided to Port all required information, Tenant's Transfer Notice will not be deemed to have been served or given. Tenant will immediately notify Port of any modifications to the proposed terms of the Sublease.

(ii) Port's Options. Upon receiving Tenant's Notice, Port will have the right to either (A) consent to the proposed Transfer, which consent shall not be unreasonably withheld, subject to any reasonable conditions upon such Transfer or (B) deny its consent to the proposed Transfer on the following reasonable grounds: (1) at the time Tenant requests Port's consent, an Event of Default or an Unmatured Event of Default has occurred and remains uncured; (2) that the proposed Transferee's financial condition and prospects are or could become insufficient to support all of the financial and other obligations of the proposed Sublease; (3) that the use to which the sublease premises will be put by the proposed Transferee is inconsistent with the terms of this Lease or the Public Trust Determination, or will otherwise affect any Port interest materially and adversely; (4) the business reputation or character of the proposed Transferee is not reasonably acceptable to Port or the proposed Transferee is not likely to conduct a business in the Premises of a quality substantially equal to Tenant's or otherwise reasonably acceptable to Port; (5) that the nature of the proposed Transferee's intended or likely use of the Premises would involve an unmitigated risk of the Handling, Release or mishandling of Hazardous Materials and Port reasonably believes that the measures proposed by Transferee are insufficient to mitigate the risk of Handling or Release of Hazardous Materials by Transferee, or otherwise materially increase the risk of fire or other casualty; or (6) in the case of a Sublease.

that (i) the rental rate does not reflect an arm's length transaction or is below the fair market rent for similar use and type of premises.

(b) Authorized Restaurant Sublease. Notwithstanding the foregoing, subject to the requirements of this *Section 26.2(b)*, the following Transfers are not subject to Port's prior written consent or the requirements of *Section 26.2*, and Tenant may enter into a Restaurant Sublease for a Ground Floor Unit without obtaining Port's consent, provided that all of the following requirements are met as of the commencement of the Sublease and throughout the Sublease term (each, an "**Authorized Restaurant Sublease**" and an "**Authorized Restaurant Subtenant**"):

(i) at least sixty (60) days prior to the effective date of the proposed Sublease, Tenant provides to Port a copy of the proposed Sublease and documentation requested by Port to evidence compliance with this Section;

(ii) the use under the sublease is visitor-serving food service;

(iii) the sublease is for a term of up to fifteen (15) years (including any renewal or extension options contained in the sublease);

(iv) rent under the sublease is no less than \$[4.40] per square foot per month (such amount to be adjusted on every 10th Anniversary Date by an increase of twenty percent (20%); provided that, if Port believes that the rental rate does not reflect an arm's length transaction or is below the fair market rent for similar use and type of premises, Port may object in which case, Tenant shall seek Port's consent to such Sublease;

(v) the sublease is a net lease under the same terms and conditions as described in *Section 7.11* as between Tenant as landlord and Subtenant as tenant;

(vi) at the time Tenant executes the Sublease, there must be no uncured Tenant Event of Default or an Unmatured Event of Default;

(vii) the proposed Subtenant's financial condition and prospects must be sufficient to support all of the financial and other obligations of the proposed Sublease;

(viii) the proposed Subtenant must conduct a business of a quality substantially equal to comparable restaurants located within the vicinity of the Premises;

(ix) any modification or amendment of the Sublease will continue to comply with the terms set forth in this *Section 26.2(b)* or will be subject to Port's consent under *Section 26.1(a)*;

(x) there shall be no further subleasing of the subleasehold; and

(xi) Provided that the following conditions are met and documentation requested by Port is provided to evidence compliance, if requested, Port will provide a non-disturbance agreement to the Authorized Restaurant Subtenant as described in *Section 26.5*:

(1) the proposed Subtenant requests a non-disturbance agreement with the notice provided under *Section 26.2(b)(i)*;

(2) concurrently with its request for a non-disturbance agreement from Port, Tenant submits an executed Tenant estoppel certificate substantially in the form attached hereto as *Exhibit M*, and Tenant certifies of the effective date of the non-disturbance agreement that the certifications made by Tenant in the estoppel certificate remain unchanged;

(3) the performance by an Authorized Restaurant Subtenant of its obligations under the Authorized Restaurant Sublease will not cause a Tenant Event of Default to occur under this Lease;

(4) the term of the Authorized Restaurant Sublease, including options, does not extend beyond the scheduled Term of this Lease; and

(5) the Authorized Restaurant Sublease includes a covenant that the Authorized Restaurant Subtenant has not and will not enter into any further subleases of the subleased space and Port shall not be bound to any such further subleasing agreement.

**26.3. Transfer Agreement Requirements.** Every Transfer Agreement (whether or not City's consent is required) must include the provisions set forth below.

(a) The Transferee's express assumption of, and acknowledgement and agreement that he or she will be jointly and severally liable for all of Tenant's obligations under this Lease to the extent such obligations are transferred;

(b) The Indemnification clause and waiver of claims provisions in *Section 25* (Indemnity and Exculpation) insofar as it applies to the portion of the Premises Transferred to the Transferee;

(c) Insurance provisions requiring that all of the Transferee's liability and other insurance policies name "*The City and County of San Francisco, the San Francisco Port Commission, and their directors, employees and agents*" as additional insureds and acknowledging City's right to demand increased coverage to amounts customarily required by other San Francisco landlords for premises where business activities similar to the Transferee's are conducted;

(d) A provision under which the Transferee expressly waives any and all relocation assistance and benefits in connection with this Lease to the extent permitted by applicable Laws; and

(e) For every Transfer that is a Sublease, the following must also be included:

(i) a provision stating that if this Lease is terminated for any reason, by either party, the Subtenant's right to possession under the Sublease will terminate, subject to the provisions of any Non-Disturbance Agreement executed by Port;

(ii) a requirement that the Subtenant must pay the Rent and other sums due under the Sublease directly to Port upon receiving Port's written notice that Tenant is in default under this Lease, a copy of which Port will deliver to Tenant.

(iii) a provision stating that in the event of termination, reentry or dispossession by Port under this Lease, Port may, at its option, take over all of the right, title and interest of Tenant under such Sublease, and such Subtenant shall, at Port's option, attorn to Port pursuant to the then executory provisions of such Sublease;

(iv) a statement that the Sublease is subject to and subordinate to this Lease;

(v) a prohibition on assignment or further subleasing, in whole or in part, without Port's consent, which may be given or withheld in Port's sole discretion;

(vi) a provision similar to *Section 32* (Port's Entry) requiring Subtenant to permit Port to enter its subleased space for the purposes specified in that Section; and

(vii) a provision similar to *Section 42.1* (Tenant Estoppel) requiring Subtenant, from time to time, to provide Port an estoppel certificate substantially similar to the form attached hereto as *Exhibit M*.



**26.4. Copy of Executed Agreement.** Tenant shall provide Port a true and complete copy of each executed Transfer Agreement regardless of whether such agreement requires Port's consent within thirty (30) days after the execution thereof.

**26.5. Non-disturbance Agreement.** Provided that Port consents to a Sublease, Port will enter into a commercially reasonable non-disturbance and attornment agreement with the relevant Subtenant which shall provide that the Subtenant will not be declared in default due to the act of Tenant or any other Subtenant or be held liable for the act of Tenant or any other Subtenant and that Port shall attorn to such Subtenant and recognize the Sublease in the event of termination of this Lease due to a default by Tenant. Each Non-Disturbance Agreement shall be substantially in the form attached hereto as *Exhibit N*.

**26.6. Assignment of Sublease Rents.** Subject to the rights of Lenders as provided in *Section 34* (Leasehold Mortgages), Tenant immediately and irrevocably assigns to Port, as security for Tenant's obligations under this Lease, all of Tenant's interest in any rent from any Sublease, except that, until the occurrence of a Tenant Event of Default, Tenant has the right to receive, collect and enjoy such rents. Subtenant will pay the rent and other sums due under any Sublease directly to Port upon receiving written notice from Port that Tenant is in default under this Lease with respect to the payment of Rent. In the event that, notwithstanding the giving of such notice, Tenant collects any rent or other sums from any Subtenant, then Tenant will hold such sums in trust for the benefit of Port and will immediately forward the same to Port. Port's collection of such rent and other sums will not constitute an acceptance by Port or attornment by such Subtenant.

**26.7. No Further Consent Implied.** No material terms of Transfer or Sublease after approval by Port, may be amended without Port's prior written consent. Consent to one Transfer or Sublease will not be construed as consent to a subsequent Transfer or Sublease.

**26.8. No Release of Tenant.** The acceptance by Port of Rent or other payment from any other person will not be deemed to be a waiver by Port of any provision of this Lease or to be a release of Tenant from any obligation under this Lease.

**26.9. Notice to Port.** In addition to the obligations under *Section 8.1(c)* (Reporting Requirements), within thirty (30) days of entering into any agreement under which Tenant grants any person the right to occupy or use any portion of the Premises for any period of time, including without limitation, any assignment, sublease, license, permit, concession or vendor agreement or other agreement or renewal thereof, Tenant shall provide written notice to Port and a copy of such agreement, regardless of whether Port consent is required under this Lease for such agreement. Tenant agrees to provide such further information as may be requested by City or Port to enable compliance with reporting obligations under state Law and San Francisco Administration Code Sections 23.38 and 23.39 (or any successor ordinance).

**26.10. Transfer/Sublease Audit.** Tenant agrees to make its Books and Records available to, and cooperate with, any City representative for the purpose of conducting an audit under the terms and conditions described in *Section 7.7* (Audit) of the accuracy of Tenant's financial reporting on an Transfer or Sublease during the Audit Period. If an audit reveals that Tenant has understated any amounts owed to Port during said Audit Period, Tenant shall pay Port, promptly upon demand, the difference between the amount Tenant has paid and the amount it should have paid to Port, plus interest at the Interest Rate from the date of the error in the payment. If an audit reveals that Tenant has overstated amounts owed to Port for said Audit Period, Tenant shall be entitled to a credit against Rent next owed equal to the difference between the amount Tenant has paid and the amount it should have paid to Port. If Tenant understates amounts owed to Port for any Audit Period by three percent (3%) or more, Tenant shall pay the cost of the audit. A second understatement within any three (3) Lease Year period of the first such understatement shall be considered an Event of Default.

**26.11. Sales.** In addition to all requirements in **Section 26** (Transfer) regarding Transfers and **Section 34** regarding Leasehold Mortgages, the following provisions apply to any Transfer in the form of a Sale. “**Port's Sale Participation**” includes all amounts payable to Port as required by this Section.

**(a) Participation Rent Attributable to a Sale of the Residential Portion.**

Tenant is not required to make any payments under this **Section 26.11(a)** until the Reserve Account required under **Section 16.2** is fully funded. Prior to the date that the Reserve Account is fully funded, Tenant shall deposit all Net Proceeds attributable to a Sale of the Residential Portion into the Reserve Account.

**(i)** Tenant must pay to Port one percent (1%) of Tenant's Net Sale Proceeds Attributable to a Sale of the Residential Portion as an administrative fee (“**Administrative Fee**”) concurrently with and as a condition to the Sale Closing.

**(ii)** Participation Rent Attributable to a Sale of the Residential Portion shall be \$ \_\_\_\_\_ in any given Lease Year (“**Deferred Rent**”). Deferred Rent shall only be payable to the extent of available Net Sales Proceeds to fund an amount equal to thirty percent (30%) of Tenant's Net Sale Proceeds attributable to the Residential portion (“**Residential Participation Rent**”). Any unpaid Deferred Rent shall accrue without interest until a Transfer occurs. Provided that there is no uncured Tenant Event of Default or Unmatured Tenant Event of Default and the Reserve Account is fully funded, Port will forgive any unpaid Deferred Rent that exceeds the Residential Participation Rent as to each Transfer, if any.

**(b) Participation Rent Attributable to a Sale of the Non-Residential Portion.**

Tenant must pay to Port fifteen percent (15%) of Tenant's Net Sale Proceeds (“**Non-residential Participation Rent**”) attributable to the non-residential portions concurrently with and as a condition to the Sale Closing.

**(c)** If Tenant operates at multiple locations, then Port's Sale Participation will be calculated using only the Gross Sale Proceeds, Net Sale Proceeds, and Costs of Sale reasonably attributable to the Premises.

**(d)** As soon as available after Port consents to the Sale, Tenant must deliver to Port an estimated closing statement that includes Tenant's best estimate of: (i) Gross Sale Proceeds; (ii) Costs of Sale; (iii) total Net Sale Proceeds; and (iv) Port's Sale Participation. The closing statement must be updated and delivered to Port the business day before the Sale Closing. If an escrow account is not established for the Sale, Tenant's chief financial officer or independent accountant must certify to Port under penalty of perjury the accuracy of the final closing statement or provide a detailed accounting of and documentation supporting any variances from the estimated closing statement in form and content reasonably acceptable to Port. Tenant must submit the amount of any underpayment with the certificate or accounting. Tenant's obligation to pay Port's Sale Participation will survive the Sale Closing and the expiration or termination of this Lease.

**(e)** If Tenant constructed the Initial Improvements or Subsequent Construction at the Premises, Net Sale Proceeds will be reduced by Tenant's Adjusted Basis, but only if Port previously approved Tenant's Certified Construction Costs as follows: Within ninety (90) days after Completion of the Initial Improvements or Subsequent Construction as the case may be, Tenant must deliver to Port a Construction Costs Report in form and content acceptable to Port in its reasonable discretion, accompanied by a CPA's agreed-upon procedures report prepared in accordance with AICPA standards for compliance attestation and specifying Port as an intended user. Port will notify Tenant in writing whether Port agrees or disagrees with Tenant's Construction Costs Report within ninety (90) days after receiving it. Port will have the right to inspect Tenant's Books and Records for the Construction Costs Report. Tenant must keep accurate Books and Records of all Construction until the later of two (2) years after Tenant's submission of its Construction Costs Report or six (6) months after any dispute regarding the

Construction Costs has been resolved. Tenant's failure to submit a Construction Costs Report as and when required under this Section will be deemed a waiver of its right to make a reduction to Net Sale Proceeds for the portion of the construction for which a report was not provided.

(f) Example Calculations for illustrative purposes only.

(1) Example of Sale Calculation: if: (i) the Initial Improvements have a Class Life of 15 years; (ii) Certified Construction Costs are \$3 million; (iii) Gross Sale Proceeds are \$10 million; (iv) Costs of Sale are \$200,000, leaving Net Sale Proceeds of \$9.8 million; and (v) the Closing Date is the 6th anniversary of the "placed in service" date of the Initial Improvements, then Port's Sale Participation is \$1,170,000, as shown in the calculation below.

Gross Sale Proceeds:	\$10,000,000
Costs of Sale:	<u>\$200,000</u>
Net Sales Proceeds before Adjusted Basis reduction:	\$9,800,000
(Certified Construction Costs of Initial Improvements:	\$3,000,000)
Adjusted Basis (10/15 years amortized):	\$2,000,000
Net Sales Proceeds less Adjusted Basis:	\$7,800,000
Port's Sale Participation at 15%	\$1,170,000

(2) Example of refinancing calculation: if: (i) the initial loan amount is \$2,100,000; (ii) the principal balance of the original loan has paid down to \$1,500,000; (iii) a new loan with a principal of \$3,500,000 has replaced the initial loan; (iv) the cost of refinancing is \$100,000; (v) equity invested remains unchanged; (vi) the appraised value of the nonresidential portion has increased; and (vii) loan underwriting terms have improved; then, after deducting (a) the \$100,000 refinancing cost, (b) the \$1,500,000 principal balance of the initial loan amount, and (c) \$800,000 of loan funds invested in the project, the Net Sale Proceeds are \$700,000 and Port's Sale Participation is \$210,000, as shown in the calculation below.

New Loan Amount:	\$3,500,000
Costs of Refinancing:	\$ 100,000
Old Loan Principal Balance:	\$1,900,000
New Loan Funds Invested:	\$ 800,000
Net Sale Proceeds:	\$ 700,000
Port's Sale Participation at 15%:	\$ 105,000

**26.12. Acknowledgement.** Tenant acknowledges and agrees that Port's rights with respect to Transfers are reasonable limitations for purposes of California Civil Code Section 1951.4 and waives any Claims arising from Port's actions under this **Section 26**.

**26.13. Permitted Limited Partners.** The Parties agree that the following transactions will not be treated as a Transfer under this Lease: (i) any cumulative or aggregate sale, assignment, encumbrance, or other transfer of any percentage of general partnership interests in Tenant of less than a Controlling interest; or(ii) or any transfer of a Limited Partner's interest in a general partner. Such transactions are subject to MOHCD's approval in accordance with the Loan Documents and Tenant shall provide Port with written notice of such transactions. Once approved by MOHCD, the Person will become a Permitted Limited Partner with rights under this Lease upon filing the notice required by **Section 34.4(b)** of this Lease.

**26.14. Transfer Definitions.** For the purpose of this Section, references to this Lease and the Premises mean this Lease and the Premises to the extent Tenant's Leasehold Estate is affected by a Transfer.

**27. DEFAULT BY TENANT.**

Any of the following shall constitute an event of default (the "**Event of Default**") by Tenant hereunder:

(a) failure to commence in accordance with the Schedule of Performance, or after commencement failure to prosecute diligently to Completion (except for Deferred Items, if any), the Construction of the Initial Improvements in accordance with the Scope of Development, approved Construction Documents, and this Lease and any such failure continues for a period of thirty (30) days from the date of written notice from Port; or

(b) Failure to comply with any applicable provision of the MMRP and such failure continues after twenty-four (24) hours following written notice from Port; or

(c) failure to pay to Port any Rent or other sum payable hereunder when due, and such default continues for a period of three (3) days following written notice from Port.

(d) abandonment or vacation of the Premises by Tenant; or

(e) failure to use the Premises solely for the Permitted Use and/or the Occupancy Restrictions, as determined by Port or MOHCD in each of its sole and absolute discretion and such failure continues for a period of twenty-four (24) hours following written notice from Port; provided, however, that notwithstanding the foregoing, failure to use the Premises solely for the Permitted Use shall, at Port's sole and absolute discretion, be deemed an incurable breach of this Lease, allowing Port to immediately terminate this Lease upon written notice without an opportunity to cure; or

(f) a Transfer, or attempted Transfer, of this Lease or the Premises by Tenant contrary to the provision of **Section 26** above (Transfers); or

(g) failure by Tenant or Tenant's broker as applicable to provide evidence of insurance coverage complying with the provisions of **Section 22** (Insurance), failure to maintain any insurance required to be maintained by Tenant pursuant to this Lease, or if any such insurance shall be canceled or terminated or shall expire or be reduced or materially changed, except as permitted in this Lease, and Tenant's or Tenant's broker's failure to deliver evidence of such coverage or failure to reinstate such coverage, all within three (3) business days following written notice from Port; or

(h) failure by Tenant to comply with the provisions of **Section 21** above (Hazardous Materials) and Tenant's failure to cure the foregoing default within twenty-four (24) hours following written notice from Port. If such default cannot reasonably be cured within such twenty-four (24) hour period, Tenant shall not be in default of this Lease if Tenant commences to cure the default within such twenty-four (24) hour period and diligently and in good faith continues to cure the default, provided, however, in no event shall Tenant have more than thirty (30) days to cure such default; or

(i) failure by Tenant to discharge any lien or encumbrance placed on the Premises or any part thereof in violation of this Lease within ten (10) days after the date such lien or encumbrance is filed or recorded against the Premises or any part thereof, or if Tenant has no knowledge of such lien, then Tenant shall discharge such lien or encumbrance within fifteen (15) days following Tenant's knowledge of such lien or encumbrance; or

(j) failure by Tenant to observe, keep or perform any of the other terms, covenants, agreements or conditions contained in this Lease and required to be observed or performed by Tenant and not specifically enumerated in this **Section 27** (Default by Tenant), and such failure continues for a period of fifteen (15) days after written notice by Port, provided that

if such default is not capable of cure within such fifteen (15) day period, Tenant shall have a reasonable period to complete such cure if Tenant promptly undertakes action to cure such default within such fifteen (15) day period and thereafter diligently prosecutes the same to completion within sixty (60) days after the receipt of notice of default from Port. Port shall not be required to provide such notice more than twice in any twelve (12) month period with respect to any material non-monetary defaults and after the second notice in any calendar year, any subsequent failure by Tenant during such twelve (12) month period shall automatically constitute an Event of Default hereunder; or

(k) Tenant shall become bankrupt or insolvent or make a transfer in fraud of creditors, or make an assignment for the benefit of creditors, or bring or have brought against Tenant 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, Tenant is not discharged from the same within sixty (60) days thereafter; or

(l) a receiver is appointed for a substantial part of the assets of Tenant and such receiver is not discharged within sixty (60) days; or

(m) this Lease or any estate of Tenant under this Lease shall be levied upon by any attachment or execution and such attachment is not stayed or lifted within sixty (60) days; or

(n) without limiting the provisions of subsections (e) or (h) above or lengthening the cure periods under those subsections, failure by Tenant to comply with Laws and Tenant's failure to cure the foregoing default within forty-eight (48) hours following written notice from Port.

## **28. PORT'S REMEDIES.**

Upon an Event of Default described in *Section 27* (Default by Tenant), and before exercising any remedies, Port will notify Tenant, the Permitted Limited Partners, MOHCD and each Lender that provided notice under *Section 34.4* (Notices to Lender) in writing of the Tenant's purported breach, failure, or act in accordance with the notice provisions of *Section 37* (Notices), giving Tenant another sixty (60) calendar days from the giving of the notice to cure such Event of Default. If Tenant does not cure or, if the Event of Default is not reasonably susceptible to cure within that sixty (60) day period, begin to cure within sixty (60) days and diligently prosecute such cure to completion, then, subject to the rights of MOHCD and any Lender under *Section 34* (Leasehold Mortgage), Port shall, without further notice or demand of any kind to Tenant or to any other person, have all of its rights at law or in equity, including the following remedies:

**28.1. *Tenant's Right to Possession Not Terminated.*** Port has the remedy described in Section 1951.4 of the California Civil Code (a landlord may continue the lease in effect after a tenant's breach and abandonment and recover rent as it becomes due, if the tenant has the right to sublet and assign subject only to reasonable limitations) under which it may continue this Lease in full force and effect and Port may enforce all of its rights and remedies under this Lease, including the right to collect Rent when due. During the period Tenant is in default, Port may enter the Premises without terminating this Lease and relet them, or any part of them, to third parties for Tenant's account. Tenant shall be liable immediately to Port for all reasonable costs Port incurs in reletting the Premises, including, but not limited to, broker's commissions, expenses of remodeling the Premises required by the reletting and like costs. Reletting can be for a period shorter or longer than the remaining Term, at such rents and on such other terms and conditions as Port deems advisable. Tenant shall pay to Port the Rent due under this Lease on the dates the Rent is due, less the Rent Port receives from any reletting. In the event that Port shall elect to so relet, then rentals received by Port from such reletting shall be applied in the following order: (i) to reasonable attorneys' fees incurred by Port as a result of a default and costs in the event suit is filed by Port to enforce such remedies; (ii) to the payment of any

indebtedness other than Rent due hereunder from Tenant to Port; (iii) to the payment of any costs of maintaining, preserving, altering, repairing and preparing the Premises for reletting, the other costs of reletting, including but not limited to brokers' commissions, attorneys' fees and expenses of removal of Personal Property, trade fixtures and Alterations; (iv) to the payment of Rent due and unpaid hereunder; (v) to the payment of future Rent and other sums payable by Tenant hereunder as the same may become due and payable hereunder; and (vi) the balance, if any, shall be paid to Tenant upon (but not before) expiration of the Term. Should that portion of such rentals received from such reletting during any month, which is applied to the payment of Rent hereunder, be less than the Rent payable during the month by Tenant hereunder, then Tenant shall pay such deficiency to Port. Such deficiency shall be calculated and paid monthly. No act by Port allowed by this **Section 28.1** shall terminate this Lease unless Port notifies Tenant that Port elects to terminate this Lease. After Tenant's default and for as long as Port does not terminate Tenant's right to possession of the Premises, if Tenant obtains Port's consent Tenant shall have the right to assign or sublet its interest in this Lease, but Tenant shall not be released from liability.

**28.2. Termination of Tenant's Right to Possession.** Port may terminate Tenant's right to possession of the Premises at any time. No act by Port other than giving notice of termination to Tenant shall terminate this Lease. Acts of maintenance, efforts to relet the Premises, or the appointment of a receiver on Port's initiative to protect Port's interest under this Lease shall not constitute a termination of Tenant's right to possession. If Port elects to terminate this Lease, Port has the rights and remedies provided by California Civil Code Section 1951.2, including the right to recover from Tenant the following:

(a) The worth at the time of award of the unpaid Rent which had been earned at the time of termination; plus

(b) The worth at the time of award of the amount by which the unpaid Rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that Tenant proves could have been reasonably avoided; plus

(c) The worth at the time of award of the amount by which the unpaid Rent for the balance of the Term after the time of award exceeds the amount of the loss of Rent that Tenant proves could be reasonably avoided; plus

(d) Any other amounts necessary to compensate Port for the detriment proximately caused by Tenant's default, or which, in the ordinary course of events, would likely result, including, but not limited to, attorneys' fees and court costs, the costs of carrying the Premises such as repairs, maintenance, taxes and insurance premiums, utilities, security precautions and the reasonable costs and expenses incurred by Port in (i) retaking possession of the Premises; (ii) cleaning and making repairs and alterations necessary to return the Premises to good condition and preparing the Premises for reletting; (iii) removing, transporting and storing any of Personal Property left at the Premises (although Port shall have no obligation so to do); and (iv) reletting the Premises, including, without limitation, brokerage commissions, advertising costs and attorneys' fees. Efforts by Port to mitigate the damages caused by Tenant's breach of this Lease do not waive Port's rights to recover damages upon termination.

The "worth at the time of award" of the amounts referred to in **Sections 28.2(a)** (Termination of Tenant's Right to Possession) and **28.2(b)** above shall be computed by allowing interest at an annual rate equal to the lesser of the Interest Rate or the maximum non-usurious rate Port is permitted by Law to charge. The "worth at the time of award" of the amount referred to in **Section 28.2(c)** above shall be computed by discounting the amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award, plus one percent (1%).

Notwithstanding the foregoing, during the 15-year tax credit "compliance period" (as defined in Section 42 of the US Internal Revenue Code, as amended) for the Project, Port may only terminate this Lease for a default by Tenant under **Section 27(k)** (Default by Tenant) above.

**28.3. Additional Remedies.** If Tenant is in default of this Lease, Port shall have the right to: (a) have a receiver appointed to collect Rent and conduct Tenant's business, provided, however, that neither the filing of a petition for the appointment of a receiver nor the appointment itself shall constitute an election by Port to terminate this Lease; or (b) seek specific performance of this Lease.

**28.4. Rights of Permitted Limited Partner.**

(a) Port will not exercise its remedy to terminate this Lease if a Permitted Limited Partner is attempting to cure the default and the cure requires removal of the managing general partner, so long as the Permitted Limited Partner is proceeding diligently to remove the managing general partner in order to effect a cure of the default. Permitted Limited Partners shall have the same rights as Lenders described in *Section 34.8(g)* with respect to amendments of this Lease.

(b) If a Permitted Limited Partner cannot cure a default due to an automatic stay in bankruptcy court because the general partner of the Tenant is in bankruptcy, any cure period will be tolled during the pendency of such automatic stay.

**28.5. No Accord and Satisfaction.** No payment by Tenant or receipt by Port of an amount less than the Rent due under this Lease shall be deemed to be other than "on account" of the earliest Rent due; nor shall any endorsement or statement on any check or payment, or letter accompanying such check or payment, be deemed an accord and satisfaction. Port may accept any such partial payment or tender without prejudice to its right to recover the balance of any amount due and to pursue any other remedy herein provided at Law or in equity.

**28.6. Waiver of Redemption.** Tenant hereby waives, for itself and all persons claiming by and under Tenant, redemption or relief from forfeiture under California Code of Civil Procedure Sections 1174 and 1179, or under any other pertinent present or future Law, in the event Tenant is evicted or Port takes possession of the Premises by reason of any default of Tenant hereunder.

**28.7. Continuation of Subleases and Other Agreements.** Subject to the rights of Lenders, Port has the right, at its sole option, to assume any and all Subleases and agreements by Tenant for the maintenance or operation of the Premises, including the Management Agreement. Tenant hereby further covenants that, upon request of Port following a Tenant Event of Default and termination of Tenant's interest in this Lease, subject to the rights of Lenders, Tenant will execute, acknowledge and deliver to Port such further instruments as may be necessary or desirable to vest or confirm or ratify vesting in Port the then existing Subleases, Management Agreement, and other agreements then in force, as above specified.

**28.8. Remedies Not Exclusive.** The remedies set forth in *Section 28* (Port's Remedies) are not exclusive; they are cumulative and in addition to any and all other rights or remedies of Port now or later allowed by Law. Tenant's obligations hereunder shall survive any termination of this Lease.

**29. DEFAULT BY PORT; TENANT'S REMEDIES.**

**29.1. Port Event of Default.** Port will be deemed to be in default hereunder ("Port Event of Default") only if Port fails to perform or comply with any obligation on its part hereunder and such failure continues for more than sixty (60) days after written notice from Tenant, or if such default cannot reasonably be cured within such sixty (60) day period, Port does not within such period commence with due diligence and dispatch the curing of such default, or, having so commenced, thereafter fails or neglects to prosecute or complete with diligence and dispatch the curing of such default.

**29.2. Tenant Remedies.** Upon the occurrence of a Port Event of Default, which Port Event of Default substantially and materially interferes with the ability of Tenant to conduct the Permitted Uses, Tenant has the exclusive right (a) to offset or deduct only from the Rent

becoming due hereunder, the amount of all actual damages incurred by Tenant as a direct result of the Port Event of Default, but only after obtaining a final, unappealable judgment in a court of competent jurisdiction for such damages in accordance with applicable Law and the provisions of this Lease, or (b) to seek equitable relief in accordance with applicable Laws and the provisions of this Lease where appropriate and where such relief does not impose personal liability on Port or its Agents; provided, however, (i) in no event will Tenant be entitled to offset from all or any portion of the Rent becoming due hereunder or to otherwise recover or obtain from Port or its Agents any damages (including, without limitation, any consequential, incidental, punitive or other damages proximately arising out of a default by Port hereunder) or losses other than Tenant's actual damages as described in the foregoing clause (a), (ii) Tenant agrees that, notwithstanding anything to the contrary herein or pursuant to any applicable Laws, Tenant's remedies hereunder constitute Tenant's sole and absolute right and remedy for a default by Port hereunder, and (iii) Tenant has no remedy of self-help.

### **30. DELAY DUE TO FORCE MAJEURE.**

(a) Effect of Force Majeure. For the purpose of this Lease, neither Party (the "Delayed Party," as applicable) will be considered in breach of or default in any obligation or satisfaction of a condition to an obligation of the other party in the event of Force Majeure, and the time fixed for performance of any such obligation or satisfaction of conditions shall be extended by a period of time equal to the duration of the Force Majeure event; provided, however, within thirty (30) days after the beginning of any such Force Majeure event, the Delayed Party shall have first notified the other party of the cause or causes of such delay and claimed an extension for the reasonably estimated period of the enforced delay.

In no event shall an event of Force Majeure extend the Term beyond December 31, 2105.

(b) Definition of Force Majeure. "Force Majeure" means events that cause delays in the Delayed Party's performance of its obligations under this Lease, or in the satisfaction of a condition to the other party's performance under this Lease, due to causes beyond the Delayed Party's control and not caused by the acts or omissions of the Delayed Party (excluding, in any case, a Delayed Party's performance of the payment of money required under the terms of this Lease), including: acts of nature or of the public enemy; war; invasion; insurrection; riots; any general moratorium in the issuance of governmental or regulatory permits applicable to the Premises or the Initial Improvements (but in the absence of such a moratorium, acts of the government relating to issuance of building permits or other Regulatory Approvals are governed by *Section 13*) (Port Acting As Owner Of Property; Regulatory Approvals); fires; floods; tidal waves; epidemics; quarantine restrictions; freight embargoes; earthquakes; unusually severe weather (but only if such unusually severe weather causes actual delays); delays of contractors or subcontractors due to any of the foregoing causes; the unanticipated presence of Hazardous Materials or other concealed conditions on the Premises that would not have reasonably been discovered through due diligence and that would actually delay or materially and adversely impair or delay Tenant's Construct the Initial Improvements; archeological finds on the Premises; strikes and substantial interruption of work because of labor disputes (excluding strikes and labor disputes directly related to any contracts between Tenant and its contractors or work performed on behalf of Tenant); inability to obtain materials or reasonably acceptable substitute materials (provided that Tenant has ordered such materials on a timely basis and Tenant is not otherwise at fault for such inability to obtain materials); or any Litigation Force Majeure (provided that the Delayed Party proceeds with due diligence to defend or commence, as applicable, such action or proceeding or take other appropriate measures to resolve any dispute that is the subject of such action or proceeding).

(c) Definition of Litigation Force Majeure. "Litigation Force Majeure" means any action or proceeding before any court, tribunal, or other judicial, adjudicative or legislative decision-making body, including any administrative appeal, brought by a third party that challenges, (a) the validity of any action taken by the City in connection with the Project or any



findings upon which any action is predicated, or (b) the failure of any Regulatory Agency to impose conditions to a Regulatory Approval including building permits or the validity of any other Regulatory Approval required in connection with the Project.

Notwithstanding anything to the contrary contained in this Lease, Litigation Force Majeure excludes any action or proceeding brought by an Affiliate of Tenant, any of Tenants' members or their Affiliates, any consultant of Tenant, or any other third party assisted by Tenant, directly or indirectly, in such action or proceeding. Performance by a party hereunder shall be deemed delayed or made impossible by virtue of Litigation Force Majeure during the pendency thereof, and until a judgment, order, or other decision resolving such matter in favor of the party whose performance is delayed has become final and unappealable.

The Parties will each proceed with due diligence and shall cooperate with one another to defend the action or proceeding or take other measures to resolve the dispute that is the subject of such action or proceeding.

(d) Limitations on Force Majeure. Under no circumstances shall the delay attributable to an event of Force Majeure or Litigation Force Majeure extend beyond twenty-four (24) months after the start of the event of Force Majeure or Litigation Force Majeure.

### **31. LITIGATION EXPENSES; ATTORNEYS' FEES.**

**31.1. *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 Lease, shall be entitled to recover from the other party its costs and expenses of suit, including but not limited to reasonable attorneys' fees, which 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.

**31.2. *Appeals***. Attorneys' fees under this Section shall include attorneys' fees and all other reasonable costs and expenses incurred in connection with any appeal.

**31.3. *City Attorney***. For purposes of this Lease, 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.

### **32. ENTRY ON PREMISES.**

**32.1. *Entry by City***. Subject to the rights of Residential Occupants, Tenant shall permit City and its Agents to enter the Premises during regular business hours upon reasonable prior notice (and at any time and without notice during Construction or in the event of an emergency) for the purpose of (i) inspecting the same for compliance with any of the provisions of this Lease, (ii) to observe the progress of Construction, to inspect the work being performed in Constructing the Improvements, and to monitor Tenant's compliance with the Mitigation Monitoring and Reporting Program and the risk management plan; (iii) performing any work on the Premises that City has right to perform, (iv) to serve, post, or keep posted any notices required or allowed under the provisions of this Lease; or (v) inspecting, sampling, testing, surveying, or monitoring the Premises or any portion thereof, including the Buildings, grounds, and subsurface areas, as City reasonably deems necessary or appropriate for evaluation of Hazardous Materials, or other physical, geotechnical, or environmental conditions. Nothing herein shall imply any duty on the part of City to conduct inspections, but such right of inspection shall not relieve Tenant of its independent responsibility to operate, manage, maintain,

and repair the Premises and Improvements in accordance with this Lease. Additionally, City's failure to inspect or obtain samples or to detect conditions attributable to Tenant'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 Tenant's responsibility under this Lease.

Nothing herein shall imply any duty on the part of City to perform any work that Tenant is required to perform, nor to place upon City any obligation or liability for the care, supervision or repair of the Premises; provided, however, City shall use commercially reasonable efforts to minimize interference with the activities of Tenant and Residential Occupants and their respective Invitees during any inspection. If City elects to perform work on the Premises, it shall not be liable for inconvenience, loss of business or other damage to Tenant by reason of the performance of such work on the Premises, or on account of bringing necessary materials, supplies and equipment into or through the Premises during the course thereof, provided that City uses commercially reasonable diligence to minimize the interference that any such work may cause to the activities of Tenant, its Subtenants, or their respective Invitees.

Without limiting the forgoing, the City and its representatives will exercise due care in entering upon and/or inspecting the Premises, and will perform all entry and inspection in a professional manner. The City and its representatives will comply with any reasonable safety and security measures imposed by Tenant and provided in advance to City and its representatives.

**32.2. Notice, Right to Accompany.** City agrees to give Tenant reasonable prior notice of City'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. Tenant shall have the right to have a representative of Tenant accompany City or its Agents on any entry into the Premises. Notwithstanding the foregoing, no notice shall be required for City's entry onto public areas of the Premises during hours such public areas are open.

**32.3. Emergency Entry.** City may enter the Premises at any time, without notice, in the event of an emergency. City shall have the right to use any and all means which City 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 forcible or unlawful entry into, or a detainer of, the Premises, or an eviction of Tenant from the Premises or any portion of the Premises.

**32.4. No Liability.** City shall not be liable in any manner, and Tenant hereby waives any Claim for damages, for any inconvenience, disturbance, loss of business, nuisance, or other damage, including without limitation any abatement or reduction in Rent, arising out of City's entry onto the Premises as provided in this Section or performance of any necessary or required work on the Premises, or on account of bringing necessary materials, supplies and equipment into or through the Premises during the course thereof, except damage resulting solely from the willful misconduct or gross negligence of City or its authorized representatives.

### **33. SURRENDER AND QUITCLAIM.**

**33.1. Surrender.** Upon expiration or earlier termination of this Lease, Tenant shall surrender to Port the Premises in good order, condition, and repair (except for ordinary wear and tear occurring after the last necessary maintenance made by Tenant and except for Casualty or Condemnation as described in *Sections 23* (Damage or Destruction) and *24* (Condemnation)). Ordinary wear and tear shall not include any damage or deterioration that would have been prevented by proper maintenance by Tenant, or Tenant otherwise performing all of its obligations under this Lease. The Premises shall be surrendered clean, free of debris, waste, and Hazardous Materials, and free and clear of all liens and encumbrances other than liens and encumbrances existing as of the date of this Lease and any other encumbrances created by Port. On or before the expiration or earlier termination of this Lease, Tenant at its sole cost shall remove from the Premises, and repair any damage caused by removal of, Personal Property,

including any signage. Except as specified in Port's Notice of Removal under **Section 16** (Improvements and Alterations, Alterations and Improvements shall remain in the Premises as Port property.

If the Premises is not surrendered at the end of the Term or sooner termination of this Lease, and in accordance with the provisions of this **Section 33** (Surrender and Quitclaim) and **Section 16.2** (Removal of Improvements), Tenant shall continue to be responsible for the payment of Rent until the Premises is surrendered in accordance with this Section, and Tenant shall Indemnify the Indemnified Parties from and against any and all loss or liability resulting from delay by Tenant in so surrendering the Premises including, without limitation, any costs of Port to obtain possession of the Premises; any loss or liability resulting from any Claim against Port made by any succeeding 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 Premises to any such succeeding tenant or prospective tenant, together with, in each instance, reasonable attorneys' fees and costs.

No act or conduct of Port, including, but not limited to, the acceptance of the keys to the Premises, shall constitute an acceptance of the surrender of the Premises by Tenant before the expiration of the Term. Only a written notice from Port to Tenant confirming termination of this Lease and surrender of the Premises by Tenant shall constitute acceptance of the surrender of the Premises and accomplish a termination of this Lease.

**33.2. Quitclaim.** Upon the expiration or earlier termination of this Lease, the Premises shall automatically, and without further act or conveyance on the part of Tenant or Port, become the property of Port, free and clear of all liens and without payment therefore by Port and shall be surrendered to Port upon such date. Upon expiration or earlier termination of this Lease, Tenant shall promptly deliver to Port, without charge, a quitclaim deed to the Premises and any other instrument reasonably requested by Port in a form suitable for recordation in the Official Records to evidence or otherwise effect the termination of Tenant's Leasehold Estate hereunder

**33.3. Abandoned Property.** Any items, including Personal Property, not removed by Tenant as required herein shall be deemed abandoned. Port may retain, store, remove, and sell or otherwise dispose of abandoned Personal Property, and Tenant waives all Claims against Port for any damages resulting from Port's retention, removal and disposition of such property; provided, however, that Tenant shall be liable to Port for all costs incurred in storing, removing and disposing of abandoned Personal Property and repairing any damage to the Premises resulting from such removal. Tenant agrees that Port may elect to sell abandoned Personal Property and offset against the sales proceeds Port's storage, removal, and disposition costs without notice to Tenant or otherwise according to the procedures set forth in California Civil Code Section 1993, the benefits of which Tenant waives.

**33.4. Survival.** Tenant's obligation under this **Section 33** (Surrender and Quitclaim) shall survive the expiration or earlier termination of this Lease.

#### **34. LEASEHOLD MORTGAGE**

**34.1. Subtenant's Rights.** The provisions of this **Section 34** apply to a Commercial Subtenant and other Subtenants and Subleasehold Estates to the same extent as to Tenant and a Leasehold Estate.

##### **34.2. No Encumbrances.**

(a) Notwithstanding any other provision of this Lease and subject to the prior written consent of MOHCD and Port, which consent shall not be unreasonably withheld, conditioned or delayed, Leasehold Mortgages are permitted to be placed upon the Leasehold Estate and/or the Improvements only for the purpose of securing loans of funds to be used for financing the acquisition, design, construction, renovation or reconstruction or refinancing of the Improvements and any other expenditures reasonably necessary and appropriate to acquire, own,

develop, construct, renovate, or reconstruct the Improvements under this Lease and in connection with the operation of the Improvements, and costs and expenses incurred or to be incurred by Tenant in furtherance of the purposes of this Lease. Tenant shall not seek Port's consent until it has obtained MOHCD's consent in writing.

(b) Tenant covenants and affirms that it shall bear all of the costs and expenses in connection with (i) the preparation and securing of any Leasehold Mortgage, (ii) the delivery of any instruments and documents and their filing and recording, if required, and (iii) all taxes and charges payable in connection with any Leasehold Mortgage.

(c) Under no circumstance whatsoever shall Tenant place or suffer to be placed any lien or encumbrance on Port's fee interest in the Premises in connection with any financing permitted hereunder or otherwise. Port shall not subordinate its interest in the Premises nor its right to receive Rent to any Lender. Any mortgage, deed of trust, encumbrance or lien not permitted by this Section shall be deemed to be a violation of this covenant on the date of its execution or filing of record regardless of whether or when it is foreclosed or otherwise enforced.

(d) Notwithstanding anything to the contrary in this Lease, Tenant and each and every Subtenant shall have the right to hypothecate, transfer, assign and encumber and grant a security interest in and to its own Personal Property located in the Premises to any lender, equipment lessor or other financier, or any accounts receivable to any factor or other lender, without the consent or knowledge of Port. Upon the request of Tenant, Port shall enter into any commercially reasonable written agreement with Tenant or Subtenant (except for Residential Occupants) and its lender for Personal Property, wherein Port shall agree to subordinate any landlord lien rights it may have in and to such Personal Property to the interest of lender, and waive any claim that the same are part of the Premises by virtue of being affixed thereto but only to the extent that the provisions of this Lease authorize Tenant or Subtenant to remove such Personal Property upon the expiration or earlier termination of this Lease. As a condition to entering into such agreement, Tenant or Subtenant shall reimburse Port for all its costs (including attorneys' fees and costs incurred and Port staff time spent) associated with reviewing, negotiating and approving such agreement. Additionally, such agreement shall (a) contain a requirement that each such lender, give proper notice to Port (i) of any default by Tenant or Subtenant, and (ii) prior to any entry of the Premises to remove Personal Property due to such default and obtain Port's approval of the timing thereof, (b) prohibit the sale of Personal Property on the Premises (c) comply with all Laws, including obtaining a Port building permit if required, and contain an agreement by such lender to repair any damage to the Premises caused by such entry and removal and Indemnify the Indemnified Parties for Claims related to such entry and removal.

(e) With the exception of the rights expressly granted in this Lease to Lenders and except to the extent otherwise specifically provided in any non-disturbance agreement entered into among Port, Tenant and a Lender, the execution and delivery of a Mortgage shall not give or be deemed to give a Lender any greater rights than those granted to Tenant hereunder.

(f) Only Senior Leasehold Lender Entitled to Protection Provisions. Notwithstanding anything to the contrary set forth herein, any rights given hereunder to Lenders will only apply to the Senior Lender, unless such Senior Lender elects not to exercise its rights thereunder in which event such rights will apply to the next most senior Lender.

**34.3. Required Provisions in Every Mortgage.** Each Mortgage permitted under this Lease shall provide: (a) that Lender shall give written notice to Port in accordance with **Section 37** (Notices) of this Lease of the occurrence of any event of default under the Mortgage; (b) that Lender shall give written notice to Port at the time such Lender initiates any foreclosure action; (c) that only an entity controlled by a California nonprofit public benefit corporation exempt from tax under Section 501(c)(3) of the Internal Revenue Code has a right to a New

Lease or may be a Subsequent Owner such that the Premises continues to receive an exemption from state property taxes as provided under Section 214 of the California Revenue and Taxation Code or successor statute with the same effect unless Lender, with the prior written consent of MOHCD in its sole discretion, elects to change the levels of affordability specified in the Permitted Uses in **Section 2** (Key Lease Terms) to cause up to one hundred percent (100%) of the residential units to be Moderate Income Households [or Middle Income Household if permissible under state law], increases the rent paid for such units by Residential Occupants to the fair market rent for such units as determined by MOHCD in its sole discretion and proportionally increases the Rent due to Port under this Lease as further described in **Section 34.9(vi)**; and (d) subject to the provisions of **Sections 23.1(b)** and **24.1(a)**, that the disposition and application of insurance and condemnation awards shall be in accordance with the provisions of this Lease.

#### **34.4. Notices to Lender.**

(a) **Copies of Notices.** Whenever Port delivers any notice or demand to Tenant for any Tenant Event of Default, Port will at the same time forward a copy of such notice or demand to each Lender having a Mortgage on the Premises and each Permitted Limited Partner who has previously made a written request to Port for a copy of any such notices in accordance with **Section 34.4(b)** (Notice to Port). Port's notice will be sent to the address specified by such Lender in its most recent notice to Port. A delay or failure by Port to provide such notice required by this **Section 34.4(a)** (Copies of Notices) will extend, for the number of days until notice is given, the time allowed to Lender for cure.

(b) **Notice to Port.** Each Lender and each Permitted Limited Partner is entitled to receive notices from time to time given to Tenant by Port under this Lease in accordance with **Section 34.4(a)** (Copies of Notices) provided such Lender or Permitted Limited Partner has delivered a notice to Port in substantially the following form:

"The undersigned does hereby certify that it is a [Lender/Permitted Limited Partner], as such term is defined in that certain Lease entered into by and between the City and County of San Francisco, operating by and through the San Francisco Port Commission, as landlord, and \_\_\_\_\_, a \_\_\_\_\_, as tenant (the "Lease"), of tenant's interest in the Lease demising the property, a legal description of which is attached hereto as **Exhibit A-1** and made a part hereof by this reference. The undersigned hereby requests that copies of any and all notices from time to time given under the Lease to tenant by Port be sent to the undersigned at the following address: \_\_\_\_\_."

If a Lender or Permitted Limited Partner desires to have Port acknowledge receipt of its notice under this **Section 34.4(b)**, then such request must be made in bold, underlined and in capitalized letters.

Each Lender or Permitted Limited Partner filing a notice under this **Section 34.4(b)** shall also advise Port in writing once it is no longer a Lender or Permitted Limited Partner.

#### **34.5. Preservation of Leasehold Benefits.**

Until such time as a Lender notifies Port in writing that the obligations of the Tenant under its Loan Documents have been satisfied, Port agrees:

(i) That Port shall not voluntarily cancel or surrender this Lease, or accept a voluntary cancellation or surrender of this Lease by Tenant, or materially amend this Lease to increase the obligations of the Tenant or the rights of Port thereunder, without the prior written consent of the Lender who has provided the notice required by **Section 34.4** (Notices to Lender); provided that Lender's consent is not unreasonably withheld or delayed;

(ii) That Port shall not enforce against a Lender any waiver or election made by the Tenant under this Lease which has a material adverse effect on the value of the Leasehold Estate under this Lease without the prior written consent of the Lender who has

provided the notice required by *Section 34.4* (Notices to Lender); provided that Lender's consent is not be unreasonably withheld or delayed;

(iii) That Port shall provide reasonable prior notice to each Lender who has provided notice required by *Section 34.4* (Notices to Lender) of any proceedings for adjustment or adjudication of any insurance or condemnation claim involving the Premises and will permit each Lender to participate therein as an interested party.

**34.6. *Lender Not Obligated to Construct.***

(a) Lender is not obligated to complete any construction of the Initial Improvements or to guarantee such completion; nor shall any covenant or any other provision of this Lease be construed so to obligate such Lender. However, in the event the Lender does undertake to complete or guarantee the Completion of the Construction of the Initial Improvements by stating its intention in writing to Port, nothing in this Lease shall be deemed or construed to permit or authorize any such Lender or its successors or assigns to devote the Premises or any portion thereof to any uses or to construct any Improvements thereon, other than the Permitted Uses and subject to any reasonable modifications in plans proposed by any Lender or its successors in interest proposed for the viability of the Premises, subject to the approval of Port which approval shall not be unreasonably withheld. Notwithstanding any other provision of this Lease or of any Mortgage, the Premises cannot be used for any purposes not consistent with any existing or future favorable Consistency Determination by Port or State Lands.

(b) In the event Lender forecloses, obtains a deed in lieu of foreclosure or otherwise obtains Tenant's interest in the Premises and undertakes construction of the Initial Improvements (A) such Lender shall not be bound by the provisions of the Schedule of Performance with respect to any deadlines for the Completion of the Initial Improvements but shall only be required to complete the Initial Improvements with due diligence and in conformance with a new Schedule of Performance as agreed upon by the Lender and Port, (B) such Lender shall only be required to complete the Initial Improvements in accordance with the Consistency Determination, all applicable building codes and ordinances, and the approved Construction Documents with such changes that are mutually agreed upon by Port and Lender pursuant to Subsection (C) hereof; and (C) Port and Lender shall negotiate in good faith such reasonable amendments and reasonable modifications to this Lease as the Parties mutually determine to be reasonably necessary based upon the financial and construction conditions then existing, but in no event shall any amendment include terms that are contrary to any existing or future favorable Consistency Determination by Port or State Lands.

(c) In any case where six (6) months after assumption of obligations pursuant to *Section 34.6(a)* (Lender Not Obligated to Construct) above, a Lender has not proceeded diligently with Completion of the construction of the Initial Improvements, Port shall be afforded the rights against such Lender it would otherwise have against Tenant under this Lease for events or failures occurring after such assumption.

**34.7. *Mortgage Default by Tenant and Port's Rights.***

(a) In the event of a default or breach by Tenant in or of its obligations under any Leasehold Mortgage and Tenant's failure to timely commence or diligently prosecute cure of such default or breach, Port may, at its option, cure such breach or default for the period of one hundred ten (110) days after the date on which the Lender provides notice of such default to Port. In such event, Port shall be entitled to reimbursement from Tenant of all costs and expenses reasonably incurred by Port in curing the default or breach. After ninety (90) days following the date of Lender's notice of default, and following the expiration of all applicable cure periods of Tenant under the applicable Loan Documents, Port shall also have the right to assign Tenant's interest in the Lease to another entity, subject to such Lender's written consent, which may be conditioned, among other things, upon the assumption by such other entity of all obligations of the Tenant under the Leasehold Mortgage.

**34.8. Lender's Right to Cure.** If Tenant shall mortgage this Lease in compliance with the provisions hereof, then, so long as any such Mortgage shall remain unsatisfied of record, the following provisions shall apply:

(a) **Cure Periods.** Each Lender shall have the right, but not the obligation, at any time prior to termination of this Lease, to pay the Rents due hereunder, to effect any insurance, to pay taxes or assessments, to make any repairs or improvements, to do any other act required of Tenant hereunder, and to do any act which may be necessary and proper to be done in the performance and observance of the agreements, covenants and conditions hereof to prevent termination of this Lease; provided that all such acts shall be performed in compliance with the terms of this Lease. Except after Lender acquires Tenant's interest under this Lease, no such action shall constitute an assumption by such Lender of the obligations of Tenant under this Lease. Subject to compliance with the applicable terms of this Lease, each Lender and its agents and contractors shall have full access to the Premises for purposes of accomplishing any of the foregoing. Any of the foregoing done by any Lender shall be as effective to comply with Tenant's obligations under the Lease, to cure a default by Tenant under the Lease or a Tenant Event of Default, or to prevent a termination of this Lease, each as the same would have been if done by Tenant. In the case of any notice of default given by Port to Tenant and/or Lender in accordance with **Section 34.4** (Notices to Lender), Lender shall have the same concurrent cure periods as are given to Tenant under this Lease for remedying a default or causing it to be remedied, plus, in each case, an additional period of sixty (60) days after the later to occur of (i) the expiration of Tenant's cure period, or (ii) the date that Port has served such notice of default upon Lender. Port shall accept such performance by or at the instance of Lender as if the same had been done by Tenant. If a non-monetary default cannot reasonably be cured or remedied within such additional sixty (60) day period, such cure period shall be extended at Lender's request so long as Lender commences the cure or remedy within such period, and prosecutes the completion thereof with diligence and dispatch, or if such default cannot be reasonably be cured or remedied by Lender within such sixty (60) day period without obtaining possession of the Premises (if possession is required to cure or remedy) the cure period shall be extended so long as Lender is diligently seeking to obtain possession and thereafter commences the cure or remedy within such period as is reasonable.

(b) **Foreclosure.** Upon the occurrence of a Tenant Event of Default, other than a monetary default or other default reasonably susceptible of being cured prior to a Lender obtaining possession, Port shall take no action to effect a termination of this Lease if, within the later of sixty (60) days after notice of such Tenant Event of Default is given to each Lender or the expiration of Tenant's cure period under the applicable Loan Documents, a Lender shall have obtained possession of the Premises (including possession by a receiver), or a Lender notified Port of its intention to institute foreclosure proceedings (or to commence actions to obtain possession of the Premises through a receiver) or otherwise acquire Tenant's interest under this Lease, and thereafter promptly commences and prosecutes such proceedings with diligence and dispatch subject to normal and customary postponements and compliance with any judicial orders relating to the timing of or the right to conduct such proceedings. A Lender, upon acquiring Tenant's interest in this Lease, shall be required promptly to cure all monetary defaults and all other defaults then reasonably susceptible of being cured by such Lender to the extent not cured prior to the completion of foreclosure proceedings. The foregoing provisions of this Section are subject to the following: (A) no Lender shall be obligated to continue possession or to continue foreclosure proceedings after a Tenant Event of Default is cured; (B) nothing herein contained shall preclude Port, subject to the provisions of this Section, from exercising any rights or remedies under this Lease (other than a termination of this Lease to the extent otherwise permitted hereunder) with respect to any other Tenant Events of Default during the pendency of such foreclosure proceedings; (C) such Lender shall agree with Port in writing to comply during the foreclosure period with the terms, conditions and covenants of this Lease as are reasonably susceptible of being complied with by Lender, including the payment of all sums due and owing hereunder and the Permitted Uses; (D) anything herein contained to the contrary

notwithstanding, a Lender, and its designee or nominee (other than Tenant), shall have no obligation to cure any non-monetary Event of Default by Tenant under this Lease which is not reasonably susceptible of being cured such as a prior unapproved Transfer of the Lease; provided, that, such provisions of this Lease shall apply to and remain effective on a prospective basis notwithstanding Lender's inability to cure such previous non-monetary default. Notwithstanding anything to the contrary, including an agreement by Lender given under clause (C) of the preceding sentence, Lender shall have the right at any time to notify Port that it has relinquished possession of the Premises to Tenant or that it will not institute foreclosure proceedings or, if such foreclosure proceedings have commenced, that it has discontinued them, and, in such event, Lender shall have no further liability under such agreement from and after the date it delivers such notice to Port, and, thereupon, Port shall be entitled to seek the termination of this Lease (unless such Tenant Event of Default has been cured) and/or any other available remedy as provided in this Lease. Upon any such termination, the provisions of this Section shall apply. If Lender is prohibited by any process or injunction issued by any court having jurisdiction of any bankruptcy or insolvency proceedings involving Tenant from commencing or prosecuting foreclosure or other appropriate proceedings in the nature thereof, the times specified above for commencing or prosecuting such foreclosure or other proceedings shall be extended for the period of such prohibition, provided that Lender shall (x) have fully cured any monetary Tenant Event of Default, (y) continue to pay currently such Rent as and when the same become due, and (z) perform all other obligations of Tenant under this Lease to the extent that such obligations are reasonably susceptible of being performed by Lender.

(c) Limitation on Liability of Lender. Anything contained in this Lease to the contrary notwithstanding, no Lender, or its designee or nominee, shall become liable under the provisions of this Lease, unless and until such time as it becomes, and then only for so long as it remains, the owner of the Leasehold Estate created hereby, and then only with respect to those obligations arising during such period of ownership.

(d) New Lease. In the event this Lease is terminated prior to the Expiration Date, except by Major Casualty during the last ten (10) years of the Term, an event of Uninsured Casualty, or Total Condemnation, Port will deliver to each Lender who has previously made a written request to Port for a copy of any such notices in accordance with **Section 34.4(b)** (Notices to Lender) written notice that this Lease has been terminated, together with a statement of any and all sums which would at that time be due under this Lease but for such termination, and of all other defaults, if any, under this Lease then known to Port. Each Lender will thereupon have the option to obtain a new lease of the Premises (“**New Lease**”), which option must be exercised by written notice to Port within thirty (30) days after service of such notice that this Lease has been terminated, in accordance with and upon the following terms and conditions: The provisions of this **Section 34.8(d)** (New Lease) will inure only to the benefit of the holders of permitted Mortgages that comply with all terms and conditions of this Lease.

(i) Port will enter into a New Lease with the most Senior Lender that is an entity controlled by a California nonprofit public benefit corporation exempt from tax under Section 501(c)(3) of the Internal Revenue Code such that the Premises receives an exemption from state property taxes as provided under Section 214 of the California Revenue and Taxation Code or successor statute with the same effect giving notice within such thirty (30)-day period, subject to the provisions set forth in this **Section 34.8(d)** (New Lease) and provided that such Lender assumes Tenant’s obligations as sublandlord under any Subleases then in effect (such Lender is sometimes referred to as a “**Subsequent Owner**”); and

(ii) If the affordable rent and use restrictions in **Section 2** (Key Lease Terms) will be maintained, the Subsequent Owner must be controlled by a California nonprofit public benefit corporation exempt from tax under Section 501(c)(3) of the Internal Revenue Code such that the Premises receives an exemption from state property taxes as provided under Section 214 of the California Revenue and Taxation Code or successor statute with the same effect; and



(iii) The New Lease will be effective as of the date of termination of this Lease, will be for the remainder of the Term, and at the Rent and upon all the agreements, terms, covenants and conditions hereof, in substantially the same form as this Lease, except for any requirements or conditions which Tenant has satisfied prior to the termination of this Lease and any new or amended ordinances or policies adopted by Port or the City applicable to real property leases. Lender will also pay for Port's reasonable Attorneys' Fees and Costs for negotiating and documenting the New Lease with Lender. The New Lease will have the same priority as this Lease. Such New Lease will require the Lender to perform any unfulfilled monetary obligation of Tenant under this Lease that would, at the time of the execution of the New Lease, be due under this Lease if this Lease had not been terminated and to perform as soon as reasonably practicable any unfulfilled non-monetary obligation which is reasonably susceptible of being performed by such Lender. Construction of the Initial Improvements and Restoration of the Improvements will be deemed to be an obligation susceptible of being performed by Lender. Upon the execution of the New Lease, Lender will pay to Port any and all sums which would at the time of the execution thereof be due under this Lease but for such termination, and will pay all expenses, including Attorneys' Fees and Costs incurred by Port in connection with such defaults and termination, the recovery of possession of the Premises, and the preparation, execution and delivery of the New Lease. The provisions of this **Section 34.8(d)** (New Lease) will survive any termination of this Lease (except as otherwise expressly set out in the first sentence of this **Section 34.8(d)** (New Lease), and will constitute a separate agreement by Port for the benefit of and enforceable by Lender.

(e) Nominee. The rights of Lender under this **Section 34.8(d)** (New Lease) may be exercised by or through its nominee or designee (other than Tenant) which is an Affiliate of Lender; provided, however, no Lender will acquire title to the Lease through a nominee or designee which is not a Person otherwise permitted to become Tenant hereunder; provided, further that a Lender may acquire title to the Lease through a wholly owned (directly or indirectly) subsidiary of Lender.

(f) Subleases. Effective upon the commencement of the term of any New Lease executed pursuant to **Section 34.8(d)** (New Lease), any Sublease then in effect will be assigned and transferred without recourse by Port to Lender. Between the date of termination of this Lease and commencement of the term of the New Lease, so long as Lender enters into a New Lease, Port will not (1) enter into any new subleases, management agreements or agreements for the maintenance of the Premises or the supplies therefor which would be binding upon Lender, (2) cancel or materially modify any of the existing subleases, management agreements or agreements for the maintenance of the Premises or the supplies therefor or any other agreements affecting the Premises, or (3) accept any cancellation, termination or surrender of any of the above without the written consent of Lender, which consent will not be unreasonably withheld or delayed. Effective upon the commencement of the term of the New Lease, if permitted by Law or if Port holds title to the Personal Property within the Premises (except for the Personal Property of Residential Occupants), Port will also transfer to Subsequent Owner, its designee or nominee (other than Tenant), without recourse, such Personal Property within the Premises.

(g) Consent of Lender. No material modification, termination or cancellation of this Lease will be effective against the a Lender unless a copy of the proposed material modification, termination or cancellation has been delivered to the most Senior Lender and such Lender has approved the material modification, termination or cancellation in writing, which approval will not be unreasonably withheld, conditioned, or delayed. Any Lender having such approval rights will either approve or disapprove the proposed modification, termination, or cancellation, as applicable, with specified reasons for any disapproval together with reasonable requirements that if satisfied would obtain such Lender's approval, in writing, within thirty (30) days after delivery of a copy thereof. The most Senior Lender's failure to deliver an approval or disapproval notice within ten (10) days after it receives a second written notice after the

applicable time period will be deemed such Lender's approval of the proposed modification, termination, or cancellation. No merger of this Lease and the fee estate in the Premises will occur on account of the acquisition by the same or related parties of the Leasehold Estate created by this Lease and the fee estate in the Premises without the prior written consent of the most Senior Lender.

(h) Limitation on Obligation to Cure. Anything herein contained to the contrary notwithstanding, a Lender, and its designee or nominee (other than Tenant), will have no obligation to cure (i) any Tenant Event of Default occurring pursuant to *Sections 27(d)* or *27(k)* (Default by Tenant), or (ii) any other non-monetary Tenant Event of Default under this Lease which is not reasonably susceptible of being cured without possession of the Premises; provided, however, such provisions of this Lease will apply to and remain effective on a prospective basis notwithstanding Lender's inability to cure such previous Events of Default.

(i) Further Assurances. Port, through its Executive Director, and Tenant will cooperate in including in this Lease by suitable written amendment from time to time any provision which may be reasonably requested by the most Senior Lender to implement the provisions and intent of this *Section 34.8(d)* (New Lease), provided, however, that any such amendment will not adversely affect any of Port's rights and remedies under this Lease and Tenant will reimburse Port for all of Port's costs related to reviewing, negotiating and executing any such amendment.

(j) MOHCD's right to cure is described in *Section 4.4*.

#### **34.9. Lender's Rights to Record, Foreclose and Assign.**

Port hereby agrees with respect to any Leasehold Mortgage, that:

(i) the Lender may cause same to be recorded and enforced, and upon foreclosure, sell and assign the Leasehold Estate created hereby to an assignee from whom it may accept a purchase price; subject, however, to Lender's first securing written approval from Port, which approval shall not be unreasonably withheld, and if the specific affordable rent, income and use restrictions set forth in *Section 2* (Key Lease Terms) will be maintained, the Subsequent Owner must be controlled by a California nonprofit public benefit corporation exempt from tax under Section 501(c)(3) of the Internal Revenue Code such that the Premises receives an exemption from state property taxes as provided under Section 214 of the California Revenue and Taxation Code or successor statute with the same effect. Lender, furthermore, may acquire title to the Leasehold Estate in any lawful way, and if the Lender becomes the assignee, may sell and assign the Leasehold Estate subject to Port approval, which shall not be unreasonably withheld.

(ii) Notwithstanding anything to the contrary in this Lease, in the event of a loss of operating subsidy, which may include but shall not be limited to Project Based Vouchers or LOSP funds, Tenant may increase rents to the maximum allowed by unit type designated in writing by MOHCD so long as such designation continues to comply with the requirements of the State Legislation as determined by Port in its sole discretion.

(iii) each Subsequent Owner must take said Leasehold Estate subject to all of the provisions of this Lease, and except as provided elsewhere in this Lease, assume all of the obligations of Tenant under this Lease;

(iv) any Permitted Limited Partners of Tenant will have the same rights as any Lender under this Section, and any reference to a Lender in those sections will be deemed to include the Permitted Limited Partners; provided, however, that the rights of the Permitted Limited Partners are subordinate to the rights of any Lender;

(v) In the event Lender subsequently Transfers its interest under this Lease after acquiring the same by foreclosure or deed in lieu of foreclosure or subsequently Transfers its interest under any New Lease and in connection with any such

Transfer, Lender takes back a mortgage or deed of trust encumbering such Leasehold Estate to secure a portion of the purchase price given to Lender for such Transfer, then such mortgage or deed of trust shall be considered a permitted Mortgage under this Lease, and Lender shall be entitled to receive the benefit and enforce the provisions of this **Section 34** and any other provisions of this Lease intended for the benefit of Lenders.

(vi) If as described in **Section 34.3**, with the prior written consent of MOHCD, a Lender or Subsequent Owner elects to change the levels of affordability specified in the Permitted Uses in **Section 2** (Key Lease Terms) to cause up to one hundred percent (100%) of the residential units for Moderate Income Households [or Middle Income Household if permissible under state law], Base Rent shall be increased to include the then-fair market rental value taking into account the affordability restrictions agreed to by the Lender or Subsequent Owner pursuant to this **Section 34.9(vi)**. MOHCD shall determine the then-fair market rental value through its standard procedures and practices including through a mutually acceptable appraisal process with the Lender or Subsequent Owner that will include a market land valuation, as well as a market land lease rent level evaluation. Any increase in Base Rent established by this process shall be documented by MOHCD, Port and the Lender or Subsequent Owner by countersigned written addendum to this Lease.

**34.10. Transfer of Mortgage.** Port hereby consents to a Transfer by Lender, absolutely or as collateral security for performance of its obligations, of its Mortgage or any interest therein, provided such transfer satisfies the requirements of this Lease, and in the event of any such Transfer the new Lender or pledgee of the Mortgage shall have all the rights of its predecessor Lender hereunder until such time as the Mortgage is further transferred or released from the Leasehold Estate.

**34.11. Appointment of Receiver.** In the event of any default under a Mortgage, the Lender of the Mortgage shall be entitled to have a receiver appointed, irrespective of whether such Lender accelerates the maturity of all indebtedness secured by its Mortgage.

**34.12. City Bankruptcy.**

(a) If a bankruptcy proceeding is filed by or against the City, the City shall immediately notify each Lender of such filing and shall deliver a copy of all notices, pleadings, schedules, and similar materials regarding the bankruptcy proceedings to each Lender.

(b) The City acknowledges that (i) the Tenant seeks to construct improvements on the Premises using proceeds of the loans provided by the Lenders, and (ii) it would be unfair to both the Tenant and the Lenders to sell the Premises free and clear of the leasehold.

(c) If a bankruptcy proceeding is filed by or on behalf of the City, the City agrees as follows: (i) the Tenant shall be presumed to have objected to any attempt by the City to sell the fee interest free and clear of the leasehold under this Lease; (ii) if Tenant does not so object, each Lender shall have the right to so object on its own behalf or on behalf of the Tenant; and (iii) in connection with any such sale, the Tenant shall not be deemed to have received adequate protection under section 363(e) of the Bankruptcy Code, unless it shall have received and paid over to each Lender outstanding balance of the obligations under its respective loan.

(d) City recognizes that the Lenders are authorized on behalf of the Tenant to vote, participate in or consent to any bankruptcy, insolvency, receivership or court proceeding concerning the Leasehold Estate under this Lease.

**35. TENANT RECORDS.** Upon reasonable notice during normal business hours, and as often as the City may deem necessary, there shall be made available to the City and its authorized representatives for examination all records, reports, data and information made or kept by Tenant regarding its activities or operations on the Premises. Nothing contained herein shall entitle the City to inspect personal histories of residents or lists of donors or supporters. To

the extent that it is permitted by law to do so, the City will respect the confidentiality requirements of Tenant in regard to the lists furnished by Tenant of the names of Residential Occupants of the residential portion of the Premises.

### **36. CITY REQUIREMENTS.**

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

#### **36.1. *Nondiscrimination.***

(a) **Covenant Not to Discriminate.** In the performance of this Lease, Tenant 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 this Chapter 12B or 12C of the San Francisco Administrative Code or in retaliation for opposition to any practices forbidden under Chapter 12B or 12C of the Administrative Code against any employee of Tenant, any City and County employee working with Tenant, any applicant for employment with Tenant, or any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by Tenant in the City and County of San Francisco.

(b) **Subleases and Other Contracts.** Tenant shall include in all subleases and other contracts relating to the Premises a non-discrimination clause applicable to such subtenant or other contractor in substantially the form of subsection (a). In addition, Tenant shall incorporate by reference in all subleases and other contracts the provisions of Sections 12B.2 (a), 12B.2 (c)-(k) and 12C.3 of the Administrative Code and shall require all subtenants and other contractors to comply with such provisions.

(c) **Nondiscrimination in Benefits.** Tenant does not as of the date of this Lease and will not during the 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 12B.2 of the Administrative Code.

(d) **CMD Form.** On or prior to the Commencement Date, Tenant shall execute and deliver to City the "Nondiscrimination in Contracts and Benefits" form approved by the CMD.

(e) **Penalties.** Tenant understands that pursuant to Section 12B.2(h) of the Administrative 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 Lease may be assessed against Tenant and/or deducted from any payments due Tenant.

**36.2. Requiring Health Benefits for Covered Employees.** Unless exempt, Tenant agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in Administrative Code Chapter 12Q (Chapter 12Q).

(a) For each Covered Employee Tenant shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO.

(b) Notwithstanding the above, if Tenant meets the requirements of a "small business" by the City pursuant to Section 12Q.3(d) of the HCAO, it shall have no obligation to comply with *Section 36.2(a)* above.

(c) If, within 30 days after receiving written notice of a breach of this Lease for violating the HCAO, Tenant fails to cure such breach or, if such breach cannot reasonably be cured within such 30-day period, Tenant 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 12Q.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 Sublease or Contract regarding services to be performed on the Premises entered into by Tenant shall require the Subtenant 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 Chapter 12Q of the Administrative Code. Tenant shall notify the Office of Labor Standards Enforcement ("OLSE") when it enters into such a Sublease or Contract and shall certify to OLSE that it has notified the Subtenant or Contractor of the obligations under the HCAO and has imposed the requirements of the HCAO on the Subtenant or Contractor through written agreement with such Subtenant or Contractor. Tenant shall be responsible for ensuring compliance with the HCAO for each Subtenant, Contractor and Subcontractor performing services on the Premises. If any Subtenant, Contractor or Subcontractor fails to comply, the City may pursue the remedies set forth in Section 12Q.5 of the Administrative Code against Tenant based on the Subtenant's, Contractor's, or Subcontractor's failure to comply, provided that OLSE has first provided Tenant with notice and an opportunity to cure the violation.

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

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

(i) Within ten (10) business days of any request, Tenant shall provide the City with access to pertinent records relating to any Tenant's compliance with the HCAO. In addition, the City and its agents may conduct random audits of Tenant at any time during the Term. Tenant 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.

**36.3. *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. Tenant 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 City, including without limitation, notification of vacancies throughout the Term and entering into a First Source Hiring Agreement, if applicable. Tenant 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 Lease.

**36.4. *Local Business Enterprises.*** The Port Commission encourages the participation of local business enterprises ("LBEs") in Tenant's operations. Tenant agrees to consult with CMD to determine appropriate methods for promoting participation by LBEs. 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: [http://sfgov.org/site/uploadedfiles/sfhumanrights/directory/vlist\\_1.htm](http://sfgov.org/site/uploadedfiles/sfhumanrights/directory/vlist_1.htm).

**36.5. *Prohibition of Tobacco Sales and Advertising.*** Tenant acknowledges and agrees that no sales or advertising of cigarettes or tobacco products is allowed on the Premises. This advertising prohibition includes the placement of the name of a company producing, selling or distributing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. This advertising prohibition does not apply to any advertisement sponsored by a state, local, nonprofit or other entity designed to (i) communicate the health hazards of cigarettes and tobacco products, or (ii) encourage people not to smoke or to stop smoking.

**36.6. *Prohibition of Alcoholic Beverages Advertising.*** Except in that portion of the Improvements authorized to sell alcohol, if any, Tenant acknowledges and agrees that no advertising of alcoholic beverages is allowed on the Premises. For purposes of this section, "alcoholic beverage" shall be defined as set forth in California Business and Professions Code Section 23004, and shall not include cleaning solutions, medical supplies and other products and substances not intended for drinking. This advertising prohibition includes the placement of the name of a company producing, selling or distributing alcoholic beverages or the name of any alcoholic beverage in any promotion of any event or product. This advertising prohibition does not apply to any advertisement sponsored by a state, local, nonprofit or other entity designed to (i) communicate the health hazards of alcoholic beverages, (ii) encourage people not to drink alcohol or to stop drinking alcohol, or (iii) provide or publicize drug or alcohol treatment or rehabilitation services.

**36.7. *Graffiti Removal.*** Tenant agrees to remove all graffiti from the Premises within forty-eight (48) hours of the earlier of Tenant's: (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the Department of Public Works. This section is not intended to require a tenant to breach any lease or other agreement that it may have concerning its use of the real property. "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 this Lease or the Port 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.).

**36.8. *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. Tenant 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 Tenant may need to apply to the Premises during the term of this Lease, (ii) describes the steps Tenant 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 Tenant’s primary IPM contact person with the City. Tenant shall comply, and shall require all of Tenant’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 Tenant 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 Tenant to keep certain records and to report to City all pesticide use by Tenant’s staff or contractors. If Tenant or Tenant’s contractor will apply pesticides to outdoor areas, Tenant 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>.

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

**36.10. *Tropical Hardwood and Virgin Redwood Ban.*** The City urges Tenant 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, Tenant shall not provide any items to the construction of Alterations, or otherwise in the performance of this Lease which are tropical hardwoods, tropical hardwood wood products, virgin redwood, or virgin redwood wood products. In the event Tenant fails to comply in good faith with any of the provisions of Chapter 8 of the Environment Code, Tenant 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.

**36.11. *Preservative-Treated Wood Containing Arsenic.*** Tenant may not purchase preservative-treated wood products containing arsenic in the performance of this Lease 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. Tenant 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 Tenant 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.

**36.12. Notification of Limitations on Contributions.** Through its execution of this Lease, Tenant acknowledges that it is familiar with 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 commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Tenant 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 \$50,000 or more. Tenant further acknowledges that, if applicable, the prohibition on contributions applies to each Tenant; each member of Tenant's board of directors, and Tenant's chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent (20%) in Tenant; any subcontractor listed in the contract; and any committee that is sponsored or controlled by Tenant. Additionally, Tenant acknowledges that if this **Section 36.12** (Notification of Limitations on Contributions) applies, Tenant must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126 and must provide to City the name of each person, entity or committee described above.

**36.13. 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 City 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.

**36.14. Public Access to Meetings and Records.** If Tenant receives a cumulative total per year of at least \$250,000 in City funds or City-administered funds and is a non-profit organization as defined in Chapter 12L of the San Francisco Administrative Code, Tenant shall comply with and be bound by all the applicable provisions of that Chapter. By executing this Lease, Tenant agrees to open its meetings and records to the public in the manner set forth in Sections 12L.4 and 12L.5 of the Administrative Code. Tenant further agrees to make good-faith efforts to promote community membership on its Board of Directors in the manner set forth in Section 12L.6 of the Administrative Code. Tenant acknowledges that its material failure to comply with any of the provisions of this paragraph shall constitute a material breach of this Lease. Tenant further acknowledges that such material breach of this Lease shall be grounds for City to terminate and/or not renew this Lease, partially or in its entirety.

**36.15. Nondisclosure of Private Information.** Tenant agrees to comply fully with and be bound by all of the applicable provisions of Chapter 12M of the San Francisco Administrative Code (the "**Nondisclosure of Private Information Ordinance**"), including the remedies provided. Consistent with the requirements of the Nondisclosure of Private Information Ordinance, to the extent applicable, Tenant agrees to all of the following:



(a) Neither Tenant nor any of its subcontractors shall disclose Private Information, unless one of the following is true:

- (i) The disclosure is authorized by this Lease;
- (ii) Tenant received advance written approval from the Contracting Department to disclose the information; or
- (iii) The disclosure is required by law or judicial order.

(b) Any disclosure or use of Private Information authorized by this Lease shall be in accordance with any conditions or restrictions stated in this Lease. Any disclosure or use of Private Information authorized by a Contracting Department shall be in accordance with any conditions or restrictions stated in the approval.

(c) Private Information shall mean any information that: (1) could be used to identify an individual, including without limitation, name, address, social security number, medical information, financial information, date and location of birth, and names of relatives; or (2) the law forbids any person from disclosing.

(d) Any failure of Tenant to comply with the Nondisclosure of Private Information Ordinance shall be a material breach of this Lease. In such an event, in addition to any other remedies available to it under equity or law, City may terminate this Lease, debar Tenant, or bring a false claim action against Tenant.

**36.16. Conflicts of Interest.** Through its execution of this Lease, Tenant 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 Tenant becomes aware of any such fact during the Term, Tenant shall immediately notify the City.

**36.17. Drug-Free Workplace.** Tenant acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1988 (41 U.S.C. §§ 701 et seq.), the unlawful manufacture, distribution, possession or use of a controlled substance is prohibited on City premises.

**36.18. Prevailing Wages and Working Conditions.** 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. Tenant 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**”). Tenant 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.

Tenant shall include and shall require its subtenants, 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. Tenant’s failure to comply with its obligations under this Section shall constitute

a material breach of this Lease. 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 23.61 against the breaching party.

Tenant shall also pay, and shall require its subtenants, 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 Administrative Code Chapter 21C: a Public Off-Street Parking Lot, Garage or Automobile Storage Facility (as defined in Section 21C.3), a Show (as defined in Section 21C.4), a Special Event (as defined in Section 21C.8), Broadcast Services (as defined in Section 21C.9), Commercial Vehicles, Loading and Unloading for Shows and Special Events (as defined in Section 21C.10), and Security Guard Services for Events (as defined in Section 21C.11).

**36.19. 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**"). Tenant Improvements and Alterations under this Lease are subject to the Local Hiring Requirements unless the cost for such work is (i) estimated to be less than \$750,000 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. Tenant agrees that it will comply with the Local Hiring Requirements to the extent applicable. Before starting any Tenant Improvements or Alterations, Tenant shall contact City's Office of Economic Workforce and Development ("**OEWD**") to determine whether the work is a Covered Project subject to the Local Hiring Requirements. Tenant shall comply with the Local Hire Plan for the Initial Improvements attached hereto as *Exhibit O* which is hereby incorporated.

Tenant shall include, and shall require its subtenants 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. Tenant shall cooperate, and require its subtenants 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. Tenant's failure to comply with its obligations under this Section shall constitute a material breach of this Lease. 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.

In accordance with San Francisco Administrative Code Sections 82.4(d)(1) and (2), where application of the Local Hiring Requirements would be prohibited by federal or state Laws or would violate or be inconsistent with the terms or conditions of a grant or a contract with a federal or state agency, such funds or contracts shall be segregated so as to maximize application of the Local Hiring Requirements where administratively feasible and where not administratively feasible with regard to some or all of the project in question, then Tenant shall comply with adapted requirements established by OEWD that advance the purposes of the Local Hiring Requirements to the maximum extent feasible without conflicting with federal or state Laws or with terms or conditions of the state or federal grant or contract in question..

**36.20. Compliance with Disability Laws.** Tenant acknowledges that, pursuant to Disability Laws, programs, services and other activities provided by a public entity to the public, whether directly or through Tenant or contractor, must be accessible to the disabled public.. Tenant shall not discriminate against any person protected under Disability Laws in connection with the use of all or any portion of the Real Property and Tenant shall comply at all times with the applicable provisions of Disability Laws. Tenant shall be solely responsible for conducting its own independent investigation of this matter, for determining which Disability Laws apply

and for ensuring that the design of all Alterations and Improvements strictly complies with all requirements of Disability Laws.

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

**36.22. Food Service and Packaging Waste Reduction Ordinance.** Tenant 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 Lease, Tenant agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Tenant 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 Lease was made. Such amounts shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Tenant's failure to comply with this provision.

**36.23. San Francisco Bottled Water Ordinance.** Tenant is subject to all applicable provisions of Environment Code Chapter 24 (which are hereby incorporated) prohibiting the sale or distribution of drinking water in plastic bottles with a capacity of twenty-one (21) fluid ounces or less at City-permitted events held on the Premises with attendance of more than 100 people.

**36.24. Consideration Of Criminal History In Hiring And Employment Decisions.**

(a) Tenant agrees to comply with and be bound by all of the applicable provisions of San Francisco Administrative Code Chapter 12T (Criminal History in Hiring and Employment Decisions; "Chapter 12T"), 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 Tenant who would be or are performing work at the Premises.

(b) Tenant shall incorporate by reference the provisions of Chapter 12T in all subleases of some or all of the Premises, and shall require all subtenants to comply with such provisions. Tenant's failure to comply with the obligations in this subsection shall constitute a material breach of this Lease.

(c) Tenant and subtenants 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) Tenant and subtenants 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 subsection (c) above. Tenant and subtenants 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) Tenant and subtenants shall state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment with Tenant or subtenant at the Premises, that the Tenant or subtenant will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of Chapter 12T.

(f) Tenant and subtenants shall post the notice prepared by the Office of Labor Standards Enforcement (“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) Tenant and subtenants understand and agree that upon any failure to comply with the requirements of Chapter 12T, the City shall have the right to pursue any rights or remedies available under Chapter 12T or this Lease, 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 Lease.

(h) If Tenant has any questions about the applicability of Chapter 12T, it may contact City for additional information. City may consult with the Director of the City’s Office of Contract Administration who may also grant a waiver, as set forth in Section 12T.8.

**36.25. 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. Tenant shall comply with the requirements of such ordinance, if applicable, including, without limitation, any requirements in the ordinance with respect to its Subtenants or operators.

**36.26. Vending Machines; Nutritional Standards and Calorie Labeling Requirements; Offerings.** Tenant 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”). Tenant 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 Lease. Without limiting Port’s other rights and remedies under this Lease, 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.

**36.27. Supervision of Minors.** In accordance with California Public Resources Code Section 5164, if Tenant or any its Subtenants or Agents is providing services at the Premises, Tenant shall not hire, and shall prevent its Subtenants or Agents from hiring, any person for employment or a volunteer position in a position having supervisory or disciplinary authority over a minor if that person has been convicted of any offense listed in Public Resources Code Section 5164. In addition, if Tenant or any its Subtenants or Agents is providing services to the City involving the supervision or discipline of minors or where Tenant or any its Subtenants or

Agents will be working with minors in an unaccompanied setting on more than an incidental or occasional basis, Tenant or any its Subtenants or Agents shall comply with any and all applicable requirements under federal or state law mandating criminal history screening for such positions and/or prohibiting employment of certain persons including but not limited to California Penal Code Section 290.95. In the event of a conflict between this section and Section 36.24 (Consideration of Criminal History in Hiring and Employment Decisions), this section shall control.

### **37. NOTICES.**

Except as otherwise expressly provided in this Lease or by Law, all notices (including notice of consent or non-consent) required or permitted by this Lease 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 State Postal Service, delivery charges prepaid. Notices to a party must be delivered to that party's mailing address in **Section 2** (Key Lease Terms), 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 information provided by Tenant in Tenant's written response to Port's written request for such information.

All notices under this Lease 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.

### **38. REPRESENTATIONS AND WARRANTIES OF TENANT.**

Tenant, and each of its partners executing this Lease, represents and warrants as follows as of the date hereof and the Commencement Date:

(a) Valid Existence; Good Standing. Tenant is a California limited partnership duly organized and validly existing and is in good standing under the laws of the State of California. Tenant, and each of its partners executing this Lease, has all requisite power and authority to conduct its business as presently conducted.

(b) Authority. Tenant, and each of its partners executing this Lease, has all requisite power and authority to execute and deliver this Lease and to carry out and perform all of the terms and covenants of this Lease.

(c) No Limitation on Ability to Perform. Neither Tenant's, nor any of its partners executing this Lease, articles of formation, limited partnership agreement, nor any other agreement or Law in any way prohibits, limits or otherwise affects the right or power of Tenant or any of its partners executing this Lease, to enter into and perform all of the terms and covenants of this Lease. Neither Tenant nor any of its partners executing this Lease, is a party to or bound by any contract, agreement, indenture, trust agreement, note, obligation or other instrument that could prohibit, limit or otherwise affect the same. Other than the Regulatory Approvals required to Construct the Initial Improvements, no consent, authorization or approval of, or other action by, and no notice to or filing with, any governmental authority, regulatory body or any other Person is required for the due execution, delivery and performance by Tenant or any of its partners executing this Lease or any of the terms and covenants contained herein. There are no pending or threatened lawsuits or proceedings or undischarged judgments affecting Tenant or any of its partners executing this Lease before any court, governmental agency, or arbitrator that might materially and adversely affect the enforceability of this Lease or the business, operations, assets or condition of Tenant or any of its partners executing this Lease.

(d) Valid Execution. The execution and delivery of this Lease by Tenant and each of its partners executing this Lease has been duly and validly authorized by all necessary action. This Lease will be a legal, valid and binding obligation of Tenant and each of its partners executing this Lease, enforceable against each of them in accordance with their terms once executed.

(e) Defaults. The execution, delivery and performance of this Lease (i) do not and will not violate or result in a violation of, contravene or conflict with, or constitute a default under (A) any agreement, document or instrument to which Tenant or each of its partners or by which Tenant's or any of its partners' assets may be bound or affected, (B) any Law, or (C) the certificate of partnership or Tenant's or any its partners executing this Lease, limited partnership agreement, and (ii) do not and will not result in the creation or imposition of any lien or other encumbrance upon the assets of Tenant or any of its partners executing this Lease.

(f) Meeting Financial Obligations. There is no material adverse change in Tenant's or any of its partners' executing this Lease financial condition and Tenant, and each of its general partners is meeting its current liabilities as they mature; no federal or state tax liens have been filed against it; and neither Tenant nor any of its general partners, is in default or claimed default under any agreement for borrowed money.

The representations and warranties in this Section shall survive any expiration or earlier termination of this Lease.

### **39. QUIET ENJOYMENT.**

Subject to the terms and conditions of this Lease and applicable Laws, Port agrees that Tenant, upon observing and keeping all of the covenants under this Lease on its part to be kept, shall lawfully and quietly hold, occupy and enjoy the Premises during the Term of this Lease without hindrance by, through or under Port. Tenant expressly acknowledges that Tenant's right to quiet possession of the Premises does not preclude Port's right to enter the Premises and/or conduct work and make alterations or repairs as permitted by this Lease. Port shall not be liable for any interference or disturbance by other tenants or third persons, nor shall Tenant be released from any of the obligations of this Lease because of such interference or disturbance.

### **40. MISCELLANEOUS PROVISIONS.**

**40.1. *Successors and Assigns***. This Lease is binding upon and will inure to the benefit of the successors and assigns of City and Tenant, subject to the limitations on Transfers set forth in **Section 26** (Transfers). Where the term "Tenant," or "City" is used in this Lease, it means and includes their respective successors and assigns. Whenever this Lease specifies Port as a Party or MOHCD or Port as the holder of the right or obligation to give approvals or consents, if Port or MOHCD or a comparable public body which has succeeded to Port's rights and obligations no longer exists, then the City (or the State, if applicable) will be deemed to be the successor and assign of Port and MOHCD for purposes of this Lease.

**40.2. *Technical Corrections***. The Parties reserve the right, upon mutual agreement of Port's Executive Director and Tenant, 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 the Initial Improvements, and upon full execution thereof, such memoranda shall be deemed to become a part of this Lease.

**40.3. *Counterparts***. This Lease may be executed in counterparts, each of which is deemed to be an original, and all such counterparts constitute one and the same instrument.

**40.4. *Extensions by Port***. Upon the request of Tenant, Port, acting through its Executive Director, may, by written instrument, extend the time for Tenant's performance of any term, covenant or condition of this Lease or permit the curing of any default upon such terms and conditions as it determines appropriate, including the time within which Tenant shall agree to such terms or conditions, provided, however, that any such extension or permissive curing of any

particular default will not operate to release any of Tenant's obligations nor constitute a waiver of Port's rights with respect to any other term, covenant or condition of this Lease or any other default in, or breach of, this Lease or otherwise effect the time of the essence provisions with respect to the extended date or the other dates for performance under this Lease.

**40.5. Further Assurances.** The Parties agree to execute and acknowledge such other and further documents and take such other reasonable actions as may be necessary or reasonably required to effectuate the terms of this Lease. Port's Executive Director is authorized to execute on behalf of Port any closing or similar documents and any contracts, agreements, memoranda or similar documents with State, regional or local entities or other Persons that are necessary or proper to achieve the purposes and objectives of this Lease and do not materially increase the obligations of Port under this Lease, if the Executive Director determines, in consultation with the City Attorney, that the document is necessary or proper and in Port's best interests. The Executive Director's signature on any such document shall conclusively evidence such a determination by him or her.

**40.6. Severability.** If any provision of this Lease, or its application to any Person or circumstance, is held invalid by any court, the invalidity or inapplicability of such provision shall not affect any other provision of this Lease or the application of such provision to any other Person or circumstance, and the remaining portions of this Lease shall continue in full force and effect, unless enforcement of this Lease 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 Lease.

**40.7. Entire Agreement.** This Lease contains all of the representations and the entire agreement between the Parties with respect to the subject matter of this Lease. Any prior correspondence, memoranda, agreements, warranties, or representations, whether written or oral, relating to such subject matter are superseded in total by this Lease. No prior drafts of this Lease or changes from those drafts to the executed version of this Lease 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 Lease.

**40.8. Interpretation of Lease.**

(a) References in this Lease to Tenant's acts or omissions will mean acts or omissions by Tenant and its Agents and Invitees unless the context requires or specifically stated otherwise.

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

(c) Whenever a section, article or paragraph is referenced, it refers to this Lease unless otherwise specifically provided. The captions preceding the articles and sections of this Lease 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 Lease. Wherever reference is made to any provision, term, or matter "in this Lease," "herein" or "hereof" or words of similar import, the reference will be deemed to refer to any reasonably related provisions of this Lease in the context of the reference, unless the reference refers solely to a specific numbered or lettered article, section, subdivision, or paragraph of this Lease.

(d) 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 Lease and as they are amended, replaced, supplemented, clarified, corrected, or superseded at any time during the Term or while any obligations under this Lease are outstanding, whether or not foreseen or contemplated by the Parties. References to specific code sections mean San Francisco ordinances unless otherwise specified.

(e) 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."

(f) This Lease 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 Lease 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 Lease.

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

(h) 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.).

(i) 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 Lease 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.

**40.9. *No Implied Waiver.*** No failure by Port to insist upon the strict performance of any obligation of Tenant under this Lease 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 Rent 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 Tenant 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 Tenant. 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 Lease.

**40.10. *Survival of Indemnities.*** Termination or expiration of this Lease 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 Lease, the ability to collect any sums due, nor shall it affect any provision of this Lease that expressly states it shall survive termination or expiration hereof.

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

**40.12. *Recordation.*** Except for any Certificate of Final Completion or other document to be prepared by the CHE, whenever this Lease requires or allows recordation in the Official Records of any other document or agreement, including by a Lender, Tenant shall prepare the necessary documents at no cost to Port in form and content satisfactory to Port and the City Attorney. Upon Port's approval, Tenant shall record such approved document or agreement in the Official Records and provide Port and MOHCD with a copy of the recorded document



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

**40.14. California Law.** This Lease is governed by, and shall be construed and interpreted in accordance with, the Laws of the State of California and City's Charter. Port and Tenant hereby irrevocably consent to the jurisdiction of and proper venue in the Superior Court for the City and County of San Francisco.

**40.15. 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 Lease. Tenant agrees to Indemnify Port from any Claims, including attorneys' fees, incurred by Port in connection with any such Claim or Claims of any person(s), finder(s), or broker(s) to a commission in connection with this Lease.

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

#### **41. LIMITATION ON DAMAGES.**

**41.1. No Recourse Beyond Value of Premises.** Notwithstanding anything to the contrary contained in this Lease, Tenant agrees that Tenant will have no recourse with respect to, and City shall not be liable for, any obligation of City under this Lease, or for any claim based upon this Lease, except to the extent of the fair market value of City's fee interest in the Premises (as encumbered by this Lease). Tenant shall look solely to the fair market value of City's fee interest in the Premises for the recovery of any judgment or award. By Tenant's execution and delivery hereof and as part of the consideration for City's obligations hereunder, Tenant expressly waives all other liability. Before filing suit for an alleged default by City, Tenant shall give City notice and reasonable time to cure the alleged default.

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

**41.3. Non-Liability of Tenant's Members, Partners, Shareholders, Directors, Officers and Employees.** No present or future member, officer, partner, shareholder, director, or employee of Tenant will be personally liable to Port for a Tenant Event of Default or for any amount which may become due to Port or for any obligations under the terms of this Lease.

**41.4. Limitation on City's Liability Upon Transfer.** In the event of any transfer of City's interest in and to the Premises, City (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 Lease thereafter to be performed on the part of City, but not from liability incurred by City (or such transferor, as the case may be) on account of covenants or obligations to be performed by City (or such transferor, as the case may be) hereunder before the date of such transfer.

#### **42. ESTOPPEL CERTIFICATES.**

**42.1. Estoppel Certificate by Tenant.** Tenant shall execute, acknowledge and deliver to City (or at City's request, to a prospective purchaser, lessee, or Lender of City's interest in the Premises), within thirty (30) days after request, a certificate in substantially the same form as

**Exhibit M.** In addition, if requested by City, Tenant shall attach to such certificate a copy of this Lease, and any amendments thereto, and include in such certificate a statement by Tenant that such attachment is a true, correct and complete copy of this Lease, as applicable, including all modifications thereto. City, any successor agency, and any prospective purchaser, lessee or Lender of the Premises or any part of City's interest in the Premises, may rely upon any such certificate therein. Tenant also will use commercially reasonable efforts (including inserting a provision similar to this **Section 42.1** (Estoppel Certificate by Tenant) into each Sublease) to cause Subtenants under Subleases to execute, acknowledge and deliver to City, within thirty (30) days after request, an estoppel certificate in substantially the same form as **Exhibit M** with respect to each such applicable Sublease, but Tenant shall not be in default hereunder for failure of any particular Subtenant to deliver such estoppel certificate to City.

**42.2. Estoppel Certificate by City.** Subject to City's receipt of its review costs as set forth in **Section 43.2** (Fees for Review), City shall execute, acknowledge and deliver to Tenant (or at Tenant's request, to a prospective Lender, Permitted Limited Partner, or other prospective transferee of Tenant's interest under this Lease), within thirty (30) days after request, a certificate in substantially the same form as **Exhibit P**. Port agrees to modify **Exhibit P** as may be reasonably requested by a Lender or Permitted Limited Partner if revisions are approved by MOHCD, and provided that revisions are materially consistent with this Lease and Port's authority as trustee under the Burton Act, the favorable Consistency Determination made by the Port Commission and State Lands in the Resolutions referenced in **Recitals O** and **Q** or required to be made hereafter, and do not increase Port's liability as reasonably determined by Port. In addition, if requested, City shall attach to such certificate a copy of this Lease and any amendments thereto, and include in such certificate a statement by City that such attachment is a true, correct and complete copy of this Lease, including all modifications thereto. Tenant, any prospective Lender, or other prospective transferee of Tenant's interest under this Lease may rely upon any such certificate.

### **43. APPROVALS BY PORT; FEES FOR REVIEW.**

**43.1. Approvals by Port.** Unless this Lease otherwise expressly provides or unless the City's Charter otherwise requires, all approvals, consents or determinations to be made by or on behalf of Port under this Lease shall be made by Port's Executive Director and shall not be unreasonably withheld or delayed. Port's Executive Director, or his or her designee, is authorized to execute on behalf of Port any closing or similar documents and any contracts, agreements, memoranda or similar documents with State, regional or local authorities or other Persons that are necessary or proper to achieve the purposes and objectives of this Lease and that do not materially increase the obligations of Port hereunder, if the Executive Director determines, after consultation with, and approval as to form by, the City Attorney, that the document is necessary or proper and in Port's best interests. The Executive Director's signature on any such documents shall be conclusive evidence of such a determination by him or her. Wherever this Lease requires or permits the giving by Port of its consent or approval, or whenever an amendment, waiver, notice, or other instrument or document is to be executed by or on behalf of Port, the Executive Director, or his or her designee, shall be authorized to execute such instrument on behalf of Port, except as otherwise provided by applicable Law, including the City's Charter.

**43.2. Fees for Review.** Within ten (10) days after Port's written request, Tenant shall pay Port, as Additional Rent, Port's reasonable costs, including attorneys' fees and costs and costs for Port staff time, incurred in connection with the review, investigation, processing, documentation, disapproval and/or approval of any proposed Transfer, Sublease, Mortgage, certificate, or Subsequent Construction. Tenant shall pay such costs regardless of whether or not Port consents to such proposal.

**44. NO MERGER OF TITLE.**

There shall be no merger of the Leasehold Estate with the fee estate in the Premises by reason of the fact that the same Person may own or hold (a) the Leasehold Estate or any interest in such Leasehold Estate, and (b) any interest in such fee estate.

**45. APPROVAL OF BOARD OF SUPERVISORS.**

Notwithstanding anything to the contrary contained in this Lease, Tenant acknowledges and agrees that no officer or employee of City has authority to commit City to this Lease unless and until City's Board of Supervisors shall have duly adopted a resolution approving this Lease and authorizing the transactions contemplated hereby. Therefore, any obligations or liabilities of City hereunder are contingent upon adoption of such a resolution and this Lease shall be null and void if City's Mayor and the Board of Supervisors do not approve this Lease, in their respective sole discretion. Approval of this Lease by any department, commission or agency of City shall not be deemed to imply that such resolution will be enacted, nor will any such approval create any binding obligations on City.

**46. DEFINITIONS.**

Definitions used in this Lease are found in the specified locations in this Lease or are set forth below. Definitions that are not capitalized below are not capitalized when used in this Lease.

"**Additional Rent**" means Port's Sale Participation and all taxes, assessments, insurance premiums, operating and maintenance charges, fees, costs, expenses, liabilities and obligations of every description which Tenant assumes or is obligated to pay or discharge pursuant to this Lease, together with every fine, penalty, interest or other charge which may be added for non-payment or late payment, whether payable to Port or to other persons, parties or entities designated herein.

"**Adjusted Basis**" means the value of the Certified Construction Costs of the Initial Improvements or the Subsequent Construction, to the extent unamortized on the Transfer Date.

"**Affiliate**" means: (i) a Person that Controls or is Controlled by Tenant, or is Controlled by the same Person that Controls Tenant; or (ii) if Tenant is a natural Person, any designated successor by trust, will, or court order following Tenant's death or incapacity.

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

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

"**Anniversary Date**" means the first and each subsequent anniversary of the Commencement Date; provided, however, that if the commencement date is not the first day of a month, then each Anniversary Date shall be calculated from the first day of the thirteenth (13th) month after the Commencement Date. Once the Certificate of Final Completion and Occupancy for the Residential Portion of the Building is issued, the Anniversary Date will mean each subsequent anniversary of the date of the Certificate of Final Completion and Occupancy for the Residential Portion of the Building; provided, however, that if the the date of the Certificate of Final Completion and Occupancy for the Residential Portion of the Building is not the first day of a month, then each Anniversary Date shall be calculated from the first day of the thirteenth (13th) month after the date of the Certificate of Final Completion and Occupancy for the Residential Portion of the Building.

"**Annual Retail Rent Statement**" is defined in *Section 7.2(c)* (Retail Rent).

“**Approved Flood Protection Plan**” is defined in *Section 5.13(b)* (CHE Determination Notice).

“**Area Median Income**” or “**AMI**” means median income as published annually by MOHCD, derived from the income limits determined by the United States Department of Housing and Urban Development for the San Francisco area, adjusted solely for household size, but not high housing cost area, also referred to as “**Unadjusted Median Income**.”

“**Authorized Restaurant Sublease**” means a Restaurant Sublease that meets the criteria set forth in *Section 26.2(b)* (Authorized Restaurant Sublease).

“**Award**” means all compensation, sums or anything of value paid, awarded or received for a Taking, whether pursuant to judgment, agreement, settlement or otherwise.

“**Base Rent**” is defined in *Section 2* (Key Lease Terms).

“**BCDC**” means the San Francisco Bay Conservation and Development Commission.

“**Building**” is defined in *Section 2* (Key Lease Terms).

“**building permit(s)**” means a permit or permits issued by the Port in its regulatory capacity that will allow Tenant to commence Construction of the Initial Improvements or any Subsequent Construction described in such permit or permits.

“**Building Systems**” means the plumbing, electrical, fire protection, life safety, security and other mechanical, electrical, and communications systems of the Building.

“**Burton Act**” means the provisions of Chapter 1333 of the Statutes of 1968 adopted by the California Legislature, as amended, providing for the transfer to City from State, subject to specified terms, conditions and reservations, of the control and management of the certain tide and submerged lands comprising the Harbor of San Francisco.

“**business day**” means any week day during which businesses are generally open for business, excluding local, state, and federal holidays observed by the City.

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

“**Capital Needs Assessment report**” or (“**CNA**”) is defined in *Section 17.2*.

“**Cash Consideration**” means cash or its equivalent in immediately available funds.

“**Casualty**” is defined in *Section 22.1(a)* (General).

“**Casualty Notice**” is defined in *Section 23.1(c)* (Notice).

“**Certificate of Final Completion and Occupancy**” means a Certificate of Final Completion and Occupancy issued by the Chief Harbor Engineer or his or her designee pursuant to Port Building Code Section 109A or its successor provisions.

“**Certificate of Final Completion and Occupancy for the Residential Portion**” means the Certificate of Final Completion and Occupancy issued by the Chief Harbor Engineer or his or her designee pursuant to Port Building Code Section 109A or its successor provisions as pertains to the Residential Units. The Certificate of Final Completion and Occupancy for the Residential Portion may also include the Ground Floor Unit(s) of the Building.

“**Certified Construction Costs**” are Construction Costs that Port has approved through the procedures described in *Section 26.11* (Participation in Sale).

“**Chief Harbor Engineer**” or “**CHE**” means the Port’s Chief Harbor Engineer acting in his/her regulatory capacity as the Port’s chief building official in accordance with applicable Laws.

“**CHE Determination**” as defined in *Section 5.13(a)* (Flood Protection Measures).

“**CHE Determination Notice**” as defined in *Section 5.13(b)* (CHE Determination Notice).

“**City**” means the City and County of San Francisco, a municipal corporation. “**City**” shall refer to the City operating by and through its Port and/or MOHCD, where appropriate in the context. All references to the City shall include Port and MOHCD.

“**Claims**” 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.

“**Class Life**” means the classification of and amortization period applicable to the Initial Improvements or the Subsequent Construction under Internal Revenue Code section 168(e).

“**Close of Escrow**” means Port’s Delivery of the Premises to Tenant pursuant to the terms and conditions of the Option Agreement and this Lease.

“**Commencement Date**” is defined in *Section 2* (Key Lease Terms).

“**Commercial Subtenant**” is defined in *Section 7.2*.

“**Commission**” means the San Francisco Port Commission.

“**Completion**” in reference to the Initial Improvements means Port’s issuance of a Certificate of Final Completion and Occupancy as further defined in *Section 14.9(a)* (Certificate of Final Completion and Occupancy; Issuance Process). “**Completion**” in reference to any Subsequent Construction means the issuance of a Certificate of Completion by Port.

“**Conduct Code**” is defined in *Section 36.12* above.

“**Concession**” is defined in *Section 40.13* (Additional Written Agreement Required).

“**Condemnation**” means the taking or damaging, including severance damage, of all or any part of any property, or the right of possession thereof, the right of access and ingress thereto, the right of egress therefrom, by eminent domain, inverse condemnation, or for any public or quasi-public use under the law. Condemnation may occur pursuant to the recording of a final order of condemnation, or by a voluntary sale of all or any part of any property to any Person having the power of eminent domain (or to a designee of any such Person).

“**Condemnation Date**” means the earlier of: (a) the date when the right of possession of the condemned property is taken by the condemning authority; or (b) the date when title to the condemned property (or any part thereof) vests in the condemning authority.

“**Condemned Land Value**” is defined in *Section 24.4(a)* (Award and Distribution).

“**Construction**” means all new construction, replacement, rehabilitation, and demolition occurring on the Premises, or where applicable, off-Premises, pursuant to this Lease.

“**Construct**” will have a correlative meaning.

“**Construction Costs**” means actual costs paid by Tenant for all categories of costs for the Initial Improvements or the Subsequent Construction without interest, amortized on a straight line basis over the Class Life of the Initial Improvements.

“**Construction Costs Report**” means a report prepared by a CPA specifying the Class Life of and verifying Tenant's actual Construction Costs for the Initial Improvements, accompanied by copies of documentation substantiating all expenditures, such as: (a) executed contracts; (b) invoices for labor, services, goods, and materials, bills of lading, and other bills or receipts marked "Paid" or similarly indicating payment in full; (c) canceled checks or other written evidence of payment; and (d) other documents reasonably requested by Port.

“**Construction Documents**” means the Schematic Design (which is attached to this Lease as *Exhibit C*), the Preliminary Construction Documents and the Final Construction Documents approved by Port prior to the Close of Escrow for this Lease pursuant to the terms of the Option Agreement for the Initial Improvements and the construction documents for any Subsequent Construction. “**Construction Documents**” does not mean any contracts between Tenant and any contractor, subcontractor, architect, engineer or consultant. With respect to the Initial Improvements, Construction Documents shall not include any documents pertaining to any planned commercial spaces, excepting the "cold shell" of such space.

"**Control**" means the direct or indirect ownership of: (a) fifty percent (50%) or more of each class of equity interests in the entity; or (b) fifty percent (50%) or more of each class of interests that have the right to nominate, vote for, or otherwise select the members of the governing body that directs or causes the direction of substantially all of the management and policies of the entity or otherwise has the right to direct or cause the direction of substantially all of the management and policies of the entity.

"**Costs of Sale**" means the following costs, but only to the extent Tenant actually incurred them in connection with a Sale: (a) reasonable (as determined by Port in its reasonable discretion) brokerage commissions; (b) customary closing fees and costs, including title insurance premiums, survey fees, escrow fees, recording charges, and transfer taxes; (c) reasonable attorneys' fees; and (d) new tenant improvements to be made solely in connection with the Sale and performed in compliance with *Section 26.11* (Participation in Sale). Costs of Sale exclude rents, taxes, or other income or expense items customarily prorated in connection with sales of real property.

"**CPA**" means an independent certified public accounting firm acceptable to Port in its reasonable discretion.

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

"**CPA**" means an independent certified public accounting firm acceptable to Port in its reasonable discretion.

"**Davis Street Project**" is defined in *Recital H*.

"**Debt Service**" is defined in *Section 7.2(b)(i)* (Retail Rent).

"**Deferred Items**" is defined in *Section 14.9(b)* (Condition to Issuance).

"**Delayed Party**" is defined in *Section 30(a)* (Delay due to Force Majeure).

"**Deliver**" or "**Delivery**" means execution and delivery through Escrow by Port to Tenant, of a leasehold estate in the Premises by this Lease.

"**Disability Laws**" means the Americans with Disabilities Act (42 U.S.C. §§ 12101 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and the Fair Housing Amendments Act (42 U.S.C. §§3601 et seq.) and all regulations and guidelines related thereto, together with any and all laws, rules, regulations, ordinances, codes and statutes now or hereafter enacted by local or state agencies having jurisdiction thereof, including all requirements of Title 24 of the State of California, as any of the same may be in effect on the date of this Lease and may be hereafter modified, amended or supplemented.

"**Excluded Condition**" is defined in *Section 21.4(b)*.

"**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 Laws affecting any portion of the Premises.

**"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 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 (in its regulatory capacity), 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 increases the quantity or concentration of Hazardous Materials in the affected area, 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 otherwise requires Investigation or Remediation that would not have been required but for the act or omission other than mere discovery of such Hazardous Materials. Exacerbate also includes the disturbance, removal or generation of Hazardous Materials in the course of Tenant's operations, Investigations, maintenance, repair, Improvements and Alterations under this Lease. **"Exacerbation"** has a correlating meaning.

**"Excess Rent"** is defined in *Section 7.3* (Excess Rent).

**"Expiration Date"** means the date on which the Term expires as specified in *Section 2* (Key Lease Terms).

**"Extended Term"** is defined in *Section 2* (Key Lease Terms).

**"Extension Notice"** is defined in *Section 6.1(b)(i)* (Conditions to Extend).

**"Extension Option"** is defined in *Section 2* (Key Lease Terms).

**"Exterior Improvements"** means any improvements, furnishings, fixtures, or equipment located in the exterior areas of the Improvements (whether public access or not and including the roof) and/or located in the public access areas of the Premises, which may include mechanical equipment, photovoltaic panels, satellite dishes, antennae and other communication equipment, public art, bollards, flower baskets, benches, tables, chairs, umbrellas, heaters, railings, gates, trash receptacles, cleats, Signs, kiosks, flagpoles, canopies, awnings, landscaping, planter boxes, light poles, lighting fixtures, fountains, ticket booths, bicycle racks, plaques, markers, tents, models, other street furniture, and paving or other surface treatments.

**"Extremely Low Income Household"** means a household with combined initial income that does not exceed the lesser of: (i) thirty percent (30%) of AMI, or (b) thirty percent (30%) income level for the County of San Francisco as published by the TCAC.

**"Event of Default"** is defined in *Section 27* above.

**"favorable Consistency Determination"** means that all findings, approvals or other determinations required by the State Legislation and any other statutes governing the use of SWL 322-1 have been made by the Port Commission and State Lands and they have determined that the permitted uses, consideration to the Port, and other pertinent provisions of this Agreement and the Ground Lease are (1) consistent with the State Legislation and other governing statutes,

and (2) do not require the Port to acquire additional land or make a deposit to the Kapiloff Land Bank Fund pursuant to Section 5 of Assembly Bill 2649, as amended or any other statute governing the use of Port lands.

**"Final Mitigated Negative Declaration"** or **"FMND"** means the Final Mitigated Negative Declaration issued by the San Francisco Planning Department on March 9, 2018.

**"financial statements"** mean a current balance sheet and profit and loss statements that have been reviewed or examined by a CPA.

**"Flood Protection Measures"** is defined in *Section 5.13(a)* (Flood Protection Measures).

**"Flood Protection Plan"** is defined in *Section 5.13(b)* (Flood Protection Measures).

**"Force Majeure"** is defined in *Section 30(b)* (Delay Due to Force Majeure).

**"foreclosure"** means a foreclosure of a Mortgage or other proceedings in the nature of foreclosure (whether conducted pursuant to court order or pursuant to a power of sale contained in the Mortgage), deed or voluntary assignment or other conveyance in lieu thereof.

**"goodwill"** means the value assigned to Tenant's intangible business assets in connection with a Transfer, but only if the Transferee will continue to operate the same business that Tenant operated at the Premises and Port reasonably agrees with the valuation.

**"Gross Revenues"** means, subject only to the exceptions stated below, all sales, payments, revenues, income, fees, rentals, receipts, proceeds and amounts of any kind whatsoever, whether for cash, credit or barter, received or receivable by Tenant or any other party from any business, use or occupation, or any combination thereof, transacted, arranged or performed, in whole or in part, on the Premises, including without limitation, all returns and refunds, employee meals, discounted and complimentary meals, beverages and services or similar benefits and/or goodwill, the total value, based on price, for the tickets, cover charges, merchandise and any other items and the operation of any event, including any special or fundraising event, and catering or food delivery business conducted by, from or at the Premises (irrespective of where the orders therefor originated or are accepted and irrespective of where the food or beverages are consumed). Except as specified below, Gross Revenues shall be determined without reserve or deduction for failure or inability to collect (including, without limitation, spillage and waste) and without deduction or allowance for cost of goods sold or other costs, charges or expenses of purchasing or selling incurred by Tenant. No value added tax, no franchise or capital stock tax and no income, gross receipts or similar tax based upon income, profits or gross receipts as such shall be deducted from Gross Revenues. The following shall be excluded from Gross Revenues, provided that, Tenant provide to Port separate records to support such deductions or exclusions, as the case may be, and separate notations are made for same on Tenant's Monthly and Annual Statements: (i) the amount of any refund made or credit allowed due to a bona fide complaint from a customer concerning the quality of food, beverages, merchandise or service by Tenant; (ii) sales by redemption of gift certificates or like vouchers, but only to the extent previously reported as part of Gross Revenues; (iii) sums collected for any sales or excise tax imposed directly upon Tenant by any duly constituted governmental authority, but only if stated separately from the selling price of the goods or merchandise, or services, and collected from customers and such amounts are in fact paid to the appropriate governmental entities for which they are collected; and (iv) food and beverage sales to employees of Tenant, not to exceed, however, one percent (1%) of Gross Revenues in any single month, and provided further that said sales are at a discount; and (v) tips paid to Tenant's employees by its customers, so long as such tips go directly to Tenant's employees (and not Tenant or Tenant's management).

**"Gross Sale Proceeds"** means all consideration in any form directly or indirectly received by or for the account of the Tenant in connection with a Sale, including: (a) Cash Consideration; (b) the principal amount of any loan by Tenant to the Transferee to finance the Sale; and (c) the



fair market value of any other non-cash consideration representing a portion of the purchase price.

“**Ground Floor Unit**” is defined in *Section 2* (Key Lease Terms).

“**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, asbestos-containing material, and presumed asbestos-containing materials, 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 Tenant, 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 or Release of any Hazardous Materials, including, without limitation, Claims 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 other Port property, the loss or restriction of the use or any amenity of the Premises or other Port property, and attorneys' fees and consultants' fees and experts' fees and costs.

“**Hazardous Material Condition**” means the presence, Release, or threatened Release of Hazardous Materials in, on, or about the Premises, other Port property, or the environment, or from any vehicles or vessels Tenant, or its Agents and Invitees uses during Tenant's occupancy of the Premises.

“**Impositions**” means all taxes (including possessory interest, real and personal taxes), assessments, liens, levies, fees, charges or expenses of every description, whether general or special, ordinary or extraordinary, foreseen or unforeseen, or hereinafter levied or assessed in lieu of or in substitution of any of the foregoing of every character as they relate to the Premises.

“**Improvements**” mean all physical Construction on the Premises (and off-Premises where so designated in the Scope of Development), the Initial Improvements (including, without limitation, all structural and substructural elements of the Initial Improvements), and all buildings, structures, fixtures, landscaping, pathways, and other improvements erected, built, renovated, rehabilitated, restored, placed, or installed upon or within the Premises on or after the Commencement Date.

“**Indemnified Parties**” is defined in *Section 25.1* above.

“**Indemnify**” means to indemnify, protect, defend, and hold harmless forever.

“**Indemnification**” and “**Indemnity**” have correlating meanings.

“**Initial Improvements**” means construction of the Building as further defined in *Recital G* and the Construction Documents for the Initial Improvements.

“**Initial Term**” is defined in *Section 6.1* (Initial Term).

“**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, other Port property, or the environment, 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 Tenant's clients, customers, invitees, patrons, guests, members, licensees, permittees, concessionaires, assignees, subtenants, and any other person whose rights arise through them, except that for the purposes of *Section 26* (Transfers), "**Invitees**" excludes Tenant's licensees, 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 Disability Laws and Regulatory Approvals issued to Port which require Tenant'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 Lease is executed or at any later time and whether or not within the present contemplation of the Parties, as amended from time to time.

"**Lease**" is defined in the preamble to this Lease.

"**Lease Memorandum**" means the memorandum of the Ground Lease, suitable for recordation in the Official Records and in the form of *Exhibit E*. This Lease will not be recorded by either Party.

"**Lease Year**" means the twelve (12) month period commencing on the Commencement Date and ending on the anniversary of such date. Once the Certificate of Final Completion and Occupancy for the Residential Portion of the Building is issued, the Lease Year will mean the twelve (12) month period commencing on such date and ending on the anniversary of such date.

"**Leasehold Estate**" means the estate held by the Tenant pursuant to and created by this Lease.

"**Leasehold Loans**" is defined in in *Section 7.2(b)(i)* (Debt Service).

"**Lender**" means MOHCD and a lender of any mortgage, deed of trust assignment of rents, fixture filing, security agreement or similar security instrument or assignment of Tenant's Leasehold Estate in compliance with the provisions of *Section 34* (Leasehold Mortgage) and approved by Port, including the successors or assigns of such Lender. Multiple financial institutions participating in a single financing secured by a single Mortgage shall be deemed a single Lender for purposes of this Lease.

"**Loan Documents**" means those certain loan agreements, notes, deeds of trust and declarations and any other documents executed and delivered in connection with the construction and permanent financing for the Premises, including MOHCD's Loan Agreement.

"**Local Operating Subsidy**" or "**LOSP**" means a local operating subsidy provided to Tenant by the City, the amount of which is sufficient to permit Tenant to operate the Project in accordance with the terms of the MOHCD Loan Agreement for Residential Occupants at income levels specified by MOHCD in writing.

"**LOSP Program**" means the program administered by MOHCD that regulates the distribution of LOSP.

“**Low Income Household**” means a tenant households with combined initial income that does not exceed the lesser of: sixty percent (60%) of AMI, or (ii) sixty percent (60%) income level for the County of San Francisco as published by the TCAC.

"**Major Casualty**" is defined in *Section 23.4* (Tenant’s Right to Terminate Due to Casualty).

“**Middle Income Household**” means a tenant household with combined initial income that does not exceed one hundred twenty percent (120%) of AMI.

“**Moderate Income Household**” means a tenant household with combined initial income that does not exceed one hundred percent (100%) of AMI.

“**MMRP**” means the Mitigation Monitoring and Reporting Program to implement that Mitigation Measures and Improvement Measures relating to the Project as described in the FMND.

“**MOHCD**” means the San Francisco Mayor’s Office of Housing and Community Development.

“**MOHCD Loan Agreement**” means that certain loan agreement, secured promissory note, deed of trust, declaration of restrictions, and any other document executed and delivered by Tenant and the MOHCD in connection with the predevelopment, construction and permanent financing of the Initial Improvements.

"**Mortgage**" means any mortgage, deed of trust, trust indenture, letter of credit or other security instrument, including but not limited to the deeds of trust securing a Mortgage and which are part of the Loan Documents, and any assignment of the rents, issues and profits from the Premises, or any portion thereof, which constitute a lien on the Leasehold Estate created by this Lease and approved in writing by Port.

"**Net Awards and Payments**" is defined in *Section 24.4* (Award and Distribution).

“**Net Cash Flow**” means Gross Revenues less Operating Expenses.

“**Net Revenues**” is defined in *Section 7.2(b)(ii)* (Retail Rent).

"**Net Sale Proceeds**" means Gross Sale Proceeds less Costs of Sale and goodwill. If Tenant made Initial Improvements or performed Subsequent Construction at the Premises, Tenant's Adjusted Basis may be deducted if Tenant previously complied with *Section 26.11(d)* (Certified Construction Costs).

“**New Capital Loans**” means

"**New Lease**" is defined in *Section 34.8(d)* (New Lease).

"**Notice of Completion**" is defined in *Section 14.9(d)(ii)* (Effect).

"**Notice of Removal**" is defined in *Section 16.2 above* (Removal of Improvements).

"**Notice to Cease Prohibited Use**" is defined in *Section 10.3 above* (Notice of Prohibited Use Charge).

"**Official Records**" means the official records of the City and County of San Francisco.

"**Operating Expenses**" is defined in in *Section 7.2(b)(iii)* (Retail Rent).

“**Option Agreement**” is defined in *Recital O*.

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

“**Partial Condemnation**” is defined in *Section 24.3* (Partial Condemnation).

“**Parties**” means Port and Tenant.

**“Permitted Limited Partner”** means an investor limited partner or a special limited partner and their respective successors and assigns approved by MOHCD in accordance with the Loan Documents.

**"Person"** means any natural person, corporation, limited liability entity, partnership, joint venture, or governmental or other political subdivision or agency.

**"Personal Property"** means all fixtures, furniture, furnishings, equipment, machinery, supplies, software and other tangible personal property that is incident to the ownership, development or operation of the Improvements and/or the Premises, whether now or hereafter located in, upon or about the Premises, belonging to Tenant, Residential Occupant or any Subtenant and/or in which Tenant, Residential Occupant or any Subtenant has or may hereafter acquire an ownership interest, together with all present and future attachments, replacements, substitutions and additions thereto or therefor.

**"Port"** means the San Francisco Port Commission.

**“Port Event of Default”** is defined in *Section 29*.

**"Port program or project"** shall mean any development, removal or renovation, by public and/or private parties, of a building, pier or seawall lot in, on or in the vicinity of the Premises (including, but not limited to any Development Project defined in *Section 5.5* (Proximity of Development Projects)).

**"Port representative"** means a Port auditor, or any auditor or representative designated by Port.

**“Port's Sale Participation”** is defined in *Section 26.11* (Port's Participation in Sale).

**"Port Work"** is defined in *Section 16.5* (Port's Alterations).

**“Port's Repair Notice”** is defined in *Section 17.4* (Port's Right to Repair).

**"Premises"** is defined in *Section 2* (Demise).

**“preservative-treated wood containing arsenic”** is defined in *Section 36.11* above.

**"prevailing party"** is defined in *Section 31.1* above.

**"Prohibited Use(s)"** is defined in *Section 10.2* above.

**“Project”** is defined in *Recital E*.

**“Project Based Vouchers”** means

**“Project Requirements”** means the following with respect to the Initial Improvements: (i) green building requirements, (ii) all applicable Laws, including the Port Building Code, required Regulatory Approvals, the Waterfront Land Use Plan, Environmental Laws, disabled access Laws, Laws regulating construction on the Premises, (iii) the Mitigation Measures and Improvements Measures in the MMRP; and (iv) the Equal Opportunity Program.

**“Property Manager”** is defined in *Section 2* (Key Lease Terms).

**“Public Trust”** means the public trust for commerce, navigation and fisheries, including the statutory trust imposed by the Burton Act.

**“Real Property”** is defined in *Section 2* (Demise).

**"Refinancing"** shall mean any debt financing or refinancing incurred by Tenant and secured by any Mortgage.

**"Regulatory Agency"** means the municipal, county, regional, state, or federal government and their bureaus, agencies, departments, divisions, courts, commissions, boards, officers, or other officials, including BCDC, any Environmental Regulatory Agency, Port (in its regulatory

capacity), other departments, offices, and commissions of the City and County of San Francisco (each in its regulatory capacity), Port's Chief Harbor Engineer, the Dredged Material Management Office, State Lands, 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, under or about the Premises, other Port property, or the environment.

**"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.

**"Rent"** means the Base Rent, Retail Rent, Excess Rent, Additional Rent and all other sums payable by Tenant to Port hereunder, including, without limitation, any Late Charge and any interest assessed pursuant to *Section 7* (Rent).

**"Rent Adjustment Date"** is defined in *Section 7.1*.

**"Rent Commencement Date"** means the date on which the payment of Rent commences as specified in *Section 2* (Key Lease Terms).

**"Renewable Energy System"** is defined in *Section 19.1*.

**"Required Element"** means those portions of the Construction Documents for the Initial Improvements that address: (i) conformity and compliance with the Project Requirements, (ii) exterior architectural appearance and aesthetics of structures on the Premises, (iii) alterations to any structures on the Premises, (iv) landscape and design of all outdoor areas, including those required under Regulatory Approvals to be accessible to the public, and (v) the design and appearance of all exterior signs (whether temporary or permanent).

**"Reserve Account"** is defined in *Section 16.2* (Removal of Improvements)

**"Residential Occupant"** means any person or entity authorized by Tenant to occupy a Residential Unit in the Building.

**"Residential Portion"** is defined in *Section 2* (Key Lease Terms).

**"Residential Unit(s)"** is defined in *Section 2* (Key Lease Terms).

**"Restoration"** and **"Restore"** means the restoration, replacement, renovation, reconstruction, repair, or rebuilding of the Improvements (or the relevant portion thereof) in accordance with all Laws then applicable.

**"Restoration Cost"** is defined in *Section 23.7(a)* (Estimators).

**"Restaurant Sublease"** means a Sublease of a Ground Floor Unit for use as a restaurant or café operation open to the general public.

**"Retail Rent"** is defined in *Section 7.2* (Retail Rent).

**"Retail Sublease"** means a Sublease for a Subtenant selling products or services to the public for their own use.

“**Retail Subtenant**” means a Subtenant with a Retail Sublease for a Ground Floor Unit.

"**Rules and Regulations**" means Port's rules and regulations for restaurants attached hereto as *Exhibit K*, as may be amended from time to time and any other Port rules and regulations applicable to the Premises as adopted and amended from time to time.

"**Sale**" means, to the extent otherwise allowed under this Lease: (a) Tenant's or a Subtenant's Transfer of its entire interest in this Lease or the entire Leasehold Estate or Subleasehold Estate, including the sale of Personal Property at the Premises (other than the Personal Property of Residential Occupants) and Tenant's or a Subtenant's goodwill to any other Person or entity; or (b) a Transfer affecting ownership of the beneficial interests in or business assets of Tenant or a Subtenant, including in either case any debt financing or refinancing incurred by Tenant or a Subtenant and secured by a Mortgage.

"**Sale Closing**" means the date that any Sale closes.

"**saltwater immersion**" is defined in *Section 36.11* above.

“**Schedule of Performance**” means the Schedule of Performance attached hereto as *Exhibit F* as may be subsequently amended and approved in writing by Port from time to time.

“**Scope of Development**” means the narrative document attached hereto as *Exhibit B*.

"**Security Deposit**" means the amount specified in *Section 2* (Key Lease Terms) and as further described in *Section 9* above.

“**Senior Lender**” means any lender and its successors, assigns, and participants or other entity holding the first deed of trust on the Leasehold Estate or otherwise the most senior Lender.

“**Sign**” means any sign, whether free-standing or affixed to a structure, flag, advertisement, poster, or banner.

“**State Lands**” means the California State Lands Commission.

“**State Legislation**” means Senate Bill 815 (Chapter 660) (2007); Assembly Bill 2649 (Chapter 757) (2012); Assembly Bill 2797 (Chapter 529) (2016); and Assembly Bill 1423 (Chapter xxx (2018), if enacted, and amendments thereto any other applicable statutes governing the Port's granted lands that permits lifting Public Trust use restrictions otherwise applicable from the Premises to allow development of the Project.

"**Sublease**" means a proposed or actual Transfer of all or any part of the Premises under a sublease or a sub-sublease or agreement of similar effect.

“**Subleasehold Estate**” means the estate held by a Subtenant for a subdivided parcel of the Premises.

"**Subletting Expenses**" means verifiable and reasonable brokerage commissions incurred in connection with a Sublease and the costs of any new tenant improvements for which Tenant is responsible under the Sublease.

"**Subsequent Construction**" means all alterations, installations, Improvements, repairs to and reconstruction, replacement, addition, expansion, restoration, alteration or modification of Initial Improvements, or any construction of additional Improvements, following Completion of the Initial Improvements.

“**Subsequent Owner**” means any successor (including a Lender or an affiliate or assignee of a Lender as applicable) to the Tenant's interest in the Leasehold Estate and the Improvements who obtains a New Lease under the terms and conditions set forth in *Section 34.8(d)* (New Lease)

“**Subtenant**” means the Person with whom Tenant makes a Sublease.

"**SWPPP**" is defined in *Section 21.6(a)* above.

“TCAC” means the California Tax Credit Allocation Committee.

"Tenant" means the party identified as Tenant in the Preamble.

"Term" is defined in *Section 6* (Term).

"Total Condemnation" is defined in *Section 24.2* (Total Condemnation).

"trade fixtures" means those items of personalty, furniture, equipment, machinery used in trade by Tenant which are customarily removed without damage to the Premises at the end of a lease term in the ordinary course of businesses of the type operated by Tenant at the Premises.

"Transfer" means any of the following events or proposed events, whether voluntary, involuntary, or by operation of Law: (a) any sale, assignment, encumbrance, sublease, or other transfer any of Tenant's interest in this Lease or in the Premises; (b) any Person other than Tenant occupies or claims a right of possession to any part of the Premises; (c) the entity which owns or Controls Tenant's equity interests or business assets (such as goodwill, inventory, and profits) changes (including without limitation a dissolution, merger, consolidation, transfer or sale); or (d) any interest of any Transferee of Tenant's interest is sold, assigned, encumbered, or otherwise Transferred. So long as Tenant is an entity whose outstanding stock is listed on a nationally recognized security exchange or if at least eighty percent (80%) of Tenant's voting stock is owned by another entity, the voting stock of which is so listed. transfer of such stock does not constitute a Transfer under this Lease.

"Transfer Agreement" means all document(s) effecting or evidencing Tenant's proposed sale, assignment, encumbrance, or other Transfer.

"Transfer Date" means the effective date of a Transfer.

"Transfer Notice" means Tenant's prior written notice to City of an intent to Transfer, specifying: (a) the Transferee's name, address, other contact information, and, if the Transferee is not a natural Person, its form of organization and the identity of each Person with Control of the Transferee; (b) the proposed Transfer Date and a full description of the Transfer Terms; (c) a description of the Transferee's proposed use of the Premises, including any required or desired Alterations or Improvements to the Premises that the Transferee may undertake in order to facilitate its proposed use; and (d) a list of the Transferee's personal, business, and credit references.

"Transfer Terms" means the terms and conditions in the proposed or final Transfer Agreement, as appropriate in context.

"Transferee" means the Person to which Tenant makes or proposes to make a Transfer.

"Uninsured Casualty" is defined in *Section 23.4* (Tenant's Right to Terminate Due to Casualty).

"Unmatured Event of Default" means any default that, with the giving of notice or the passage of time, or both, would constitute a Tenant Event of Default.

"Utilities" means electricity, water, gas, heat, sewers, oil, telecommunication services and all other Utilities.

"Very Low-Income Household" means: (a) during the Initial Term, a household with combined initial income that does not exceed fifty percent (50%) of Area Median Income; and (b) for any period of the Term (or Extended Term) thereafter, a tenant household with combined initial income that does not exceed fifty percent (50%) of area median income, as published by the TCAC.

"WDAC" means the Waterfront Design Advisory Committee authorized under Planning Code Section 240.

"Waiving Party" is defined in *Section 22.5* above.

"worth at the time of award" is defined in *Section 28.2* above.

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IN WITNESS WHEREOF, PORT and TENANT execute this Lease as of the last date set forth below.

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

By: \_\_\_\_\_  
Michael J. Martin  
Deputy Director, Real Estate and Development

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

[Signatures Continue on Next Page]

**TENANT:** **88 BROADWAY FAMILY LP,  
a California limited partnership**

By: 88 Broadway Family BRIDGE LLC,  
a California limited liability company,  
its managing general partner

By: MCB Family Housing, Inc.,  
a California nonprofit public benefit corporation,  
its sole member and manager

By: \_\_\_\_\_

Rebecca Hlebasko, Vice President

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

By: JSCo 88 Broadway Family LLC,  
a California limited liability company,  
its administrative general partner

By: John Stewart Company,  
a California corporation,  
its sole member and manager

By: \_\_\_\_\_

Jack D. Gardner, President

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

[Signatures Continue on Next Page]

**CONSENT: CITY AND COUNTY OF SAN FRANCISCO,**  
a municipal corporation, operating by and through the  
**MAYOR'S OFFICE OF HOUSING AND COMMUNITY**  
**DEVELOPMENT**

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

Date Signed: \_\_\_\_\_

APPROVED AS TO FORM:  
DENNIS J. HERRERA, City Attorney

By: \_\_\_\_\_  
Name:  
Deputy City Attorney

Port Commission Resolution No.  
Board of Supervisors Resolution No.

Lease Prepared By: Ricky Tijani (initial)

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**EXHIBIT A-1**

**LEGAL DESCRIPTION OF PREMISES**

[Attachment on following page]

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**EXHIBIT A-2**

**SITE PLAN**

[Attachment on following page]

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**EXHIBIT B**

**PROJECT DESCRIPTION/SCOPE OF DEVELOPMENT**

[Attachment on following page]

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**EXHIBIT C**

**SCHEMATIC DESIGN**

[Attachment on following page]

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**EXHIBIT D**

**COMMENCEMENT DATE AND EXPIRATION DATE MEMORANDUM**

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

Tenant:

Lease Number:

Lease Date:

Premises: [\_\_\_\_\_, Suite \_\_\_\_]  
San Francisco, California

The Commencement Date of the Lease is hereby established as \_\_\_\_\_, 20\_\_\_\_, the  
Rent Commencement Date of the Lease is hereby established as \_\_\_\_\_, 20\_\_\_\_ the  
Anniversary Date is hereby established as \_\_\_\_\_, 20\_\_\_\_ and the Expiration Date as  
\_\_\_\_\_, 20\_\_\_\_.

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

By: \_\_\_\_\_  
Michael J. Martin  
Deputy Director, Real Estate and Development

Date Signed: \_\_\_\_\_

Tenant:

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

Date Signed: \_\_\_\_\_

**EXHIBIT E**

**FORM OF LEASE MEMORANDUM**

[Attachment on following page]

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**EXHIBIT F**

**SCHEDULE OF PERFORMANCE**

[Attachment on following page]



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**EXHIBIT G**

**MANAGEMENT PLAN**

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**EXHIBIT H**  
**MITIGATION MONITORING AND REPORTING PROGRAM**

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**EXHIBIT I**

**GOOD NEIGHBOR POLICIES**

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**EXHIBIT J**

**PERMITTED TITLE EXCEPTIONS**

[Attachment on following page]



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**EXHIBIT K**

**RESTAURANT RULES AND REGULATIONS**

[Attachment on following page]

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**EXHIBIT L**

**TENANT INCOME CERTIFICATION**

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**EXHIBIT M**  
**FORM TENANT ESTOPPEL CERTIFICATE**

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**EXHIBIT N**

**FORM NON-DISTURBANCE AGREEMENT**

[Attachment on following page]



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**EXHIBIT O**

**LOCAL HIRE PLAN**

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**EXHIBIT P**

**FORM CITY ESTOPPEL CERTIFICATE**

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**SCHEDULE 2**  
**FEMA Disclosure Notice**

The Federal Emergency Management Agency ("FEMA") is revising Flood Insurance Rate Maps ("FIRMs") for San Francisco Bay Area communities. As part of this effort, FEMA is preparing a FIRM for the City and County of San Francisco for the first time. That process may have significant impacts for developing new structures and reconstructing or repairing existing structures on San Francisco's waterfront.

FEMA prepares the FIRMs to support the National Flood Insurance Program ("NFIP"), a federal program that enables property owners, businesses, and residents in participating communities to purchase flood insurance backed by the federal government. The San Francisco Board of Supervisors has adopted a floodplain management ordinance governing new construction and substantial improvements in flood prone areas of San Francisco and authorizing the City's participation in NFIP (as amended, the "Floodplain Ordinance"). The Floodplain Ordinance imposes requirements on any new construction or substantial improvement of structures in city-designated flood zones that are intended to minimize or eliminate flood hazard risks. NFIP regulations allow a local jurisdiction to issue variances to its floodplain management ordinance under certain narrow circumstances, without jeopardizing the local jurisdiction's eligibility in the NFIP. However, the particular projects that are granted variances by the local jurisdiction may be deemed ineligible for federally-backed flood insurance by FEMA.

FIRMs identify areas that are subject to inundation during a flood having a 1% chance of occurrence in a given year (also known as a "base flood" or "100-year flood"). FEMA refers to an area that is at risk from a flood of this magnitude as a special flood hazard area ("SFHA"). To prepare the FIRM for San Francisco, FEMA has performed detailed coastal engineering analyses and mapping of the San Francisco Bay shoreline. The San Francisco Bay Area Coastal Study includes both regional hydrodynamic and wave modeling of the San Francisco Bay, as well as detailed onshore coastal analysis used to estimate wave runup and overtopping, as well as overland wave propagation. These onshore analyses form the basis for the Base Flood Elevations (BFEs) and SFHAs shown on the FIRM..

In November 2015, FEMA issued a preliminary FIRM of San Francisco tentatively identifying SFHAs along City's shoreline in and along the San Francisco Bay consisting of "A zones" (areas subject to inundation by tidal surge) and "V zones" (areas subject to the additional hazards that accompany wave action). These zones generally affect City property under the jurisdiction of the Port of San Francisco and other areas of the San Francisco waterfront, including parts of Mission Bay, Hunters Point Shipyard, Candlestick Point, Treasure and Yerba Buena Islands, and an area adjacent to Islais Creek. FEMA plans to finalize the FIRM in mid-2018. Six months after this date, the FIRM will become effective and will be used for flood insurance and floodplain management purposes. During this six-month period, the City plans to amend the Floodplain Ordinance to adopt the FIRM.

The federal legislation and regulations implementing the NFIP are located at 42 U.S.C. §§ 4001 et seq.; 44 C.F.R. Parts 59-78, §§ 59.1-78.14. FEMA also publishes "Answers to Questions About the NFIP" and FEMA Publication 186 entitled "Mandatory Purchase of Flood Insurance Guidelines." Additional information on this matter can be found on the City's and FEMA's websites at the following links:

<http://sfgsa.org/san-francisco-floodplain-management-program>

<https://www.fema.gov/national-flood-insurance-program-flood-hazard-mapping>

<https://www.fema.gov/national-flood-insurance-program>

[http://www.r9map.org/Docs/Oct13-SanFranCo-FEMA\\_Factsheet\\_rev%20\(2\).pdf](http://www.r9map.org/Docs/Oct13-SanFranCo-FEMA_Factsheet_rev%20(2).pdf)

**SCHEDULE 3**

**HAZARDOUS MATERIALS DISCLOSURE**

[Attachment on following page]