



**City and County of San Francisco
Edwin M. Lee, Mayor**

EXCLUSIVE NEGOTIATION AGREEMENT

By and Between

**THE CITY AND COUNTY OF SAN FRANCISCO
acting by and through the
SAN FRANCISCO PORT COMMISSION**

And

**TZK BROADWAY, LLC
a California limited liability company**

SEAWALL LOTS 323 AND 324

San Francisco Port Commission

**Leslie Katz, President
Willie Adams, Vice President
Kimberly Brandon, Commissioner
Doreen Woo Ho, Commissioner**

**Monique Moyer
Executive Director**

September 10, 2015

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EXHIBITS

- Exhibit A: The Site
- Exhibit B: Performance Benchmarks
- Schedule 1: FEMA Disclosure Notice

EXCLUSIVE NEGOTIATION AGREEMENT

This Exclusive Negotiation Agreement (this “Agreement”) dated as of September 10, 2015, for reference purposes only, is by and between the **CITY AND COUNTY OF SAN FRANCISCO** (the “City”), a municipal corporation acting by and through the **SAN FRANCISCO PORT COMMISSION** (the “Port” or the “Port Commission”), and **TZK BROADWAY, LLC**, a California limited liability company (“Developer” or “TZK”). Locations of defined terms are listed in *Section 17*.

RECITALS

A. Seawall Lot 323 (“SWL 323”) and Seawall Lot 324 (“SWL 324”) are two nearly triangular land parcels with a combined surface area of approximately 42,719 square feet with frontages on The Embarcadero, Broadway, Davis and Vallejo Streets (collectively, the “SWLs”). The SWLs are to be developed with the two abutting right-of-way parcels (“ROW”) that form the terminus of Vallejo Street and Davis Street as they intersect The Embarcadero. The Vallejo Street ROW is approximately 4,842 square foot in area and the Davis Street ROW is approximately 9,619 in area. The SWLs and the two ROWs have a combined land area of 57,170 square feet and they collectively constitute the site for the proposed development described in this Agreement (the “Site”).

B. SWL 323 and SWL 324 (part of City Assessor’s Block 138 and 139 respectively) are part of the Northeast Waterfront area of Port of San Francisco Waterfront Land Use Plan. Hotel, entertainment, theatre and public open space are listed as acceptable uses for the SWLs in Port’s Waterfront Land Use Plan, the City Planning Department’s Northeastern Waterfront Subarea Plan, and the Planning Department’s Northeast Embarcadero Study issued in June of 2013. The Site is also in the Northeast Waterfront Historic District and is within a C-2 (Community Business) zoning district and a 40-X Height and Bulk district. The Site is subject to the common law public trust doctrine, as well as the terms and conditions of the Burton Act, which is the trust grant from the State of California to the City (sometimes referred to collectively as the “public trust”).

C. The Site is currently operated as a surface parking lot by Priority Parking CA pursuant to that certain Lease No. L- 14747 dated October 1, 2009 (“Existing Lease”). The Existing Lease generated approximately \$1 million in net revenue to Port in fiscal year 2014-2015. Port expects to solicit proposals for a new parking operator at the Site, select the next parking operator, and enter into a new agreement for parking operations at the Site sometime in 2016 (together with the Existing Lease, the “Parking Operation Agreements”).

D. Port and One Reel, a Washington State nonprofit corporation (“Teatro”), entered into that certain Lease No. L-12847 in 1999 (as amended, the “Theater Lease”) for Teatro to use certain portions of Piers 27 and 29 for its dinner theater and cabaret operations named Teatro ZinZanni. The Theater Lease expired in 2005, and continued on a holdover month-to-month basis until 2011. To accommodate the 34th America’s Cup and the construction of the new James R. Herman Cruise Terminal on Pier 27, Port and Teatro mutually agreed to terminate the Theater Lease and identified a portion of SWL 324 as a potential relocation site pursuant to that certain Mutual Agreement for Lease Termination and Reservation of Rights Agreement dated August 12, 2011 (“Mutual Termination Agreement”). If Teatro satisfied certain pre-conditions (such as completion of environmental review and project design compatible with the Northeast Waterfront Historic District), the parties would enter into a new lease on a portion of SWL 324.

E. Teatro initially proposed using temporary structures for its operations on a portion of SWL 324, with a lease term not exceeding 10 years. But there were concerns from various stakeholders that temporary structures would be incompatible within the historic district.

F. In early 2013, Teatro concluded that for it to amortize the cost of constructing permanent structures, it would need a long-term lease of at least 10 years; an expanded land use program capable of generating the required revenues and investment returns to support the development cost; and a larger site to accommodate the expanded use program. It proposed that its leasehold premises be expanded to include all of SWL 324 and the adjacent SWL 323.

G. In late 2013, Teatro began seeking a lease with Port that would allow it to pursue the feasibility of its expanded proposal. The expanded proposal includes building a new privately financed, state-of-the-art theatre as a long-term home for Teatro's dinner theatre performance and a state-of-the-art boutique hotel comprised of a maximum of 200 rooms, including up to 10 transient residences for visiting Teatro artists, situated within a 40-foot, four-story building, together with related public infrastructure and access improvements and other improvements, including construction of a new public park at the north end of the Site (collectively, the "Project"). Teatro determined that it needed development expertise for the expanded program.

H. TZZ is partnering with Kenwood Investments specifically for its additional expertise on hotel development and project financing. Kenwood Investments has San Francisco Bay Area expertise in developing and obtaining project financing for a variety of developments throughout the Bay Area such as Treasure Island Community Development, the developer of Treasure Island, The Aquarium of the Bay at Pier 39, the approximately 400-slip marina proposed for the Treasure Island, a proposed 62-room hotel with 80-seat restaurant in Sonoma, Sonoma Ramekins Culinary School/event center/Inn, Cornerstone Event Center in Sonoma and Sonoma Media Investments, to name a few. Teatro is now operating as TZZ, LLC, a Washington limited liability company ("TZZ"). TZZ is also an affiliate of Teatro. TZZ, LLC and Kenwood Investments No. 6, LLC ("Kenwood"), an affiliate of Kenwood Investments, are the sole members of TZK.

I. The policy of the San Francisco Board of Supervisors (the "Board"), as set forth in Administrative Code Section 2.6-1, is to competitively bid opportunities to lease City property or facilities, except where competitive bidding is impractical or impossible. A significant number of neighbors and community stakeholders expressed supports for Teatro to reopen in the waterfront, and Teatro began seeking an exemption from the City's competitive bidding policy after consultation with Port.

J. On October 28, 2014, the Port Commission approved Resolution No. 14-58 directing Port staff to assist Teatro and Developer in developing and introducing a resolution to the San Francisco Board to consider exempting the proposed Project from the competitive bidding policy of Administrative Code Section 2.6-1 with respect to the potential lease of the Site to Developer.

K. On May 5, 2015, the Board adopted Resolution No. 170-15 (the "Board Resolution"), which found that the proposed Project is exempt from competitive bidding requirements of Administrative Code Section 2.6-1 on the following basis: the unique, one-of-a-kind attributes of Teatro; the unique opportunity presented by Developer's proposal to build and finance the Project; Teatro's position as a tenant in good standing under Port policies; the provisions of the Mutual Termination Agreement; and, in keeping with Administrative Code Chapter 90A to retain an important entertainment icon, provide performer lodging and workforce training, and numerous other public benefits to the City and the region that the proposed Project would produce, as further described in the Board Resolution.

L. The Board Resolution also (i) urged Port, Teatro and Developer to engage in continued outreach to affected and interested neighbors, community members and stakeholders to ensure that the proposed Project is designed with public input; (ii) urged Port to hire a third

party real estate economic consultant during negotiations with Developer to ensure Port receive fair market value for the lease of the Site; and (iii) directed Port to submit to the Clerk of the Board a copy of Port's real estate consultant's report confirming TZK's financial capacity and qualifications to develop the Project prior to the Port Commission hearing at which the Port Commission considers awarding the this Agreement to Developer.

M. Port staff and a Port-hired third-party real estate consultant reviewed Kenwood Investments' qualifications and financial capacity to develop the Project and issued a report confirming that Kenwood Investments is qualified to develop the Project ("**Qualification Determination**"). Port staff submitted a copy of the Qualifications Determination to the Clerk of the Board on August 18, 2015.

N. On September 8, 2015, the Port Commission adopted Resolution No. 15—31 and authorized and directed Port's Executive Director (the "**Executive Director**"), or her designee, to enter into this Agreement, with the understanding that the final terms and conditions of the Transaction Documents will be subject to approval by the Port Commission and, as applicable, the Board.

O. This Agreement sets forth the process, terms, and conditions upon which Port and Developer will negotiate terms for the lease disposition and development agreement ("**LDDA**"), long-term lease (the "**Lease**") and other related agreements and documents (collectively, the "**Transaction Documents**") for the development and operation of the proposed Project on the Site.

AGREEMENT

1. AGREEMENT.

1.1. **Conditions Precedent.** Before the Effective Date, Developer must deliver to Port the following items:

(a) A \$25,000 check made payable to Port representing a portion of the Negotiation Fee;

(b) The first Payment Advance of Forty-Five Thousand Dollars (\$45,000) to cover the anticipated Transaction Costs for the period from and including September 8, 2015 through and including December 31, 2015;

(c) A copy of Developer's (and its managing member's) certificate of incorporation, certified by the California Secretary of State ("**Secretary of State**") as a true and correct copy on file with the Secretary of State; and

(d) An original of Developer's (and its managing member's) certificate of good standing issued by the Secretary of State no earlier than thirty (30) days prior to the Effective Date.

1.2. **Exclusive Negotiations.**

(a) During the term of this Agreement (as extended or earlier terminated, the "**Exclusive Negotiation Period**"), and subject to **Section 2.4** (Port's Reserved Rights), Port will not solicit or consider any other proposals or negotiate with any other tenant or developer with respect to the long-term development of the Site without Developer's consent.

(b) Developer acknowledges that: (i) certain portions of the Site are subject to existing interim leases, licenses or other occupancy agreements and practices, including the Parking Operation Agreements; and (ii) as further provided in **Section 2.4**, Port has the continuing right to enter into additional interim leases, licenses and other occupancy and agreements at the Site, as long as Port delivers exclusive possession of the Site to Developer when required under the Transaction Documents, should the Project be approved.

2. TERM; EXTENSION OPTIONS; FORCE MAJEURE; PORT'S RESERVED RIGHTS.

2.1. Initial Term. The initial term of the Exclusive Negotiation Period (the "Initial Term") will commence on the date the Executive Director executes this Agreement (the "Effective Date") and will expire one (1) year after the Effective Date (the "Initial Expiration Date"), subject to extension or earlier termination as provided in this Agreement.

2.2. Extension Options.

(a) Subject to satisfaction of all the conditions set forth in this *Section 2.2*, Developer has four (4) consecutive options (each an "Extension Option") to extend the Exclusive Negotiation Period by an additional six (6) months each (each an "Extension Term"). If Developer fails to timely exercise any Extension Option in accordance with this *Section 2.2*, then such applicable Extension Option and any subsequent Extension Option or Extension Options will immediately and automatically terminate without the need for any action or documentation by either party.

(b) The term "First Extended Expiration Date" means the date that is six (6) months after the Initial Expiration Date. The term "Second Extended Expiration Date" means the date that is six (6) months after the First Extended Expiration Date. The term "Third Extended Expiration Date" means the date that is six (6) months after the Second Extended Expiration Date. The term "Extended Expiration Date" means as applicable, the First Extended Expiration Date, the Second Extended Expiration Date, or the Third Extended Expiration Date. The term "Expiration Date" means the Initial Expiration Date or if the term of this Agreement has been extended in accordance with this *Section 2.2*, then "Expiration Date" means the last day of the applicable Extension Term.

(c) In order to exercise any Extension Option, Developer must satisfy all of the following conditions:

(i) The Executive Director is satisfied in her reasonable judgment that Developer has satisfied, or is making good faith and reasonable efforts to satisfy, all of the Performance Benchmarks described in *Exhibit B* (the "Performance Benchmarks") by the Initial Expiration Date and the applicable Extended Expiration Date, as applicable;

(ii) There is no Developer Event of Default and there has been no event, with the passage of time, that would result in a Developer Event of Default;

(iii) Port has received Developer's written notice of its election to extend the Exclusive Negotiation Period at least two (2) weeks prior to, as applicable, the Initial Expiration Date or the applicable Extended Expiration Date; and

(iv) Port has received the Extension Fee prior to, as applicable, the Initial Expiration Date or the applicable Extended Expiration Date.

(d) Except for the Expiration Date and if applicable, the changes in the Performance Benchmark performance dates, all other terms and conditions of this Agreement will remain in full force and effect.

2.3. Force Majeure Event.

(a) If Developer is unable to satisfy any Performance Benchmark because of a Force Majeure Event, then Developer will have the option to extend the Exclusive Negotiation Period (a "Force Majeure Extension") upon notice to the Port (the "Force Majeure Notice"), which must be given within 30 days after Developer first learns of the Force Majeure Event. In the Force Majeure Notice, Developer must describe the Force Majeure Event and provide its good faith estimate of the dates by which Developer will be able to satisfy the remaining Performance Benchmarks, the last of which must be on or before the Upset Date. The dates for Developer's

performance of the remaining Performance Benchmarks will be extended to the dates specified in the Force Majeure Notice unless any of the following applies:

(i) The Port gives Developer notice within 10 days after Port's receipt of the Force Majeure Notice that, based on the Port's reasonable judgment, no basis for a Force Majeure Extension exists; or

(ii) A Terminating Event has occurred; or

(iii) An Event of Default, or an event that, with notice or the passage of time or both would constitute an Event of Default, has occurred and is uncured when Developer gives its Force Majeure Notice.

(b) Except for the Expiration Date and the changes in the Performance Benchmark performance dates, all other terms and conditions of the Agreement will remain in full force and effect during a Force Majeure Extension. With respect to any Force Majeure Event, the parties agree to proceed with due diligence and cooperate with one another to defend and resolve the dispute, and acknowledge that the resolution of the Force Majeure Event may affect Term Sheet provisions to which they have previously agreed and require additional Term Sheet negotiations.

(c) Under no circumstances may a Force Majeure Extension extend beyond the Upset Date unless expressly agreed in writing by both parties, in their respective sole and absolute discretion, and approved by the Port Commission, in its sole and absolute discretion.

(d) The following definitions apply in this Agreement.

(i) "Force Majeure Event" means any proceeding before any court, tribunal, or other judicial, adjudicative, or legislative decision-making body, including any administrative appeal that challenges the validity of any City or Port Regulatory Approval with respect to the Project, including any findings under CEQA, if the pendency of the proceeding is reasonably likely to prevent the parties from timely entering into the Transaction Documents. Force Majeure Events include litigation related to a Fiscal Feasibility Determination (if any), Port Endorsement or Board Endorsement, or approval of any of the Transaction Document by Port or the Board, as applicable. Force Majeure Events exclude any action or proceeding brought by any Developer Affiliate or their Affiliates, any Developer consultant, or any other third party assisted directly or indirectly by Developer.

(ii) "Upset Date" means the date that is 24 months after the Expiration Date applicable for the period covered by the most recent Extension Option exercised by Developer and granted by Port in accordance with *Section 2.2*.

2.4. Port's Reserved Rights. During the Exclusive Negotiation Period, the Port Commission reserves the right, in its sole discretion, to take or not take, any or all of the following actions:

(a) Enter into interim leases, licenses or other occupancy agreements, including the Parking Operation Agreements, for any portion of the Site Port' so long as they expire or are terminable by Port without penalty, cost or expense to Developer before the anticipated close of escrow under the LDDA;

(b) Direct the Executive Director to waive, extend or conditionally extend the time to complete the various Performance Benchmarks by the applicable dates set forth in *Exhibit B* attached hereto (the "Performance Dates");

(c) Extend the Exclusive Negotiation Period.

(d) If negotiations with Developer under this ENA are unsuccessful and do not lead to approval of a LDDA within the Exclusive Negotiation Period, to negotiate with

another developer for the long-term development of the Site or to undertake other efforts with the Site including, but not limited to, issuing a request for proposals.

(e) Expand or contract the scope of the Project by adding or removing minor areas to or from the Site, committing or withholding public financing, or otherwise altering the Project concept from that initially proposed to respond to new information, community, regulatory or environmental issues, or opportunities to improve the financial return to Port from the Project, or to enhance public benefits.

3. NEGOTIATION OF TERM SHEET

3.1. *Negotiating Principles.* During the Exclusive Negotiation Period, Port and Developer (i) will each assign a principal (i.e., an officer, board member, executive employee, or other agent with management level authority) who will negotiate on its behalf, and (ii) use commercially reasonable efforts to meet and negotiate to complete a Term Sheet and Transaction Documents conforming to the Term Sheet, in mutually satisfactory forms approved by the Office of the City Attorney.

3.2. *Term Sheet.*

(a) *Generally.* The parties will negotiate a non-binding term sheet for the Project (the "Term Sheet"). The Term Sheet will describe the basic elements of the Project, site plan, use program, economic parameters, and fundamental terms that will serve as a basis for negotiating the Transaction Documents. Except to the extent agreed otherwise, the Term Sheet must address the following terms:

- (i) guaranteed minimum rent to Port equal to the higher of \$1,250,000 per year or the fair market rent, plus percentage rent, each subject to annual increases;
- (ii) Port participation in sale and refinancing proceeds;
- (iii) mechanisms to ensure that the Project is self-supporting;
- (iv) Developer is solely responsible for all development and operating costs of the Project without any cost or liability to Port;
- (v) acknowledgement that Port's interest in the land will be superior to any debt, and that Port will not incur costs for or otherwise subsidize the Project;
- (vi) specific requirements for creating, maintaining, and retaining a public park and open space as permanent conditions of the Project;
- (vii) a complete description of proposed design and use program for the Site that is consistent with the public trust;
- (viii) the proposed use program and improvements to the Site, including height and massing, and conceptual substructure and seismic designs;
- (ix) operation plan;
- (x) a viable financial plan along with any proformas and financial information requested by Port to evaluate the Developer's financial proposal; and
- (xi) necessary data to support an analysis of tax, economic and employment benefits of the Project.

3.3. *Fiscal Feasibility Determination.* The parties acknowledge that the Project may be subject to the Board finding that it is fiscally feasible under Administrative Code Chapter 29 ("Fiscal Feasibility Determination"). The parties further acknowledge that if a Fiscal Feasibility Determination is required, environmental review under the California Environmental Quality Act ("CEQA") cannot be commenced before the Board makes the Fiscal Feasibility Determination.

Whether Fiscal Feasibility Determination is required will be determined prior to presenting the Term Sheet for endorsement to the Port Commission.

3.4. Term Sheet Endorsements.

(a) **Port Endorsement.** After the parties agree on the Term Sheet, the Executive Director will recommend that the Port Commission endorse the Term Sheet (“**Port Endorsement**”). Following Port Endorsement, references to the Project in this Agreement will mean the Project as reflected in the Port Endorsement.

(b) **Board Endorsement.** Subject to Port Endorsement, Port will submit the Term Sheet to the Board for its review and endorsement (“**Board Endorsement**”) concurrently with a request for Fiscal Feasibility Determination if required. Developer and Port agree to use reasonable efforts to coordinate and cooperate with the Board to schedule hearings on the earliest feasible dates. At Port’s request, Developer will attend the hearings and, if requested, make presentations on the Project to the Port Commission, the full Board and any of its committees.

(c) **No Board Endorsement or No Fiscal Feasibility Determination.** If the Board does not issue a Board Endorsement or make a Fiscal Feasibility Determination if required, then the following will occur:

(i) Either party may initiate additional Term Sheet negotiations to address the Board’s concerns by giving notice to the other party no later than five (5) days after the full Board Hearing to consider the Board Endorsement (a “**Negotiation Notice**”). The parties agree to negotiate in good faith to revise the Term Sheet during a 60-day period that starts immediately after delivery of the Negotiation Notice (“**Negotiation Period**”), but Port will not be required to agree to revise terms that would (1) violate the public trust or its goals and objectives under the Waterfront Land Use Plan in its reasonable judgment, or (2) increase Port’s or City’s liabilities or obligations or decrease Port’s or City’s financial return from the Term Sheet initially submitted to the Board. If the parties agree on the terms of a revised Term Sheet (the “**Revised Term Sheet**”) within the Negotiation Period, the Executive Director will present the Revised Term Sheet to the Port Commission for its review and approval. If the Port Commission approves the Revised Term Sheet, Port will present the Revised Term Sheet to the Board for its endorsement. If the Board endorses the Revised Term Sheet, all references in this Agreement to the Term Sheet will mean the Revised Term Sheet where appropriate in context. If the Board does not endorse the Revised Term Sheet, this Agreement will automatically terminate.

(ii) Either party may terminate this Agreement on no less than five (5) days’ notice given to the other party (“**Termination Notice**”). The Termination Notice must be delivered within fifteen (15) days after the Board’s vote not to grant the Board Endorsement. But subject to the immediately following sentence, if the other party delivers a Negotiation Notice within the five (5)-day period under **Section 3.4(c)(i)**, the Termination Notice will be suspended during the Negotiation Period and be deemed rescinded if the parties agree to a Revised Term Sheet during the Negotiating Period. The suspension of the Termination Notice will apply only to the Board’s failure to endorse the Term Sheet and will not apply to the Board’s failure to endorse the Revised Term Sheet.

(iii) This Agreement will terminate automatically if any of the following occur: (1) neither party gives a timely Negotiation Notice or Termination Notice; (2) the parties do not agree on a Revised Term Sheet during the Negotiation Period; (3) the Port Commission does not endorse the Revised Term Sheet; or (4) the Board does not endorse the Revised Term Sheet.

(d) **Execution of Term Sheet.** Developer will execute the Term Sheet before it is submitted to the Port Commission and the Board for endorsement. Neither Port Executive Director nor any other City or Port official will have any obligation to execute the Term Sheet until both Port Endorsement and the Board Endorsement have become effective. The parties acknowledge that the Term Sheet is intended only to set forth general principles for negotiation

of the Transaction Documents. The Transaction Documents will be subject to review and approval by the parties, their respective legal counsel, and the Port Commission, and as applicable, by the Board (including approval of the Lease by the Board under Charter Section 9.118). Irrespective of whether the Term Sheet is executed by Port, the Port and the City cannot be bound by any of the Transaction Documents until the Transaction Documents are executed by Port only after approval by the Port Commission and as applicable, the Board, in their respective sole and absolute discretion.

3.5. Subsequent Changes. After execution of the Term Sheet, Developer may propose modifications or changes to the Term Sheet and Project (“**Developer’s Proposed Changes**”) if the changes are in response to any Regulatory Agency’s (including Port) request, guidance or requirements or if Developer reasonably believes the changes to be in the best interests of Port or the Project. If Port reasonably determines that Developer’s Proposed Changes would: (a) materially alter the Project described in the Term Sheet; (b) materially increase Port’s liability with respect to the Project; (c) materially adversely affect Port’s Management Obligations; or (d) materially decrease Port’s financial return from the Project as agreed in the Term Sheet then, within 45 days after Port notifies Developer of this determination, Developer must present Developer’s Proposed Changes to the Port Commission for consideration and endorsement. As part of any request for approval, Developer must present a detailed description of each of Developer’s Proposed Changes and explain the reasons supporting each change. The Port Commission, in its sole and absolute discretion, may approve or disapprove all or any of Developer’s Proposed Changes. None of Developer’s Proposed Changes will take effect until explicitly endorsed by the Port Commission. Additionally, Port, in its sole discretion, may submit Developer’s Proposed Changes to the Board for endorsement. Both the subsequent Port Endorsement and if determined by Port to be required, the Board Endorsement, of Developer’s Proposed Changes are conditions to Port Executive Director’s obligation to accept Developer’s Proposed Changes.

4. REQUIRED PAYMENTS.

In consideration of the right to negotiate exclusively with Port for the Site, Developer agrees to pay Port a non-refundable negotiation fee in accordance with *Section 4.1(a)* (the “**Negotiation Fee**”), non-refundable Extension Fees in accordance with *Section 4.1(b)* if the Term is extended (the “**Extension Fee**”), and the Transaction Costs in accordance with *Section 4.2*. Any sums payable to Port under this Agreement must be tendered in United States currency in immediately available funds when due. Time is of the essence regarding all such payments.

4.1. Negotiating Fee and Extension Fee.

(a) Negotiation Fee. As consideration for the right to negotiate exclusively with Port for the Site during the Initial Term, Developer will pay to Port a Negotiation Fee equal to a maximum of One Hundred Thousand Dollars (\$100,000). The Negotiation Fee is payable to Port in the following increments:

(i) Twenty-Five Thousand Dollars (\$25,000) before the Effective Date;

(ii) Twenty Five Thousand Dollars (\$25,000) on or before six (6) months after the Effective Date.

(iii) The balance of the Negotiation Fee in the amount of Fifty Thousand Dollars (\$50,000) on or before the date of the closing specified in the LDDA.

(b) Extension Fee. In consideration of the right to extend the Initial Term, Developer must pay an Extension Fee to Port in the amount of Fifty Thousand Dollars (\$50,000) for each six (6) month Extension Term on or before the Initial Expiration Date or if applicable, the applicable Extended Expiration Date.

(c) No Proration. The Negotiation Fee and the Extension Fees will not be prorated for any reason and are non-refundable.

4.2. *Transaction Costs.*

(a) In addition to the Negotiating Fee and if applicable, the Extension Fees, Developer agrees to pay all Transaction Costs that Port incurs from September 8, 2015 (the date the Port Commission authorized exclusive negotiations with Developer) through the expiration or earlier termination of the Exclusive Negotiation Period in accordance with this *Section 4.2.*

(b) Port will use Payment Advances as needed to reimburse Port for its Transaction Costs during the Exclusive Negotiation Period. The first Payment Advance is due prior to the Effective Date and covers the period from and including September 8, 2015 through and including December 31, 2015. Each subsequent Payment Advance is due on the first day of every subsequent calendar quarter (i.e., January 1, April 1, July 1, and October 1). The parties agree and acknowledge that a Payment Advance may not cover all of Port's Transaction Costs incurred for the period covered by such Payment Advance. Accordingly, irrespective of any Payment Advances paid to Port, Developer must pay any Underpayment to Port within five (5) business days after Port's delivery of the Port Statement showing an Underpayment. Within thirty (30) days after the end of each calendar quarter during the Exclusive Negotiation Period or following a termination or expiration of this Agreement, Port will provide Developer with a Port Statement for such applicable period. Developer's obligation to pay any Underpayments will survive the expiration or earlier termination of this Agreement.

(c) Developer expressly agrees that Port may apply any Overpayment against any Negotiating Fee then owed to Port after this Agreement terminates. Subject to the immediately following sentence, any remaining Overpayment will be returned to Developer within ninety (90) days after this Agreement terminates. The parties expressly agree and acknowledge that the LDDA will contain a provision for Developer's payment of Port's transaction costs (to be defined in the LDDA) incurred during the term of the LDDA, and that any Overpayment that Port holds when the LDDA is executed will be applied to transaction costs during the term of the LDDA.

(d) The following terms have the meanings set forth below:

"Consultant Invoice" means an invoice for Outside Transaction Costs.

"Outside Transaction Costs" means all reasonable costs that Port incurs for services of architect, engineering, appraisal, real estate, economics, and other professional consultants, construction management services, and City Attorney and outside counsel fees and costs.

"Overpayment" means Payment Advances paid by Developer in excess of the actual Transaction Costs for the periods covered.

"Payment Advance" means an installment payment by Developer to Port to be applied towards Port's Transaction Costs. Each Payment Advance will equal Forty-Five Thousand Dollars (\$45,000).

"Port Statement" means a reasonably detailed statement showing Transaction Costs incurred by Port for, and Port's application of previously paid Payment Advances during, the immediately preceding quarter, including a calculation of the difference between the amounts of the Payment Advance and actual Transactions Costs for the immediately preceding quarter. Port will include in Port Statement any Consultant Invoices for any Outside Transaction Costs paid during that quarter.

"Transaction Costs" means expenses reasonably incurred by Port during the Exclusive Negotiation Period for the Project, such as costs for: (i) Port staff time spent on the Project and Outside Transaction Costs; (ii) negotiating this Agreement, the Term Sheet, the LDDA, the Lease, and other Transaction Documents; (iii) CEQA review; (iv) obtaining entitlements for

which Port is required to be a co-permittee or co-applicant; (v) review of the Project's public trust consistency by State Lands, including, if necessary, any legislative process pursued to obtain legislative authorization of trust consistency; (vi) community outreach and other public meetings; (vii) materials prepared for the Port Commission and the Board, including studies, legislative reports, findings, and resolutions; and (viii) review of architectural design and schematic drawings, plans and specifications.

"Underpayment" means the amount of actual Transaction Costs incurred by Port to date as set forth in a Port Statement that exceeds the Payment Advance paid by Developer for such applicable period.

4.3. Survival. The provisions of this *Section 4* will survive the expiration or Termination of this Agreement.

4.4. Acknowledgements. The parties acknowledge and agree that: (a) under California Government Code section 87103.6, Developer's payments to Port and the City are not a "source of income" within the meaning of the California Political Reform Act; (b) Port reserves the full and sole discretion and authority to determine which consultants, contractors, or employees to hire or assign to work on Port's and City's behalf on the Project, to direct and evaluate their work and to establish the amount of compensation paid; (c) Developer will have no control over which Port or City account is used to pay for their consultants, contractors, or employees; (d) Developer will have no right to withhold payment of or recover from Port or the City any portion of the Negotiating Fee, Extension Fee or Transaction Costs that have become due and payable under this Agreement (regardless of whether or not a Term Sheet, LDDA, Lease and/or other Transaction Document is executed; and (f) Developer's obligation to pay any portion of the Negotiating Fee, Extension Fee, and Transaction Costs that have become due and payable will survive termination or expiration of this Agreement, and Port may offset any outstanding amounts due and payable (including amounts due and payable to Port under *Section 11.1* (Port's Remedies) following a Developer Event of Default) against such amounts before Port is obligated to refund any unused balance to Developer.

5. DEVELOPER'S OBLIGATIONS.

Developer must pursue diligently and in good faith to completion all of its obligations under this Agreement during the Exclusive Negotiation Period. In furtherance of this Agreement, Developer agrees as follows.

5.1. Developer's Costs. Developer will be solely responsible for all costs (including fees for its attorneys, architects, engineers, consultants, and other professionals) Developer incurs related to or arising from this Agreement, the development and construction of the Project, the negotiation and execution of any of the Transaction Documents, obtaining entitlements and other Regulatory Approvals required for the Project, CEQA review of the Project, and obtaining a Public Trust Determination. Developer will have no claims against Port or the City for reimbursement for Developer's costs even if, by way of example only and without limitation: (a) the Project is determined to be inconsistent with the public trust; (b) any Regulatory Agency (including Port) does not approve the required permits or issue required approvals; (c) the Port Commission fails to endorse the Term Sheet or to approve the LDDA, the Lease, or any other Transaction Documents; (e) the Board fails to endorse the Term Sheet, make a Fiscal Feasibility Determination if required, or approve any Transaction Documents that are subject to Board approval; or (f) the Planning Commission fails to certify the environmental impact report ("EIR") or other environmental approval under CEQA, or, if applicable, after an appeal of the EIR certification or other environmental approval under CEQA to the Board, the Board reverses the Planning Commission's determination.

5.2. Submittals to Port. Developer must: (a) undertake and complete its due diligence review of the Site; (b) provide copies to Port of Developer's final reports and studies on material physical aspects of the Project, such as engineering and geotechnical reports;

(c) prepare financial projections and complete concept plans and schematic design plans for the Project, including floor plans, elevations, and renderings; and (d) provide copies to Port of any new or amended documents relating to Developer's composition, members' obligations to Developer, and operations.

5.3. Community Outreach. Developer must present to Port for its approval Developer's proposed plans for conducting outreach to various community groups and stakeholders in the vicinity of the Project, for educating the public with respect to the Project, and for informing the Board and other Regulatory Agencies about the Project ("**Community Outreach Program**"). The Community Outreach Program must include: (i) Developer's plan for publicizing the Project (i.e., mailers, brochures, Press Releases, and forums educating the public); (ii) Developer's strategy for keeping the appropriate Regulatory Agencies apprised of the Project; (iii) a schedule of presentations to community groups, stakeholders, and Regulatory Agencies during the Exclusive Negotiation Period; and (iv) Developer's proposal for keeping Port informed of its activities during the Exclusive Negotiation Period.

5.4. Public Relations.

(a) PR Program.

(i) Developer must present to Port for its approval Developer's proposed public relations program ("**PR Program**"). The PR Program must include: (i) Developer's plan for publicizing the Project (i.e., mailers, brochures, Press Releases, and forums educating the public); (ii) Developer's strategy for keeping the appropriate Regulatory Agencies apprised of the Project; (iii) a schedule of presentations to community groups, stakeholders, and Regulatory Agencies during the Exclusive Negotiation Period; and (iv) Developer's proposal for keeping Port informed of its activities during the Exclusive Negotiation Period.

(ii) Following Port Executive Director's approval of the PR Program, it will govern Developer's media contacts, unless Port by written notice notifies Developer that Port believes that Developer has not kept Port informed of Developer's media activities with respect to the Project as provided in the PR Program. After the date specified in Port's notice, which will not be deemed a notice under *Section 10* (Default), Developer may not issue, or authorize any other party to issue, any written press release, advertisement, or other formal communication (individually and collectively, "**Press Release**") to any media outlet (including newspapers, radio and television stations, and web sites) relating to its negotiations with Port, including the public release or description of any of Developer's proposed development concepts and plans, phasing, or uses that have not been presented to Port and approved for public release (collectively, "**Press Matters**"), that is not covered by the PR Program without Port's prior consent. Developer agrees it will provide Port with a draft copy of any Press Release before its proposed release of the Press Release. Port will have the right to issue separate Press Releases.

(b) **Press Conference.** Developer agrees not to hold any press conference relating to Press Matters without first extending an invitation to Port to have a Port representative present at the press conference. Developer must provide Port with no less than two (2) full business days' prior notice of the date and time of any proposed press conference and state in detail the purpose of the press conference and the topics to be discussed ("**Conference Summary**"). Port agrees to review the Conference Summary promptly and advise Developer of any comments by 5:00 p.m. on the day before the press conference. If Port does not respond within 2 business days, the Conference Summary will be deemed approved. Developer must make efforts to schedule the press conference to accommodate the schedules of staff designated by Port to attend, but Developer will be permitted to proceed if it determines that rescheduling is infeasible.

(c) **Purpose of Port Review.** The sole purpose of Port's review of a Press Release or a Conference Summary will be to determine whether it would adversely affect Port's Management Obligations or Port's relationship with its constituents or another Regulatory

Agency. If after review of the Press Release or Conference Summary Port believes that revisions or changes are advisable and appropriate, Port may suggest revisions or changes, which Developer agrees to consider incorporating. If Port believes that a Press Release or Conference Summary cannot be revised or changed to its satisfaction, irrespective of whether it may further Developer's interests, or if Port believes that it would adversely affect Port's Management Obligations or Port's relationship with its constituents or another Regulatory Agency, then:

(i) Either: (A) Port may require by written notice to Developer that Developer add to the Press Release the following statement in bold type and no less than font size used in the body of the Press release: "After consultation with Port of San Francisco relating to the matters stated in this press release, Port Executive Director does not endorse any of the statements in this press release;" or (B) Port may issue its own Press Release responding to Developer's Press Release; and

(ii) Port may require by written notice to Developer that Developer make a statement at the press conference substantially consistent with the following: "After consultation with Port of San Francisco relating to the matters stated in this press conference, Port Executive Director does not endorse any statements made at this press conference."

(d) Port's Media Contact. Port will designate a staff person to receive and communicate with Developer about all media matters ("**Media Contact**"). Developer must give timely notice to Port of media inquiries and of Developer's response. Upon written or telephonic request by Developer to the Media Contact, Port in its discretion may waive any applicable notice periods otherwise required under this Section.

(e) Miscellaneous. This Section will not: (i) apply to non-substantive communications in the ordinary course of Developer's business and informational brochures, flyers, and similar materials describing the elements of Developer's proposed Project; or (ii) preclude Developer, its members, or its Agents from responding orally or in writing to media inquiries about its business, operations, or its role in the Project. Developer agrees in any case to make reasonable, good faith efforts to notify Port's Media Contact or Project Manager for the Project before issuing any media communications regarding the Project.

5.5. Public Trust Consistency.

(a) Developer acknowledges that the Site is subject to the public trust and that Port will not enter into the Transaction Documents with Developer until the Project is found by the Port Commission to be consistent with the public trust doctrine, which may be based on a California State Lands Commission ("**State Lands**") finding or an act of the California State Legislature (a "**Public Trust Determination**").

(b) Developer further acknowledges that: (i) obtaining a favorable Public Trust Determination may involve a lengthy and complex entitlement process, the result of which Port cannot guarantee; (ii) Port is making no representations or assurances regarding the Project's public trust consistency; (iii) Developer is assuming the risk of a Public Trust Determination that permits the development and construction of the Project not being granted; and (iv) other than as set forth in this Section, Developer is solely responsible for obtaining a Public Trust Determination for the Project and satisfying any conditions to approval.

(c) Developer must engage actively, along with Port in a process for obtaining each Public Trust Determination for the Project.

(i) This process will include regular discussions with State Lands staff regarding the trust consistent elements of the Project. Except for discussions in the ordinary course of business that do not involve substantive legal, strategic, project design, or other material issues affecting the Project, Developer agrees not to engage in any substantive discussions regarding the Project with State Lands staff or commissioners, the Attorney General's Office or other counsel without Port's prior consent. Port's failure to respond to

Developer's notice of any such discussions will not be deemed consent for Developer to confer with and meet without Port staff. Developer must provide Port with prior notice of any proposed course of substantive discussions with the Governor's Office or members of the State Legislature (including their respective staffs or counsel) regarding the Project or the general application of the public trust doctrine, or other policy. Port may elect to participate in any such discussions with State Lands staff or commissioners or Attorney General's Office or other counsel.

(ii) Developer must present to Port for its approval the basis upon which Developer proposes to obtain a favorable Public Trust Determination (the "Public Trust Consistency Proposal"). Developer shall make all good-faith efforts to incorporate into the Project's design and use program features that Port deem essential to obtaining the Public Trust Determination. Port may suggest reasonable revisions or changes to the proposed Public Trust Consistency Proposal, which Developer must consider in good faith. If Port withholds its consent to the proposed Public Trust Consistency Proposal, the parties will work together in good faith to develop and implement a Public Trust Consistency Proposal that is consistent with Port's Management Obligations. Developer acknowledges and agrees that maintaining professional working relations with State Lands and other Regulatory Agencies and undertaking the economic development, historic preservation, public access improvements, and the repair and replacement of Port facilities are critical to implementing Port's overall management goals for Port lands (the "Port's Management Obligations"). Accordingly, Developer must use its best efforts throughout the Exclusive Negotiation Period to take no actions relating to the Project that would adversely affect Port's relationship with State Lands and other Regulatory Agencies, or result in a Public Trust Determination that would adversely affect Port's ability to achieve Port's Management Obligations. Port shall not have any obligation to negotiate any terms regarding the Project or the Transaction Documents, or include anything in the applications for Public Trust Determinations, that would adversely affect Port's ability to achieve Port's Management Obligations.

(iii) When developing its proposed Public Trust Consistency Proposal, Developer must take into account the following factors:

- A. the fair market value of the Site;
- B. a hotel use to further the enjoyment of visitors to the waterfront and to reinforce the success of the Ferry Building waterfront;
- C. whether the proposed 10 transient residences for visiting Teatro artists conform to the public trust; and
- D. whether other uses ancillary to the proposed Project conform to the public trust.

(d) The Port will seek the Public Trust Determinations on the basis of the Public Trust Consistency Proposal developed collaboratively by Port and Developer. Port has final discretion over the form and substance of the applications for Public Trust Determinations, which discretion shall not be exercised unreasonably. Port will be an applicant for the Public Trust Determinations and may, at its sole discretion, determine that Developer should be a co-applicant.

5.6. Regulatory Approvals; Effective Date of Lease.

(a) In addition to obtaining Public Trust Determinations, the parties acknowledge that other regulatory approvals and permits are required for the development of the Project (each, a "Regulatory Approval"). Without limiting the foregoing, Developer understands and agrees that Port will have no obligation to advocate, promote or lobby any Regulatory Agency and/or any local, regional, state or federal official for any Regulatory Approval, Public Trust Determination, Fiscal Feasibility Determination, Port Endorsement or Board Endorsement, or for approval of the Project, this Agreement, the LDDA, the Lease or any other Transaction

Document. Any such advocacy, promotion or lobbying shall be done by Developer at Developer's sole cost and expense. Port's sole obligation shall be to negotiate with Developer in compliance with this Agreement and to present any final negotiated agreements to the Port Commission and, as applicable, the Board for their review and consideration.

(b) Before taking any action to obtain any Regulatory Approval other than a Public Trust Determination, Developer first must present to Port for Port Executive Director's approval, the basis upon which Developer proposes to obtain the required Regulatory Approvals (the "Regulatory Approval Strategy"). Port may suggest revisions or changes to the proposed Regulatory Approval Strategy, which Developer must consider in good faith. Developer acknowledges and agrees that maintaining professional working relations with other agencies with regulatory authority over the Project (each, including Port, a "Regulatory Agency") is critical to implementing Port's Management Obligations. Accordingly, Developer must use its best efforts throughout the Exclusive Negotiation Period to take no actions relating to the Project that would adversely affect Port's relationship with any other Regulatory Agency or adversely affect Port's ability to achieve Port's Management Obligations.

(c) Developer will be solely responsible for applying for, obtaining, and paying all costs associated with all Regulatory Approvals, and may not file any application for any Regulatory Approval without first obtaining Port's authorization, which Port will not unreasonably withhold or delay. Developer agrees that Port's withholding or delay in approving any application for a Regulatory Approval will be reasonable if the application conflicts with Port's Management Obligations, does not substantially conform to the Term Sheet or any subsequent development design and program to which Port and Developer agreed, or Port is a co-permittee to the application.

(d) Developer, at its sole cost and expense, will comply with the terms of all Regulatory Approvals and shall pay and discharge any fines or penalties imposed as a result of Developer's failure to comply with any Regulatory Approval, for which Port will have no monetary or other liability.

(e) Developer must submit to Port, State Lands, the City Planning Commission, the San Francisco Planning Department's Environmental Planning division, and any other Regulatory Agency having approval over any aspect of the Project all specifications, descriptive information, studies, reports, disclosures, and any other information as and when required to satisfy the application filing requirements of those departments or agencies.

(f) Close of escrow under the LDDA for the execution of the Lease will not occur until Developer has obtained all necessary Regulatory Approvals.

5.7. No Representation or Warranty. Developer acknowledges and agrees that neither Port nor the City has made any representation or warranty regarding any matters relating to the Site, including the suitability of the Site for construction of the Project, or the Project or Developer's ability to obtain the Regulatory Approvals. Developer further acknowledges and agrees that although Port is a Regulatory Agency, Port has no authority or influence over other City officials, departments, boards, commissions, or agencies or any other Regulatory Agency responsible for issuing required Regulatory Approvals (including Port, in its regulatory capacity) and that Port is entering into this Agreement in its capacity as a landowner with a proprietary interest in the Site and not as a Regulatory Agency with certain police powers. Accordingly, no guarantee or presumption exists that any of the Regulatory Approvals will be issued by the appropriate Regulatory Agency, and Port's status as a City Regulatory Agency will not limit Developer's obligation to obtain Regulatory Approvals from appropriate Regulatory Agencies that have jurisdiction over the Project.

5.8. Quarterly Report. Developer must prepare and submit to Port no later than the first day of each calendar quarter during the Exclusive Negotiation Period a meaningful summary of major activities to achieve each Performance Benchmark, including the status of the

Public Trust Determination, CEQA review and other Regulatory Approvals. The first report will be for the period from the Effective Date to December 31, 2015.

5.9. Weekly Meetings. Developer and Port will meet weekly to discuss Project coordination, Transaction Documents, entitlement issues, and other Project-related matters, unless waived or rescheduled by mutual agreement.

5.10. FEMA Disclosure. Developer represents and warrants to Port that Developer has received and reviewed the FEMA disclosure notice attached as *Schedule 1*.

5.11. Assignment of Project Materials. Developer will make commercially reasonable efforts to include in all of its contracts with architects, engineers, and other consultants (collectively, "Project Consultants") to produce studies, applications, reports, permits, plans, drawings, and similar work product for the Project ("Project Materials") provisions assigning Project Materials to Port automatically if this Agreement is Terminated. Project Materials will be assigned to Port in accordance with *Section 9.4*.

6. PORT'S OBLIGATIONS .

Port agrees, subject to Port's rights under *Section 5.5* (Public Trust Consistency) and *Section 5.6* (Regulatory Approvals), to: (a) reasonably cooperate with Developer in filing for, processing, and obtaining all Public Trust Determinations and Regulatory Approvals in accordance with the Regulatory Approval Strategy; and (b) respond within a commercially reasonable time to requests for coordination, consultation, and scheduling additional meetings regarding the Project, including matters relating to Public Trust Determinations or any Regulatory Approval where Port is the co-applicant. This Section does not limit or otherwise constrain Port's discretion, powers, and duties as a Regulatory Agency.

7. FINAL ACTION SUBJECT TO ENVIRONMENTAL REVIEW.

The Project is subject to a process of thorough public review and input and all necessary and appropriate approvals; that process must include environmental review under CEQA, as amended, before Port may consider approving the Project; and the Project will require discretionary approvals by a number of government bodies after public hearings and environmental review. Nothing in this Agreement commits, or shall be deemed to commit Port or the City, or any other public agency to approve or implement the Project, and they may not do so until environmental review of the Project as required under applicable law has been completed; accordingly, the references to the "Project" or the like in this Agreement shall mean the proposed project subject to future environmental review and consideration by Port, the City, and other public bodies; further, Port, the City, and other public agencies with jurisdiction over any part of the proposed Project each shall have the absolute discretion before approving the project to: (i) make such modifications to the Project as may be necessary to mitigate significant environmental impacts; (ii) select other feasible alternatives to avoid or substantially reduce significant environmental impacts; (iii) require the implementation of specific measures to mitigate any specific impacts of the Project; (iv) balance the benefits of the Project against any significant environmental impacts before taking final action if such significant impacts cannot be otherwise be avoided; or (v) determine whether or not to proceed with the Project.

8. PROHIBITED ACTIONS

8.1. Assignment. Developer acknowledges that Port is entering into this Agreement on the basis of Developer's special skills, capabilities, and experience. This Agreement is personal to Developer and, except as provided in this Agreement, may not be Transferred without the Port Commission's prior consent, which may be withheld in the Port Commission's sole and absolute discretion. Any Transfer in violation of this Section will be an incurable Event of Default under this Agreement.

Under this Agreement, "Transfer" means: (1) dissolution, merger, consolidation, or other reorganization; (2) any cumulative or aggregate sale, assignment, encumbrance, or other transfer

of (i) fifty (50) percent or more of Kenwood's legal or beneficial interests in Developer, or (ii) any percentage of TZZ's legal or beneficial interests in Developer; (3) the withdrawal or substitution (whether voluntary, involuntary, or by operation of law and whether occurring at one time or over a period of time) of any member of Developer owning ten (10) percent or more of the interests in Developer or rights to its capital or profits; (4) the occurrence of any of the events described in (1), (2), or (3) with respect to either Kenwood Investments, LLC No. 6 or TZZ, LLC; or (5) Darius Anderson or Norman Langill are no longer actively involved in the day-to-day operations of the Project.

No Transfer made with Port's consent, or as herein otherwise permitted, will be effective unless and until Port receives within thirty (30) days after the applicable transferor has entered into a transfer agreement with the transferee, an executed counterpart of such transfer agreement and any changes or amendments of any operating agreement in connection with such Transfer.

8.2. Prohibited Payments. Developer may not pay, or agree to pay, any fee or commission, or any other thing of value contingent on entering into this Agreement, any other Transaction Document, or any other agreement with Port related to the Project, to any City or Port employee or official or to any contracting consultant hired by City or Port for the Project. By entering into this Agreement, Developer certifies to Port that Developer has not paid or agreed to pay any fee or commission, or any other thing of value contingent on entering into this Agreement, any other Transaction Document, or any other agreement with Port related to the Project, to any City or Port employee or official or to any contracting consultant hired by City or Port for the Project.

8.3. Ballot Measures. Developer expressly agrees not to initiate, promote, support or pursue, or authorize any other person or party to initiate, promote, support or pursue, any ballot measure relating to the Project without prior consultation with Port's Executive Director about the contents of the ballot measure and its intended benefit to the Project.

8.4. No Entry. Developer expressly acknowledges and agrees that this Agreement does not give Developer or any of its employees, officers, members, managers, directors, agents, contractors, consultants, architects, or engineers (collectively, "Agents") the right to enter or access the Site. If requested, Port agrees it will enter into a separate agreement with Developer specifying the terms and conditions of Developer's and its Agents' entry on and access to the Site, consistent with Port's standard practice for doing so, and subject to the terms of the Parking Operation Agreements or other interim leases or other occupancy agreements described in *Section 2.4(a)*.

9. TERMINATION.

9.1. Events Causing Termination. The occurrence of any of the following events (each, a "Terminating Event") will cause early termination of and extinguish this Agreement ("Termination"), without an opportunity to cure or further Port action:

(a) Subject to extension of the term in accordance with *Section 2.2* and a Force Majeure Event in accordance with *Section 2.3*, Developer fails to obtain Port Endorsement by the applicable Performance Date set forth in *Exhibit B*, as such Performance Date may have been extended by Port; or

(b) Subject to extension of the term in accordance with Section 2 (Term), Developer fails to obtain the Board Endorsement (and if applicable, the Fiscal Feasibility Determination) by the applicable Performance Date set forth in *Exhibit B*, as such Performance Date may have been extended by Port or either party elects to terminate this Agreement in accordance with *Section 3.4(c)(ii)*; or

(c) This Agreement Terminates in accordance with *Section 3.4(c)(iii)*.

(d) The Exclusive Negotiation Period expires before the LDDA is executed; or

- (e) Developer voluntarily withdraws from or abandons the Project; or
- (f) The Port exercises its right to Terminate this Agreement following an Event of Default by the Developer; or
- (g) Developer exercises its right to terminate this Agreement following a Port Event of Default by Port; or
- (h) A draft or final CEQA document (including an environmental impact report or “EIR”) for the Project is published without Port’s concurrence;
- (i) Developer submits an application for a conditional use permit or similar entitlement application to City Planning to entitle the Project without Port’s concurrence; or
- (j) Developer fails to comply with *Section 8* (Prohibited Actions) or *Section 14.1* (Nondiscrimination in City Contracts and Benefits Ordinance).

9.2. Effect of Termination. Following a Termination, this Agreement will terminate and Developer, City and Port will be released from all liability under this Agreement except for any obligations that expressly survive the termination or expiration of this Agreement.

9.3. Port’s Rights Following Termination. If negotiations with Developer are unsuccessful, leading to Termination, the Port Commission in its sole discretion may: (a) agree to reinstate and consent to an assignment of this Agreement; or (b) undertake other efforts to develop the Site, including issuing a request for proposals; (c) take any action with respect to the Site.

9.4. Project Assignment After Termination.

(a) If this Agreement is Terminated, Developer must within sixty (60) days after Port’s notice:

- (i) provide to Port at no cost a Project Assignment of all Project Materials, to the extent permitted under its consulting contract;
- (ii) satisfy all outstanding fees relating to the Project Materials that are then due and payable or will become due and payable for services relating to the Project rendered by any of the Project Consultants up to the date of Termination and provide written evidence of satisfaction to Port; and
- (iii) deliver copies of all Project Materials in Developer’s possession or, for materials not in Developer’s possession, confirm, upon request from Project Consultants or Port, that Project Consultants are authorized to deliver or have delivered from the appropriate parties all Project Materials to Port. Developer’s obligations under this *Section 9.4* will survive the expiration or earlier Termination of this Agreement.

(b) Developer will be permitted to disclaim any representations or warranties with respect to the Project Materials (other than Developer’s payment of fees), and, at Developer’s request, Port will provide Developer with a release from liability for future use of the applicable Project Materials, in a form acceptable to Developer and Port. Developer’s acceptance of Port’s release will be deemed to waive and release Port from any claims of proprietary rights or interest in the Project Materials, and Developer agrees that, following a Project Assignment, Port or its designee may use any of the Project Materials for any purpose, including pursuit of the same or a similar Project with a third party.

(c) “Project Assignment” means a contractual assignment of all of Developer’s rights under a consulting contract with a Project Consultant, including any rights to use the Project Consultant’s work product.

10. DEFAULT

10.1. *Developer's Event of Default.* In addition to Terminating Events under *Article 9* (Termination), the occurrence of any of the following events will constitute a default by Developer under this Agreement after the expiration of the applicable cure period, if any (each, an "Event of Default"):

- (a) Developer fails to pay any sum when due under this Agreement; or
- (b) Developer fails to achieve any of the Performance Benchmarks in the manner and by the Performance Dates set forth in *Exhibit B* as the Performance Dates may be extended or stayed in accordance with Sections 2.2 and 2.3, as applicable; or
- (c) Developer fails to comply with any other provision of this Agreement, if not cured within 30 days after Port's notice to Developer, but if the default cannot reasonably be cured within the 30-day cure period, Developer will not be in default of this Agreement if Developer commences to cure the default within the 30-day cure period and diligently and in good faith prosecutes the cure to completion; or
- (d) A voluntary or involuntary action is filed: (i) to have Developer adjudicated insolvent and unable to pay its debts as they mature or a petition for reorganization, arrangement or liquidation under any bankruptcy or insolvency law, or a general assignment by Developer for the benefit of creditors; or (ii) seeking Developer's reorganization, arrangement, liquidation, or other relief under any law relating to bankruptcy, insolvency, or reorganization or seeking appointment of a trustee, receiver, or liquidator of Developer or any substantial part of Developer's assets; or
- (e) Any of the events described in *Section 10.1(d)* occurs with respect to any members of Developer.

10.2. *Port Event of Default.* Port's failure to comply with any provision of this Agreement, if the failure is not cured within 30 days after Developer's notice to Port, will constitute an event of default by Port ("Port Event of Default"); but if Port Event of Default cannot reasonably be cured within the 30-day cure period, Port will not be in default of this Agreement if Port commences to cure Port Event of Default within the 30-day cure period and diligently and in good faith prosecutes the cure Port Event of Default to completion.

11. REMEDIES

11.1. *Port's Remedies.* Following a Developer Event of Default, Port may: (a) Terminate this Agreement by delivery of notice to Developer, and Developer, the City and Port will each be released from all liability under this Agreement (except for those obligations that survive Termination); (b) seek to enforce Developer's indemnity obligations; (c) seek to recover from Developer any funds due and owing to Port; (d) seek to obtain copies and/or assignments of the Project Materials to which Port is entitled; and (e) seek enforcement of any of its other remedies under this Agreement. These remedies are not exclusive, but are cumulative with any remedies now or later allowed by law or in equity.

11.2. *Developer's Remedies.* Following a Port Event of Default, Developer will have the option, as its sole and exclusive remedy at law or in equity, to: (a) Terminate this Agreement by delivery of notice to Port, and Developer, City and Port will each be released from all liability under this Agreement (except for those provisions that survive Termination); or (b) file in any court of competent jurisdiction an action for specific performance to require Port to perform under this Agreement (but Developer will not be entitled to recover monetary damages from Port in connection with Port Event of Default) if Port willfully and without good faith belief and an adequate basis for its belief under this Agreement breaches any of Port's material obligations under this Agreement in order to begin negotiations with another developer in violation of this Agreement. Developer waives any and all rights it may now or later have to pursue any other

remedy or recover any other damages on account of any Port breach or default, including loss of bargain, special, punitive, compensatory or consequential damages.

12. INDEMNITY; WAIVERS.

12.1. Developer's Duty to Indemnify. To the fullest extent permitted by law, and related to facts and circumstances arising from and after the Effective Date, Developer agrees to indemnify and hold City, Port and their respective Agents (collectively, the "Indemnified Parties") harmless from and against any loss, expense, cost, compensation, damages (including foreseeable and unforeseeable consequential damages), attorneys' fees, claims, liens, obligations, injuries, interest, penalties, fines, lawsuits and other proceedings, judgments, awards, or liabilities of any kind, known or unknown, contingent or otherwise, equitable relief, mandamus relief, specific performance, or any other relief (collectively, "Losses") that the Indemnified Parties may incur as a result of Developer's failure to: (a) obtain or comply with the terms and conditions of any Regulatory Approval; (b) reimburse Port for the Transaction Costs; or (c) comply with other the terms and conditions of this Agreement. Developer's obligations under this Section will survive the expiration or earlier Termination of this Agreement.

12.2. Developer's Releases. Developer, on behalf of itself and its members, affiliates, Agents, successors and assigns (collectively, "Developer Agents"), fully, unconditionally and irrevocably releases, discharges, and forever waives (collectively, "releases") any and all claims, demands, rights, and causes of action (collectively, "claims") against, and covenants not to sue or to pay the attorneys' fees and other litigation costs of any party to sue, Port or City, or any of their respective Agents (collectively, "City Agents"), for Losses arising from, accruing from, or due to, directly or indirectly: (i) the facts or circumstances of or alleged in connection with the Project to the extent arising before the Effective Date; and (ii) any Regulatory Agency's failure to issue any required Regulatory Approval.

12.3. Port's Releases. Port, on behalf of itself and City Agents, releases any and all claims against, and covenants not to sue or to pay the attorneys' fees and other litigation costs of any party to sue, Developer or any Developer Agents for Losses arising from, accruing from, or due to, directly or indirectly, the facts or circumstances of or alleged in connection with the Project to the extent arising before the Effective Date.

12.4. Acknowledgment. In providing the releases in this Section 12, Developer and Port understand that if any facts concerning the claims released in this Agreement should be found to be other than or different from the facts now believed to be true, Developer and Port each expressly accepts and assumes the risk of the possible difference in facts and agrees that the releases set forth in this Agreement will remain effective. Therefore, with respect to the claims released in this Agreement, Developer and Port each waive 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.

By placing its initials below, Developer and Port each specifically acknowledges and confirms the validity of the release made above and the fact that Developer and Port were each represented by counsel who explained the consequences of the above release at the time this Agreement was made.

INITIALS: Developer: DA Port: MY

13. NOTICES.

Any notice given under this Agreement must be in writing delivered in person, by commercial courier, or by registered, certified mail or express mail, return receipt requested,

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with postage prepaid, to the mailing addresses below. All notices under this Agreement will be deemed given, received, made or communicated on the date personal receipt actually occurs or, if mailed, on the delivery date or attempted delivery date shown on the return receipt. Any mailing address or telephone or facsimile number may be changed at any time by giving written notice of the change in the manner provided above at least ten (10) days before the effective date of the change.

For the convenience of the parties, copies of notices may also be given by email to the email address given below, by facsimile to the telephone number listed below, or other numbers as may be provided from time to time, but email, telephonic or facsimile notice will not be binding on either party. The effective time of a notice will not be affected by the receipt of the original or facsimile copy of the notice.

Port: Director, Planning & Development
Port of San Francisco
Pier 1
San Francisco, CA 94111
Telephone: (415) 274-0400
Facsimile: (415) 274-0495

With a copy to: City Attorney's Office
General Counsel to Port of San Francisco
Pier 1
San Francisco, CA 94111
Telephone: (415) 274-0485
Facsimile: (415) 274-0494

Developer: TZK Broadway, LLC (Developer)
1215 K Street, Suite 1150
Sacramento, CA 95814
Attn: Darius Andersen, Manager
Telephone: (916) 443-8891
Facsimile: (916) 443-8913
Email: dwa@platinumadvisors.com

With a copy to: Jay Wallace, Member
TZK Broadway, LLC
1010 B Street, Suite 300
San Rafael, CA 94901
Telephone: (415) 601-2081
Facsimile: (916) 443-8913
Email: jwallace@jaywallaceassociates.com

Annie Jamison, Chief Operating Officer
Teatro ZinZanni
4025 21st Street West
Seattle, WA 98199
Telephone: (206) 650-6316
Email: annie@zinzanni.com

14. CITY AND PORT REQUIREMENTS.

Developer has reviewed, understands, and is ready, willing, and able to comply with the terms and conditions of this Article, which summarizes special City and Port requirements as of the Effective Date, each of which is fully incorporated by reference. Developer acknowledges that City and Port requirements in effect when the Transaction Documents are executed will be incorporated into the Transaction Documents, as applicable, and will apply to all contractors, subcontractors, subtenants, and any other Developer parties, as applicable. City requirements of general applicability will apply to the Project even if not summarized below.

The following summary is for Developer's convenience only; Developer is obligated to become familiar with all applicable requirements and to comply with them fully as they are amended from time to time. City ordinances are currently available on the web at www.sfgov.org. References to specific laws in this Article refer to San Francisco municipal codes unless specified otherwise. Capitalized terms used in this Article and not defined in this Agreement will have the meanings assigned to them in the applicable ordinance.

14.1. *Nondiscrimination in City Contracts and Benefits Ordinance.*

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

(b) **Subleases and Other Contracts:** Developer must include in all subleases and other contracts relating to the Premises a nondiscrimination clause applicable to each subtenant or other contractor in substantially the form of Subsection (a). In addition, Developer must incorporate by reference in all subleases and other contracts the provisions of Administrative Code sections 12B.2(a), 12B.2(c)-(k) and 12C.3 and must require all subtenants and other contractors to comply with these provisions.

(c) **Nondiscrimination in Benefits:** Developer does not as of the date of this Agreement and will not at any time while this Agreement is in effect, 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 under state or local Law authorizing such registration, subject to the conditions set forth in Administrative Code section 12B.2.

(d) **HRC Form:** Before the parties enter into the Lease, Developer must execute and deliver to Port the "Nondiscrimination in Contracts and Benefits" form approved by the San Francisco Human Rights Commission.

(e) **Penalties:** Developer understands that under Administrative Code section 12B.2(h), Developer may be subject to a monetary penalty (currently \$50) for each person for each calendar day during which Developer discriminated against that person.

14.2. Requiring Health Benefits for Covered Employees. Unless exempt, Developer 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, including the implementing regulations.

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

(b) Notwithstanding the above, if Developer 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 28.2(a) above.

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

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

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

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

14.3. 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. Developer acknowledges receiving and reviewing the First Source Hiring Program materials and requirements and agrees to comply with all requirements of the ordinance as implemented by Port and/or City, including without limitation, notification of vacancies throughout the Term of the Lease and entering into a First Source Hiring Agreement, if applicable. Developer 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 the Lease.

14.4. Resource Efficiency Requirements. The Project will be subject to Chapter 7 of the San Francisco Environment Code. Accordingly, the Project must meet certain resource efficient requirements. Developer agrees that it will design the Project to comply with Chapter 7 of the San Francisco Environment Code, as may be amended from time to time, or any similar law.

14.5. Tobacco and Alcohol Products Advertising Ban. Developer acknowledges and agrees that no advertising of cigarettes, tobacco products, or alcoholic beverages is allowed on any real property owned by or under the control of the City. This prohibition includes the placement of the name of a company producing, selling or distributing cigarettes, tobacco products, or alcoholic beverages or the name of any cigarette, tobacco product, or alcoholic beverages in any promotion of any event or product. This prohibition does not apply to any advertisement sponsored by a state, local, nonprofit, or other entity designed to: (a) communicate the health hazards of cigarettes and tobacco products or alcoholic beverages; (b) encourage people not to smoke or to stop smoking, or not to drink alcohol or to stop drinking alcohol; or (c) provide or publicize drug or alcohol treatment or rehabilitation services.

14.6. 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. Developer shall not use or apply or allow the use or application of any pesticides on the Site, and shall not contract with any party to provide pest abatement or control services to the Site, 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 Developer may need to apply to the Site during the term of this Agreement, (ii) describes the steps Developer 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 Developer's primary IPM contact person with the City. Developer shall comply, and shall require all of Developer'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 Developer 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 Developer to keep certain records and to report to City all pesticide use by Developer's staff or contractors. If Developer or Developer's

contractor will apply pesticides to outdoor areas, Developer 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>.

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

14.8. *Tropical Hardwood and Virgin Redwood Ban.* Port and the City urge Developer 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 Environment Code sections 802(b) and 803(b), Developer may not provide any items to the construction of the Project, or otherwise in the performance of this Agreement that are tropical hardwoods, tropical hardwood wood products, virgin redwood, or virgin redwood wood products. If Developer fails to comply in good faith with any of the provisions of Environment Code chapter 8, Developer will be liable for liquidated damages for each violation in any amount equal to the contractor's net profit on the contract, or 5 percent of the total amount of the contract dollars, whichever is greater.

14.9. *Preservative-Treated Wood Containing Arsenic.* Developer may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless the Department of Environment grants Developer an exemption from the requirements of Environment Code Chapter 13. The term "preservative-treated wood containing arsenic" means wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including chromated copper arsenate preservative, ammoniac copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Developer 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 Developer from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" means a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

14.10. *Notification of Limitations on Contributions.* Developer acknowledges that it is familiar with Campaign and Governmental Conduct Code section 1.126 (the "Conduct Code"), which prohibits any person who contracts with the City for the sale or lease any land or building to or from the City whenever the transaction would require the approval by a City elective officer or the board on which that City elective officer serves, from making a contribution to the officer, or candidate for office, or committee controlled by the officer or candidate at any time from the commencement of negotiations for the contract until the termination of negotiations for the contract or a specified amount of time (currently 6 months) has elapsed from the date the contract is approved by the City elective officer, or the board on which that City elective officer serves.

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

provided to Port that is within the scope of this Section will be made available to the public upon request.

14.12. *Conflicts of Interest.* Developer acknowledges that it is familiar with the provisions of San Francisco Charter, article III, chapter 2, section 15.103 of the City's Campaign and Governmental Conduct Code, and California Government Code sections 87100 *et seq.* and sections 1090 *et seq.*, certifies that it does not know of any facts that would constitute a violation of these provisions, and agrees that if Developer becomes aware of any such fact during the term of this Agreement, Developer will notify Port immediately.

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

14.14. *Prevailing Wages and Working Conditions.* Developer's improvements and alterations and any construction, alteration, demolition, installation, maintenance, repair, or laying of carpet at, or hauling of refuse from, the Site comprise a public work if paid for in whole or in part out of public funds. The terms "public work" and "paid for in whole or in part out of public funds" as used in this Section are defined in California Labor Code Section 1720 *et seq.*, as amended. Developer agrees that any person performing labor on any public work at the Site shall be paid not less than the highest prevailing rate of wages consistent with the requirements of Section 6.22(E) of the San Francisco Administrative Code, and shall be subject to the same hours and working conditions, and shall receive the same benefits as in each case are provided for similar work performed in San Francisco County. Developer shall include in any contract for such labor a requirement that all persons performing labor under such contract shall be paid not less than the highest prevailing rate of wages for the labor so performed. Developer shall require any contractor to provide, and shall deliver to City upon request, certified payroll reports with respect to all persons performing such labor on the Project.

14.15. *Prevailing Wage Rate Requirement For Theatrical Workers.* City law entitles individual engaged in theatrical or technical services related to the presentation of a Show at the Site, including individuals engaged in rigging, sound, projection, theatrical lighting, videos, computers, draping, carpentry, special effects, and motion picture services, to be paid not less than the Prevailing Rate of Wages (including fringe benefits or matching equivalents) fixed by the Board of Supervisors, unless the Show is free and open to the public or meets any of the other exemptions in Administrative Code Section 21C.4(b). Capitalized terms in this *Section 14.15* shall have the meanings provided in Administrative Code Sections 21.C4 and 21.C7, as applicable. Accordingly, Developer, as a condition of this Agreement, agrees that:

(a) Developer shall comply with the obligations in San Francisco Administrative Code Section 21C.4, and shall require its contractors, and any subcontractors, to comply with the obligations in Section 21C.4, including the payment of Prevailing Rate of Wages to individuals engaged in theatrical or technical services related to the presentation of a Show. In addition, if Developer or its contractor (or any subcontractor) fails to comply with these obligations, the City shall have all available remedies against Developer to secure compliance and seek redress for workers who provided the services as described in Section 21C.7, together with the remedies set forth in this Agreement.

(b) To determine whether Developer is complying with Administrative Code Section 21C.4, the City may, without prior notice to Developer, (i) enter and inspect any workplace or job site pertaining to the presentation of a Show at the Site, and (ii) interview any individual who provides, or has provided, work involving theatrical or technical services for the Show at the Site; provided that the City agrees it will not conduct any such inspection or interview at a time or in a manner that would unreasonably interfere with performances at the Site.

(c) To determine whether Developer is complying with Administrative Code Section 21C.4, City has the right to inspect and copy all workers' time sheets, payroll records, and paychecks (collectively, "Payroll Records") in so far as they relate to the presentation of a Show at the Site. Developer will provide to the City (and will require any of its subtenant, contractor or subcontractor who maintains such Payroll Records to provide to the City) within seventy-two (72) hours after the City's written request to Developer, access to all such Payroll Records for inspection and/or copying between the hours of 9:00 a.m.—5:00 p.m., Mondays—Fridays ("Business Hours") in so far as they relate the presentation of a Show at the Site.

For current Prevailing Wage rates, see the Office of Labor Standard Enforcement's website or call the Office of Labor Standard Enforcement at 415-554-6235.

14.16. Prevailing Wage Rate Requirement For Trade Show and Special Event Work. Developer acknowledges that City law entitles individuals engaged in work involving the on-site installation, set-up, assembly, and dismantling of temporary exhibits, displays, booths, modular systems, signage, drapery, specialty furniture, floor coverings, and decorative materials in connection with trade shows, conventions, expositions, and other special events on City property to receive the Prevailing Rate of Wages (which includes fringe benefits or matching equivalents) fixed by the Board of Supervisors, unless the event is free and open to the public or meets any of the other exemptions in San Francisco Administrative Code Section 21C.8(b). Capitalized terms in this subsection shall have the meanings provided in Administrative Code Sections 21.C7 and 21.C8, as applicable. Accordingly, Developer, as a condition of this Agreement, agrees that:

(a) Developer will comply with the obligations in San Francisco Administrative Code Section 21C.8, and will require Developer's subtenants, contractors, and any subcontractors, to comply with the obligations in Section 21C.8, including the payment of Prevailing Wage Rates to workers engaged in On-site work on Trade Shows or Special Events. In addition, if Developer or its subtenant, contractor (or any subcontractor) fails to comply with these obligations, City will have all available remedies against Developer to secure compliance and seek redress for workers who provided the services as described in Section 21C.7, together with the remedies set forth in this Agreement.

(b) To determine whether Developer is complying with Administrative Code Section 21C.8, the City may, without prior notice to Developer, (i) enter and inspect any workplace or job site pertaining to On-site work on Trade Shows or Special Events at the Site, and (ii) interview any individual who provides, or has provided, On-site work on Trade Shows or Special Events at the Site; provided that the City agrees it will not conduct any such inspection or interview at a time or in a manner that would unreasonably interfere with performances at the Site.

(c) To determine whether Developer is complying with Administrative Code Section 21C.8, City has the right to inspect and copy all Payroll Records in so far as they relate to a Trade Show or Special Event at the Site. Developer will provide to the City (and will require any of its subtenant, contractor or subcontractor who maintains such records to provide to the City) within seventy-two (72) hours after the City's written request to Developer, access to all such Payroll Records for inspection and/or copying during Business Hours in so far as they relate a Trade Show or Special Event at the Site.

For current Prevailing Wage rates, see www.sfgov.org/olse/prevailingwages or call the City's Office of Labor Standard Enforcement at 415-554-6235.

14.17. Local Hire. Unless exempt, Developer agrees to comply with the Local Hiring Policy set forth in San Francisco Administrative Code Section 6.22(G) (the "Local Hiring Policy") in the performance of the work. Before starting any work, Developer shall contact City's Office of Economic Workforce and Development ("OEWD") to verify the Local Hiring Policy requirements that apply to the work and Developer shall comply with all such

requirements. Failure to comply shall be deemed a breach of this Agreement, and Developer may also be liable for penalties as set forth in Section 6.22(G). Without limiting the foregoing:

A. For Covered Projects that exceed \$750,000, Developer shall comply with the applicable mandatory participation levels for Project Work Hours performed by Local Residents, Disadvantaged Workers, and Apprentices as set forth in Section 6.22(G)(4).

B. For Covered Projects that exceed \$1,000,000, Developer shall prepare and submit to OEWD for approval a local hiring plan as set forth in Section 6.22(G)(6).

C. Developer shall comply with the applicable record keeping and reporting requirements and shall cooperate in City inspections and audits for compliance with the Local Hiring Policy.

Any capitalized term used in this Section that is not defined will have the meaning given to such term in the Local Hiring Policy.

14.18. Food Service Waste Reduction Ordinance. Developer agrees to comply fully with and be bound by the Food Service Waste Reduction Ordinance (Env. Code ch. 16), including implementing guidelines and rules. Developer agrees that if it breaches this provision, the City will suffer actual damages that will be impractical or extremely difficult to determine; further, Developer agrees that the sums of \$100 in liquidated damages for the first breach, \$200 in liquidated damages for the second breach in the same year, and \$500 in liquidated damages for subsequent breaches in the same year is an estimate of the damage that the City will incur based on a violation, established in light of the circumstances existing at the time this Agreement was made. These amounts will not be considered a penalty, but rather agreed monetary damages sustained by the City because of Developer's failure to comply with this provision.

14.19. Local Business Enterprises.

(a) The Port Commission encourages the participation of local business enterprises ("LBEs") in Developer's operations. Developer agrees to work with the City's Human Rights Commission (the "HRC") to develop and/or institute appropriate programs for achieving LBE participation in the Project. 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.

(b) Developer agrees that, for all trucking opportunities associated with the Project over which Developer has direct control, including hauling of materials on and off the Site, Developer will make good faith efforts to use local truckers, as defined in the LBE Ordinance ("Local Truckers"). To the extent that Developer in its sole discretion directly employs or directly contracts with truckers for hauling materials on or off the Site, Developer will cause not less than 60 percent of all materials to be hauled in trucks operated by Local Truckers. If Developer fails to meet the 60 percent threshold, Developer will not be in default of these requirements so long as Developer first offered trucking opportunities to Local Truckers, and the truckers were unavailable or unwilling to haul materials to or from the Site. During construction activities, Developer will provide Port with a monthly report setting forth the quantities of material hauled onto or off of the Site during the preceding month and identifying the Local Truckers utilized by Developer and the quantities of materials hauled by Local Truckers, and, if Developer failed to meet the 60 percent threshold, evidence and results of Developer's outreach to Local Truckers during the applicable period.

14.20. Card Check Ordinance. If applicable, Developer will be required to comply with the Card Check Ordinance (Admin. Code ch. 23). That ordinance requires employers of employees in hotel or restaurant projects on public property with more than 50 employees 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.

14.21. San Francisco Bottled Water Ordinance. Tenant is subject to all applicable provisions of Environment Code Chapter 24 (the "Bottled Water Ordinance") prohibiting the sale or distribution of Bottled Water (as defined in the Bottled Water Ordinance) at any Event (as defined in the Bottled Water Ordinance) held on the Premises.

14.22. Consideration of Criminal History in Hiring and Employment Decisions.

(a) Developer agrees to comply with and be bound by all of the 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 Developer who would be or are performing work at the Site.

(b) Developer shall incorporate by reference the provisions of Chapter 12T in all Subcontracts related to the Project, and shall require all Subcontractors to comply with such provisions. Developer's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

(c) Developer and its Subcontractors 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; provided, however, that Developer or Subcontractors may inquire about, require disclosure of, base an Adverse Action on, or otherwise consider an infraction or infractions contained in an applicant or employee's driving record if driving is more than a de minimis element of the employment in question.

(d) Developer and its Subcontractors 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. Developer and Subcontractors 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) Developer and its Subcontractors shall state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment with Developer or its Subcontractor at the Site that the Developer or its Subcontractor will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of Chapter 12T.

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

(g) Developer and its Subcontractors 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 Agreement, including but not limited to a penalty of \$50 for a second violation and \$100 for a subsequent violation for each employee, applicant or other person as to whom a violation occurred or continued, termination or suspension in whole or in part of this Agreement.

(h) If Developer has any questions about the applicability of Chapter 12T, it may contact Port for additional information. Port 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.

14.23. Diesel Fuel Measures. Developer must minimize exhaust emissions from operating equipment and trucks at the Site. At a minimum, Developer will maintain vehicles and equipment in good condition and well-tuned to minimize emissions, ensure that vehicles and equipment run only when necessary, and prohibit running engines when vehicles and equipment are not in use or when queuing. Developer must also make good faith efforts to use low-emission diesel fuel or alternative low-emission fuels for all petroleum hydrocarbon-powered equipment used on the Site, and to explore emerging new technologies for reducing diesel particulate matter, such as catalytic particulate traps, which currently are under study by the California Air Resources Board. Identifying sources of viable alternative low-emission fuels, retrofitting or purchasing new or late-model equipment to use such fuels to the extent reasonably feasible, and using low-emission fuels to the extent reasonably practicable are examples of "good faith efforts" under this Section." In addition, Developer will encourage independent truckers contracting with Developer to move materials to and from the Site to use low-emission fuels if possible, including, if reasonably feasible, providing the truckers with economic incentives to retrofit equipment or take other measures necessary to use low-emission fuels.

15. DEVELOPER REPRESENTATIONS AND WARRANTIES.

Developer represents, warrants and covenants to Port (and will cause its members, on behalf of themselves, to represent, warrant and covenant to Port) as follows, as of the date hereof and as of the commencement of any Extension Term:

(a) Valid Existence; Good Standing. Developer is a limited liability company duly incorporated and validly existing under the laws of the State of California. Developer has the requisite power and authority to own its property and conduct its business as presently conducted. Developer is in good standing in the State of California.

(b) Authority. Developer has the requisite power and authority to execute and deliver this Agreement and the agreements contemplated hereby and to carry out and perform all of the terms and covenants of this Agreement and the agreements contemplated hereby to be performed by Developer.

(c) No Limitation on Ability to Perform. Neither Developer's articles of organization or operating agreement, nor any applicable Law, prohibit Developer's entry into this Agreement or its performance hereunder. No consent, authorization or approval of, and no notice to or filing with, any governmental authority, Regulatory Agency or other Person is required for the due execution and delivery of this Agreement by Developer and Developer's performance hereunder, except for consents, authorizations and approvals which have already been obtained, notices which have already been given and filings which have already been made. There are no undischarged judgments pending against Developer, and Developer has not received notice of the filing of any pending suit or proceedings against Developer before any court, Regulatory Agency, or arbitrator, which might materially adversely affect the enforceability of this Agreement or the business, operations, assets or condition of Developer.

(d) Valid Execution. The execution and delivery of this Agreement and the performance by Developer hereunder have been duly and validly authorized. When executed and delivered by Port and Developer, this Agreement will be a legal, valid and binding obligation of Developer.

(e) Defaults. The execution, delivery and performance of this Agreement (i) do not and will not violate or result in a violation of, contravene or conflict with, or constitute a default by Developer under (1) any agreement, document or instrument to which Developer is a party or by which Developer is bound, (2) any Law applicable to Developer or its business, or (3) the articles of organization or the operating agreement of Developer, and (ii) do not result in

the creation or imposition of any lien or other encumbrance upon the assets of Developer, except as contemplated hereby.

(f) **Financial Matters.** Developer is not in default under, and has not received notice asserting that it is in default under, any agreement for borrowed money, Developer has not filed a petition for relief under any chapter of the U.S. Bankruptcy Code, there has been no event that has materially adversely affected Developer's ability to meet its Lease obligations hereunder, and to the best of Developer's knowledge, no involuntary petition naming Developer as debtor has been filed under any chapter of the U.S. Bankruptcy Code.

The representations and warranties herein will survive any termination of this Agreement.

16. MISCELLANEOUS.

16.1. **Attorneys' Fees.** If either party brings an action or proceeding at law or in equity against the other party to enforce any provision of this Agreement or to protect or establish any right or remedy under this Agreement, the unsuccessful party to the litigation must pay to the prevailing party all costs and expenses incurred by the prevailing party as determined by the court, including reasonable attorneys' fees. If the prevailing party obtains a judgment in any action or proceeding, costs, expenses, and attorneys' fees will be included in and be a part of the judgment. For purposes of this Agreement, reasonable fees of attorneys of the Office of the City Attorney will 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 the City in law firms with approximately the same number of attorneys as employed by the Office of the City Attorney.

16.2. **California Law.** This Agreement must be construed and interpreted in accordance with the laws of the State of California and the City's Charter.

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

16.4. **Amendments.** No amendment to this Agreement will be valid unless it is in writing and signed by all of the parties.

16.5. **Severability.** Except as otherwise specifically provided in this Agreement, a judgment or court order invalidating any provision of this Agreement, or its application to any person, will not affect any other provision of this Agreement or its application to any other person or circumstance, and the remaining portions of this Agreement will continue in full force and effect, unless enforcement of this Agreement as invalidated would be unreasonable or grossly inequitable under all of the circumstances or would frustrate the purposes of this Agreement.

16.6. **No Party Drafter; Captions.** The provisions of this Agreement will be construed as a whole according to their common meaning and not strictly for or against any party in order to achieve the objectives and purposes of the parties. Any caption preceding the text of any section, paragraph or subsection or in the table of contents is included only for convenience of reference and will be disregarded in the construction and interpretation of this Agreement.

16.7. **Interpretation.** Whenever required by the context, the singular shall include the plural and vice versa, the masculine gender shall include 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," "waived," "waiving"). In this Agreement, the terms

“include,” “included” and “including” will be deemed to be followed by the words “without limitation” or “but not limited to.”

16.8. Waiver. None of the following will constitute a waiver of any breach under, or of Port’s right to demand strict compliance with, this Agreement: (a) Port’s failure to insist upon Developer’s strict performance of any obligation under this Agreement; (b) Port’s failure to exercise any right, power, or remedy arising from Developer’s failure to perform its obligations for any length of time; or (c) Port’s acceptance of any full or partial payment, including any portion of the Negotiating Fee, during the continuance of the breach. Port’s consent to or approval of any act by Developer requiring Port’s consent or approval may not be deemed to waive or render unnecessary Port’s consent to or approval of any subsequent act by Developer. Any waiver by Port of any default must be in writing and will not be a waiver of any other default concerning the same or any other provision of this Agreement.

16.9. No Brokerage Fees. Port will not pay a finder’s or broker’s fee in connection with this Agreement or upon execution of any of the Transaction Documents. Developer agrees to indemnify and hold Port harmless from any costs, including attorneys’ fees, Port incurs if any broker or brokers claim a commission in connection with this Agreement or any of the Transaction Documents.

16.10. Time is of the Essence. Time is of the essence for each provision of this Agreement, including performance of the Performance Benchmarks.

17. DEFINED TERMS.

- “Agents” is defined in Section 8.4.
- “Agreement” is defined in Section Preamble.
- “Business Hours” is defined in Section 14.15(c).
- “Board” is defined in Recital I.
- “Board Endorsement” is defined in Section 3.4(b).
- “Board Resolution” is defined in Recital K.
- “CEQA” is defined in Section 3.3.
- “City” is defined in Preamble.
- “City Agents” is defined in Section 12.2.
- “claims” is defined in Section 12.2
- “Community Outreach Program” is defined in Section 5.3.
- “Conduct Code” is defined in Section 14.10
- “Conference Summary” is defined in Section 5.4(b).
- “Consultant Invoice” is defined in Section 4.2(d).
- “Core Benefits” is defined in Section 14.1(c).
- “Developer” is defined in Preamble
- “Developer Agents” is defined in Section 12.2.
- “Developer’s Proposed Changes” is defined in Section 3.5.
- “Effective Date” is defined in Section 2.1.
- “EIR” is defined in Section 5.1.
- “Event of Default” is defined in Section 10.1.

“**Exclusive Negotiation Period**” is defined in Section 1.2(a).
“**Executive Director**” is defined in Recital N.
“**Existing Lease**” is defined in Recital C
“**Extended Expiration Date**” is defined in Section 2.2.
“**Extension Fee**” is defined in Section 4.
“**Extension Option**” is defined in Section 2.2.
“**First Extended Expiration Date**” is defined in Section 2.2.
“**Force Majeure Event**” is defined in Section 2.3(d).
“**Force Majeure Extension**” is defined in Section 2.3(a).
“**Force Majeure Notice**” is defined in Section 2.3(a).
“**HCAO**” is defined in Section 14.2.
“**HRC**” is defined in Section 14.19(a).
“**Indemnified Parties**” is defined in Section 12.1.
“**Initial Expiration Date**” is defined in Section 2.1.
“**Initial Term**” is defined in Section 2.1.
“**IPM**” is defined in Section 14.6.
“**IPM Ordinance**” is defined in Section 14.6.
“**Kenwood**” is defined in Recital H.
“**LBES**” is defined in Section 14.19(a).
“**LDDA**” is defined in Recital O.
“**Lease**” is defined in Recital O.
“**Losses**” is defined in Section 12.1.
“**Media Contact**” is defined in Section 5.4(d).
“**Mutual Termination Agreement**” is defined in Recital D.
“**Negotiation Fee**” is defined in Section 4.
“**Negotiation Notice**” is defined in Section 3.4(c)(i).
“**Negotiation Period**” is defined in Section 3.4(c)(i).
“**Outside Transaction Costs**” is defined in Section 4.2(d).
“**Overpayment**” is defined in Section 4.2(d).
“**Payroll Records**” is defined in Section 14.15(c).
“**Payment Advance**” is defined in Section 4.2(d).
“**Performance Benchmarks**” is defined in Section 2.2(c)(i) and Exhibit B.
“**Performance Dates**” is defined in Section 2.4(b) and Exhibit B.
“**Pesticide Ordinance**” is defined in Section 14.8.
“**Port Endorsement**” is defined in Section 3.4.
“**Port Event of Default**” is defined in Section 10.2.

“**Port Statement**” is defined in Section 4.2(d).

“**Port’s Management Obligations**” is defined in Section 5.5(c)(ii).

“**Parking Operation Agreements**” is defined in Recital C.

“**PR Program**” is defined in Section 5.4(a)

“**Press Matters**” is defined in Section 5.4(a).

“**Press Release**” is defined in Section 5.4(a).

“**Project**” is defined in Recital D.

“**Project Assignment**” is defined in Section 9.4(c).

“**Project Consultants**” is defined in Section 5.11.

“**Project Materials**” is defined in Section 5.11.

“**public trust**” is defined in Section B

“**Public Trust Determination**” is defined in Section 5.5(a).

“**Public Trust Consistency Proposal**” is defined in Section 5.5(c)(ii).

“**Regulatory Agency**” is defined in Section 5.6(b).

“**Regulatory Approval**” is defined in Section 5.6(a).

“**Regulatory Approval Strategy**” is defined in Section 5.6(b).

“**releases**” is defined in Section 12.2.

“**Revised Term Sheet**” is defined in Section 3.4(c)(i).

“**Second Extended Expiration Date**” is defined in Section 2.2.

“**Site**” is defined in Recital A, Exhibit A.

“**State Lands**” is defined in Section 5.5.

“**Teatro**” is defined in Recital D.

“**Term Sheet**” is defined in Section 3.2.

“**Terminating Event**” is defined in Section 9.1.

“**Termination**” is defined in Section 9.1.

“**Termination Notice**” is defined in Section 3.4(c)(ii).

“**Third Extended Expiration Date**” is defined in Section 2.2.

“**Transaction Costs**” is defined in Section 4.2(d).

“**Transaction Documents**” is defined in Recital O.

“**Transfer**” is defined in Section 8.1.

“**TZZ**” is defined in Recital H.

“**Underpayment**” is defined in Section 4.2(d).

“**Upset Date**” is defined in Section 2.3(d)(ii),

[SIGNATURES ON FOLLOWING PAGE]

Developer and Port have executed this Agreement as of the last date written below.

DEVELOPER: **TZK BROADWAY, LLC** a California limited liability company

By: Kenwood Investments No. 6, LLC, a California limited liability company,
its Member and Manager

By: 
Darius Anderson, Managing Member

Date: 10/29/15

By: TZZ, LLC, a Washington limited liability company,
its Member

By: 
Norman Langill, Managing Member

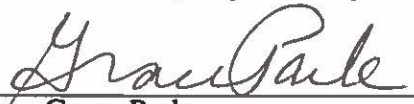
Date: 10/27/15

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

By: 
Monique Moyer
Executive Director

Date: November 5, 2015

APPROVED AS TO FORM:
Dennis J. Herrera, City Attorney

By: 
Grace Park
Deputy City Attorney

Authorized by Port Resolution No. 15-31



EXHIBIT B
PERFORMANCE BENCHMARKS

Performance Benchmarks	Time for Performance
1. <u>Developer Formation Documents</u> : TZK to provide updates to Port if there are any material changes to the documents.	Ongoing.
2. <u>Updated Proposed Development Concept</u> : TZK must submit its updated development concept showing its preliminary massing and land use concept.	October 2015
3. <u>Community Outreach Plan</u> : TZK must submit its proposed Community Outreach Plan	October 2015
4. <u>Public Trust Consistency Proposal</u> : TZK must submit its proposed Public Trust Consistency Plan for the Site;	December 2015
5. <u>Deal Term Sheet</u> : TZK must submit its proposed Term Sheet of the Revised Development Proposal. What to cover in Term Sheet: <ul style="list-style-type: none"> 1. Lease terms and conditions (including all the terms set forth in Section 3.2 of the ENA) 2. Terms/conditions of related transaction documents 	January 2016
6. <u>Site Control for non-Port Parcels</u> : TZK must submit its plan for Site Control of DPW Street stubs	January 2016
7. <u>Regulatory Approval Strategy</u> : TZK must submit its proposed Regulatory Approval Strategy.	January 2016
8. <u>Design Review Submission</u> : TZK must submit its design concept for review by the applicable regulatory bodies.	February 2016
9. <u>Port Commission Endorsement</u> : TZK to obtain the Port Commission's endorsement of the Term Sheet.	February 2016
10. <u>Board Endorsement and Fiscal Feasibility Determination</u> : TZK to obtain the Board of Supervisors' endorsement of the Term Sheet and if required, Fiscal Feasibility Determination.	March 2016
11. <u>Implementation Strategies</u> : Traffic and parking impact mitigation, financing, franchising/branding, building operations, operation management, leasing, and public benefit improvements.	September 2015 -- April 2016
12. <u>CEQA Environmental Evaluation</u> : TZK to submit the environmental evaluation application for the Development with a timeline for the publication of certification of environmental review	September 2015 – April 2016
13. <u>Due Diligence Investigation</u> : TZK must complete its due diligence investigation of the Site, including surveys, title, environmental site	April 2016

assessment, field measurements, samples, borings, soil and geotechnical analysis, utility availability, and any other investigations as required by its technical advisors.

14. Transaction Documents: TZK and Port must reach final agreement on the form of LDDA, Lease and all related transaction documents. June 2016
15. Port Commission adoption of CEQA Findings and Public Trust Consistency findings, and approval of final Transaction Documents. June 2016
16. Board of Supervisors' Adoption of CEQA Finding and Approval of Lease. September 2016

Schedule 1

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 plans to prepare 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.

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”).

On September 21, 2007, 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 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 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.

FEMA is performing detailed coastal engineering analyses and mapping of the San Francisco Bay shoreline in accordance with FEMA’s February 2005 Pacific guidelines for new coastal studies. 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 run-up and overtopping, as well as overland wave propagation. These onshore analyses will form the basis for potential revisions to the Base Flood Elevations (BFEs) and Special Flood Hazard Areas (SFHAs) within the coastal areas. The new coastal study will revise and update the flood and wave data based on current conditions within the coastal Flood Insurance Study reports and Flood Insurance Rate Maps for each of the nine counties. For San Francisco, the preliminary FIRMs will replace the preliminary FIRMs issued in 2007. FEMA expects to issue preliminary FIRMs for San Francisco in early 2014, with an intended effective date in mid-2015.

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://www.fema.gov/plan/prevent/fhm/index.shtml>; [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); <http://www.fema.gov/business/nfip/index.shtml>; and <http://www.sfgov.org>.

