



**CITY AND COUNTY OF SAN FRANCISCO  
LONDON N. BREED, MAYOR**

---

**LEASE NO. L-16585**

**BETWEEN THE**

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

**AS LANDLORD**

**AND**

**TZK BROADWAY, LLC  
A CALIFORNIA LIMITED LIABILITY COMPANY**

**AS TENANT**

**SEAWALL LOTS 323 AND 324**

**DATED AS OF \_\_\_\_\_, 201[\_\_\_]**

---

**ELAINE FORBES  
EXECUTIVE DIRECTOR**

**SAN FRANCISCO PORT COMMISSION**

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

## TABLE OF CONTENTS

	<u>Page</u>
1. PREMISES .....	5
1.1. Premises .....	5
1.2. Unique Nature of Premises .....	6
1.3. As Is With All Faults .....	6
1.4. Disclaimer of Representations and Warranties .....	6
1.5. Independent Investigation by Tenant .....	6
1.6. Release and Waiver .....	7
1.7. Restrictions on Encumbering Port's Reversionary Interest .....	8
1.8. Port's Reservation of Rights .....	8
1.9. Title Exceptions and Defects .....	8
1.10. Access for Emergency Vehicles .....	9
1.11. Subsurface Mineral Rights .....	9
1.12. Accessibility Inspection Disclosure .....	9
1.13. San Francisco Disability Access Disclosures .....	10
1.14. Memorandum of Technical Corrections .....	10
1.15. Relationship of Lease to LDDA .....	10
2. TERM .....	10
2.1. Initial Term .....	10
2.2. Option to Extend Term .....	10
3. RENT .....	11
3.1. Tenant's Covenant to Pay Rent .....	11
3.2. Minimum Rent .....	11
3.3. Adjustments to Minimum Rent .....	12
3.4. Percentage Rent .....	13
3.5. Port Share of Excess Cash Flow .....	16
3.6. Port Participation in Transfer Proceeds .....	19
3.7. Port Participation in Refinancing Proceeds .....	21
3.8. Submission of Revenue Statements .....	23
3.9. Books and Records .....	25

3.10.	Audit .....	25
3.11.	Manner of Payment.....	26
3.12.	No Abatement or Setoff .....	26
3.13.	Interest on Delinquent Rent .....	26
3.14.	Late Charges .....	26
3.15.	Source of Payment Limited to Revenues from the Premises.....	26
3.16.	Net Lease .....	27
4.	USES.....	27
4.1.	Permitted Uses .....	27
4.2.	Prohibited Uses within the Premises .....	27
4.3.	Signs.....	29
4.4.	Required Public Park and Open Space and Public Utility Areas.....	29
4.5.	Benefits to Public Trust .....	29
5.	PARKING.....	29
6.	DEVELOPMENT PROJECTS.....	30
7.	TAXES AND ASSESSMENTS .....	30
7.1.	Payment of Taxes and Other Impositions.....	30
7.2.	Infrastructure Financing District.....	31
7.3.	Community Facilities Districts; Assessments.....	31
7.4.	Port’s Right to Pay .....	31
8.	CONTESTS .....	32
9.	COMPLIANCE WITH LAWS.....	32
9.1.	Compliance with Laws and Other Requirements .....	32
9.2.	Regulatory Approvals .....	33
10.	TENANT’S MANAGEMENT AND OPERATING COVENANTS.....	34
10.1.	Approved Operating Standards.....	34
10.2.	Continuous Operation .....	36
10.3.	Economic Activity .....	36
10.4.	Hotel Management.....	37
10.5.	Personal Property .....	38
10.6.	Reserve Accounts.....	38
10.7.	Port Approval Required for Capital Expenditures to Earn a Return .....	39

10.8.	Circumstances When Tenant Equity During Market-Wide Downturn May Earn Interest.....	40
10.9.	Liquor License .....	42
10.10.	Compliance with Special City and Port Provisions .....	42
10.11.	Flags .....	42
10.12.	Exterior Improvements .....	43
10.13.	Graffiti Removal .....	43
10.14.	Mitigation Monitoring and Reporting Program.....	43
10.15.	Public Park Area .....	43
10.16.	Good Neighbor Policy .....	44
11.	<b>REPAIR AND MAINTENANCE; FACILITIES CONDITION REPORT; CAPITAL RESERVES.....</b>	<b>44</b>
11.1.	Covenants to Repair and Maintain the Premises .....	44
11.2.	Facilities Condition Report.....	44
11.3.	No Obligation of Port; Waiver of Rights .....	44
11.4.	Port’s Right to Repair .....	45
12.	<b>INITIAL IMPROVEMENTS .....</b>	<b>45</b>
12.1.	Tenant’s Obligation to Construct the Initial Improvements .....	45
12.2.	Title to Improvements.....	46
13.	<b>SUBSEQUENT CONSTRUCTION.....</b>	<b>46</b>
13.1.	Port’s Right to Approve Subsequent Construction.....	46
13.2.	Minor Alterations.....	47
13.3.	Construction Documents in Connection with Subsequent Construction .....	47
13.4.	Port Approval of Construction Documents.....	47
13.5.	Construction.....	48
13.6.	Record Drawings .....	49
14.	<b>UTILITIES.....</b>	<b>50</b>
14.1.	Utility Services.....	50
14.2.	Photovoltaic Panels.....	50
14.3.	SFPUC Power .....	51
14.4.	Waiver.....	51
15.	<b>ROOFTOP EQUIPMENT .....</b>	<b>51</b>
15.1.	Telecommunications Equipment and Satellite Dish.....	51

15.2.	Other Rooftop Equipment.....	51
15.3.	Port Satellite Dish .....	51
16.	DAMAGE OR DESTRUCTION.....	52
16.1.	General; Notice; Waiver .....	52
16.2.	No Release of Tenant’s Obligations .....	52
16.3.	Tenant’s Obligation to Restore .....	52
16.4.	Termination due to Major Casualty or Uninsured Casualty .....	53
16.5.	Date and Effect of Termination .....	55
16.6.	Distribution upon Tenant Event of Default .....	55
16.7.	Use of Insurance Proceeds .....	56
17.	CONDEMNATION .....	56
17.1.	General; Notice; Waiver .....	56
17.2.	Total Condemnation.....	57
17.3.	Substantial Condemnation; Partial Condemnation; Rent Abatement.....	57
17.4.	Awards .....	58
17.5.	Temporary Condemnation .....	59
17.6.	Personal Property .....	59
18.	LIENS .....	59
18.1.	Liens.....	59
18.2.	Mechanics’ Liens .....	59
19.	SECURITY DEPOSIT.....	59
19.1.	Security Deposit.....	59
19.2.	Environmental Financial Performance Deposit .....	60
19.3.	Environmental Oversight Deposit.....	60
19.4.	General.....	61
20.	ASSIGNMENT AND SUBLETTING .....	61
20.1.	Assignment .....	61
20.2.	Port Participation in Transfer Proceeds .....	63
20.3.	Assignment of Rents .....	63
20.4.	Subletting by Tenant .....	64
20.5.	Non-Disturbance of Subtenants, Attornment, Sublease Provisions.....	66
20.6.	No Further Amendment; No Further Consent Implied.....	68
20.7.	Fees for Review .....	68

20.8.	No Release of Tenant.....	68
20.9.	Assignment of Sublease Rents.....	68
20.10.	Acknowledgement .....	69
21.	INDEMNIFICATION OF PORT; WAIVER .....	69
21.1.	General Indemnification of the Indemnified Parties.....	69
21.2.	Hazardous Materials Indemnification.....	69
21.3.	Scope of Indemnities; Obligation to Defend .....	70
21.4.	Exclusions from Indemnifications, Waivers and Releases .....	70
21.5.	Survival.....	70
21.6.	Defense .....	70
21.7.	Waiver.....	70
22.	HAZARDOUS MATERIALS .....	71
22.1.	Requirements for Handling.....	71
22.2.	Tenant Responsibility .....	71
22.3.	Tenant’s Environmental Condition Notification Requirements .....	72
22.4.	Tenant Requirement to Remediate.....	73
22.5.	Port’s Right to Audit.....	73
22.6.	Notification of Asbestos and Lead.....	73
22.7.	Presence of Hazardous Materials.....	74
22.8.	Pesticide Prohibition .....	75
22.9.	Survival.....	75
22.10.	Stormwater Pollution Prevention.....	75
23.	INSURANCE.....	75
23.1.	Property and Liability Coverage.....	75
23.2.	Port Entitled to Participate .....	81
23.3.	Release and Waiver.....	81
23.4.	No Limitation.....	81
24.	DISPUTE RESOLUTION FOR CERTAIN MATTERS .....	81
25.	DELAY DUE TO FORCE MAJEURE .....	82
26.	PORT’S RIGHT TO PAY SUMS OWED BY TENANT .....	82
26.1.	Port May Pay Sums Owed by Tenant Following Tenant’s Failure to Pay .....	82
26.2.	Tenant’s Obligation to Reimburse Port .....	83
27.	TENANT EVENTS OF DEFAULT .....	83

28.	PORT’S REMEDIES .....	84
28.1.	Port’s Remedies Generally .....	84
28.2.	Right to Keep Lease in Effect .....	84
28.3.	Right to Terminate Lease .....	85
28.4.	Interest .....	86
28.5.	No Rights to Assign or Sublet .....	86
28.6.	Continuation of Subleases and Other Agreements .....	86
28.7.	Appointment of Receiver .....	86
28.8.	Waiver of Redemption .....	86
28.9.	Remedies Not Exclusive .....	86
29.	NO WAIVER .....	86
29.1.	No Implied Waiver by Port .....	86
29.2.	No Accord or Satisfaction .....	86
30.	PORT EVENT OF DEFAULT; TENANT REMEDIES .....	87
30.1.	Port Event of Default .....	87
30.2.	Tenant Remedies .....	87
31.	LIMITATION ON LIABILITY .....	87
31.1.	No Recourse Beyond Value of Property .....	87
31.2.	Nonliability of City Officials, Employees and Agents .....	87
31.3.	Nonliability of Tenant’s Members, Partners, Shareholders, Directors, Officers and Employees .....	88
31.4.	No Liability for Consequential, Incidental or Punitive Damages .....	88
32.	ESTOPPEL CERTIFICATES .....	88
32.1.	Estoppel Certificate by Tenant .....	88
32.2.	Estoppel Certificate by Port .....	88
33.	APPROVALS BY PORT; FEES FOR REVIEW .....	88
33.1.	Approvals by Port .....	88
33.2.	Standard Otherwise Applicable .....	88
33.3.	Fees for Review .....	89
34.	NO MERGER OF TITLE .....	89
35.	SURRENDER OF PREMISES UPON EXPIRATION OR EARLIER TERMINATION .....	89
35.1.	Condition of Premises .....	89

35.2.	Subleases and Agreements.....	89
35.3.	Personal Property .....	89
35.4.	Demolition .....	90
35.5.	Quitclaim.....	90
35.6.	Survival.....	90
36.	HOLD OVER.....	90
37.	NOTICES.....	90
37.1.	Notices .....	90
37.2.	Form and Effect of Notice .....	91
38.	ACCESS TO THE PREMISES .....	92
38.1.	Entry by Port.....	92
38.2.	Notice, Right to Accompany.....	92
39.	LEASEHOLD MORTGAGE .....	92
39.1.	No Mortgage Except as Set Forth Herein.....	92
39.2.	Leasehold Liens; Tenant’s Obligation to Obtain Additional Financing.....	93
39.3.	Notice of Liens.....	93
39.4.	Purpose of Mortgage.....	93
39.5.	Interest Covered by Mortgage .....	94
39.6.	Bona Fide Institutional Lender; Other Permitted Mortgagees.....	94
39.7.	Port Participation in Refinance Proceeds.....	94
39.8.	Rights Subject to Lease.....	94
39.9.	Required Provisions in Every Mortgage.....	95
39.10.	Notices to Mortgagee.....	95
39.11.	Mortgagee’s Right to Cure.....	95
39.12.	Assignment by Mortgagee .....	100
39.13.	Transfer of Mortgage .....	100
39.14.	Appointment of Receiver.....	100
40.	NO JOINT VENTURE.....	100
41.	ECONOMIC ACCESS .....	100
42.	REPRESENTATIONS AND WARRANTIES.....	101
43.	SPECIAL CITY AND PORT PROVISIONS.....	101
43.1.	Non-Discrimination in City Contracts and Benefits Ordinance .....	102
43.2.	Requiring Health Benefits for Covered Employees.....	102



43.3.	First Source Hiring.....	104
43.4.	Local Business Enterprises .....	104
43.5.	Indoor Air Quality.....	104
43.6.	Prohibition Against Tobacco Advertising; Prohibition Against Tobacco Product Sales, Manufacture, and Distribution .....	104
43.7.	Prohibition of Alcoholic Beverages Advertising.....	104
43.8.	Restrictions on the Use of Pesticides .....	105
43.9.	MacBride Principles - Northern Ireland .....	105
43.10.	Tropical Hardwood and Virgin Redwood Ban .....	105
43.11.	Preservative Treated Wood Containing Arsenic.....	106
43.12.	Notification of Limitations on Contributions .....	106
43.13.	Sunshine Ordinance .....	106
43.14.	Tenant Conflicts of Interest .....	107
43.15.	Drug-Free Workplace .....	107
43.16.	Prevailing Wages and Working Conditions.....	107
43.17.	Prohibition of Political Activity with City Funds.....	109
43.18.	Compliance with Disabled Access Laws.....	109
43.19.	Protection of Private Information .....	109
43.20.	Diesel Fuel Measures.....	109
43.21.	Charter Provisions.....	110
43.22.	Card Check Agreement.....	110
43.23.	Food Service Waste Reduction Ordinance .....	110
43.24.	Consideration Of Criminal History In Hiring And Employment Decisions..	110
43.25.	Local Hire .....	111
43.26.	San Francisco Bottled Water Ordinance.....	111
43.27.	Vending Machines; Nutritional Standards and Calorie Labeling Requirements; Offerings .....	112
43.28.	All-Gender Toilet Facilities .....	112
43.29.	Waiver of Relocation Assistance Rights.....	112
43.30.	Consideration of Salary History.....	112
44.	NO LIGHT, AIR OR VIEW EASEMENT.....	112
45.	GENERAL PROVISIONS .....	113
45.1.	Time of Performance .....	113

45.2.	Interpretation of Agreement.....	113
45.3.	Successors and Assigns.....	114
45.4.	No Third Party Beneficiaries .....	114
45.5.	Real Estate Commissions.....	114
45.6.	Counterparts .....	114
45.7.	Entire Agreement .....	114
45.8.	Amendment.....	114
45.9.	Governing Law; Selection of Forum .....	114
45.10.	Recordation.....	114
45.11.	Extensions by Port .....	114
45.12.	Further Assurances.....	115
45.13.	Severability .....	115
46.	FEMA DISCLOSURE NOTICE .....	115
47.	DEFINITIONS.....	116

**EXHIBITS**

Exhibit A-1	Legal Description of Premises
Exhibit A-2	Site Map of Premises
Exhibit B	Permitted Title Exceptions
Exhibit C	Open Space Area Site Plan <b>[Note: Needs to identify Public Utility Area and Public Park Area]</b>
Exhibit D	Example of Minimum Rent Adjustments
Exhibit E	Example of Percentage Rent Calculation
Exhibit F	Example of Actual Equity Capital Calculation
Exhibit G	Example of IRR Calculation
Exhibit H	Example of Port Participation Rent Calculation
Exhibit I	Example of Port's Share of Transfer Proceeds Calculation
Exhibit J	Example of Port's Share of Refinancing Proceeds Calculation
Exhibit K	Example of Revenue Statement
Exhibit L-1	Port's Sign Guidelines
[Exhibit L-2	Approved Sign] <b>[Note: Remove exhibit and all exhibit references if there is no approved sign at lease commencement.]</b>
Exhibit M	Project Benefits to Public Trust
Exhibit N	Improvement Measures Related to Parking Operations and TDM Plan
Exhibit O-1	Open Space Area Operating Standards <b>[Note: Operating Standards will include requirement of minimum threshold of public access during any special events, reasonable limitations on number/scope of special events, hours of operations, when closures can happen, etc., and specific requirements/restrictions/standards related to the Public Utility.]</b>
Exhibit O-2	Good Neighbor Policy
Exhibit P-1	Example of Determining Base Year for Market-Wide Downturn
Exhibit P-2	Example of Calculation Determining Limited Operations Equity
Exhibit Q	Adjustments of Limited Operations Equity Cap

Exhibit R Mitigation Monitoring and Reporting Program  
Exhibit S Form of Tenant Estoppel Certificate  
Exhibit T Form of Subtenant Estoppel Certificate  
Exhibit U Form of Non-Disturbance Agreement  
Exhibit V Non-Disturbance Agreement Among Port, Tenant and Teatro  
Exhibit W Asbestos Notification and Information  
Exhibit X Hazardous Materials Disclosures  
Exhibit Y Form of Port Estoppel Certificate  
[Exhibit Z First Source Hiring MOU]  
Exhibit AA Form of Memorandum of Lease  
Exhibit BB LDDA Scope of Development  
[Exhibit CC Operations Plan] [**Note: Remove exhibit and all exhibit references if there is no approved operations plan at lease commencement.**]

## Basic Lease Information

<i>Lease Date:</i>	[REDACTED], 20XX
<i>Lease No.:</i>	<b>L-16585</b>
<i>Landlord or "Port":</i>	<b>CITY AND COUNTY OF SAN FRANCISCO</b> , a municipal corporation, operating by and through the <b>SAN FRANCISCO PORT COMMISSION</b>
<i>Tenant:</i>	TZK Broadway, LLC, a California limited liability company
<i>Landlord's Notice Address:</i>	Port of San Francisco Pier 1 San Francisco, California 94111 Attention: Director of Real Estate Telephone: (415) 274-0400
<i>Tenant's Notice Address:</i>	TZK Broadway, LLC 1215 K Street, Suite 1150 Sacramento, CA 95814 Attention: Darius Anderson, Manager Telephone: (916) 443-8891  With a copy to: PresidioCo Bay Area LLC 631 Folsom Street, 11F San Francisco, CA 94107 Attention: Rikesh Patel, Manager and General Counsel Telephone: (415) 264-7298  With a copy to: TZZ San Francisco, LLC TZZ, LLC, its Manager 4300 NE 145th Street Woodinville, WA 98072 Attention: Norman Langill, Manager Telephone: (206) 359-5474
<i>Premises:</i>	As described in <b>Section 1.1</b> , and as depicted on <b>Exhibit A-1</b> .
<i>Commencement Date:</i>	[REDACTED], 20XX]
<i>Expiration Date:</i>	
<i>Length of Term:</i>	Fifty (50) years plus, if applicable, the Renewal Term.
<i>Renewal Term:</i>	One option to extend for an additional sixteen (16) years in accordance with <b>Section 2.2</b> .

<i>Permitted Use:</i>	See <i>Section 4.1</i> .
<i>Security Deposit:</i>	One Hundred Sixty-Six Thousand Six Hundred Sixty-Six Dollars and 66/100 (\$166,666.66), as adjusted in accordance with <i>Section 19.1</i> .
<i>Rent:</i>	See <i>Section 3</i> .
<i>Maintenance and Repair:</i>	Sole obligation of Tenant.
<i>Utilities:</i>	Sole obligation of Tenant.
<i>Development Projects:</i>	88 Broadway (SWL 322-1); Piers 17, 19, 23, and 29; SFPUC's Embarcadero/Drumm/Jackson Project; Downtown San Francisco Ferry Terminal Expansion Project
<i>Lease Prepared By:</i>	Ricky Tijani, Planning and Development

## LEASE

**THIS LEASE NO. L-16585** is entered into as of the Lease Date set forth in the Basic Lease Information, by and between the **CITY AND COUNTY OF SAN FRANCISCO**, a municipal corporation (the “**City**”), operating by and through the **SAN FRANCISCO PORT COMMISSION** (“**Port**” or “**Port Commission**”), and **TZK BROADWAY, LLC**, a California limited liability company (“**Tenant**”). Capitalized terms in this Lease are defined or referenced in *Article 47*. The basic lease information (the “**Basic Lease Information**”), the exhibits, schedule and this Lease Agreement are and will be construed as a single instrument and are referred to herein as this “**Lease.**”

## RECITALS

THIS LEASE IS MADE WITH REFERENCE TO THE FOLLOWING FACTS AND CIRCUMSTANCES:

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

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

**C.** Seawall Lot (“**SWL**”) 323 and SWL 324 are two separate, nearly triangular land parcels with frontages on The Embarcadero, Broadway, Davis and Vallejo Streets and are located in the Northeast Waterfront area of the WLUP. The SWLs are also located in the Northeast Waterfront Historic District and is within a C-2 (Community Business) zoning district, Waterfront Special Use District No. 3, and a 40-X Height and Bulk district.

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

**E.** Port and One Reel, a Washington State nonprofit corporation, entered into Lease No. L-12847 in 1999 (as amended, the “**Theater Lease**”) for portions of Piers 27 and 29 for Teatro’s dinner-theater and cabaret operations commonly known as Teatro ZinZanni. Teatro ZinZanni, a Washington State non-profit corporation (“**TZ**”) was created in 2002 to serve as the manager and transferee of the Theater Lease and as the operator of Teatro’s dinner-theater operations. 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 TZ mutually terminated 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**”).

**F.** TZ initially proposed that it lease from Port a portion of SWL 324 for a term not to exceed 10 years and operate within a temporary structure. But TZ abandoned the initial proposal after various stakeholders raised concerns that a temporary structure would be incompatible within the historic district.

**G.** TZ, in 2013, re-formed itself as TZZ San Francisco, LLC, a Washington limited liability company (“**Teatro**”). TZZ San Francisco, LLC is the successor-in-interest to TZ.

**H.** Teatro concluded that to amortize the cost of permanent structures, it would need to increase the lease term, expand the use program and enlarge the footprint of the development. Accordingly, Teatro proposed to bring on a development partner with the financial resources and expertise to help it shepherd the expanded development.

**I.** Teatro, Kenwood Investments No. 6, LLC (“**Kenwood**”) and PresidioCo Bay Area LLC (“**Presidio**”), each a member of Tenant, are developing the Project.

**J.** Tenant is proposing to finance, build and operate a state-of-the-art theatre housed within a historic Spiegel tent, a one hundred ninety-two (192) room boutique hotel, and a public park, together with related public infrastructure and access and other improvements, as further described in the LDDA (collectively, the “**Project**”). The Project will be located on a site comprised of all of SWL 324 and SWL 323, and the two abutting right-of-way parcels that form the terminus of Vallejo Street and Davis Street west of The Embarcadero and north of Broadway.

**K.** On October 28, 2014, the Port Commission approved Resolution No. 14-58 directing Port staff to assist Teatro and Tenant in developing and introducing a resolution to the Board of Supervisors (“**Board**”) for its consideration on exempting the potential lease of the Property to Tenant from the competitive bidding policy of Administrative Code Section 2.6-1.

**L.** On May 5, 2015, the Board adopted Resolution No. 170-15 (the “**Sole Source Resolution**”) and found that the proposed Project is exempt from competitive bidding requirements of Administrative Code Section 2.6-1.

**M.** The Sole Source Resolution also (i) urged Port, Teatro and Tenant 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 Tenant to ensure Port receive fair market value for the lease of the Property; and (iii) directed Port to submit to the Clerk of the Board a copy of Port’s real estate consultant’s report confirming Tenant’s financial capacity and qualifications to develop the Project prior to the Port Commission hearing at which the Port Commission considers awarding an exclusive negotiation agreement to Tenant.

**N.** Port staff and a Port-hired third-party real estate consultant reviewed Kenwood’s qualifications and financial capacity to develop the Project and issued a report confirming that Kenwood 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.

**O.** 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 an Exclusive Negotiation Agreement (“**ENA**”). The ENA, dated September 10, 2015, was subsequently executed by the Parties.

**P.** On April 26, 2016, the Port Commission adopted Resolution No. 16—18 and endorsed a non-binding term sheet describing the fundamental deal terms for the Project (“**Term Sheet**”) and authorized and directed the Executive Director, or her designee, to forward the Term Sheet to the Board for its consideration. In the same resolution the Port Commission directed the Executive Director, or her designee, to work with the Tenant to undertake project review and negotiate the terms and conditions of the final transaction documents.

**Q.** On July 12, 2016, the Board adopted Resolution No. 277—16 and endorsed the Term Sheet.

**R.** On December 21, 2018, the Planning Department approved the issuance of the Final Mitigated Negative Declaration (“**FMND**”) as prepared by the Planning Department.

**S.** On March 6, 2019, the Historic Preservation Commission adopted Motion No. 0370 finding that the proposed Project is consistent with Article 10 of the Planning Code and the Secretary of the Interior’s Standards for Rehabilitation in conformance with the architectural

plans filed with the Planning Department subject to the conditions and findings listed in its Motion No. 0370.

**T.** On May 2, 2019, the Planning Commission conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Authorization Application and General Plan Referral Nos. 2015-016326 CUA and 2016- 011011GPR. At that hearing, pursuant to Resolution No. 20443, the Planning Commission made Findings of Consistency with the General Plan and with the Priority Policies of Planning Code Section 101.1 for the street vacations for the Project, pursuant to Section 4.105 of the City Charter and Section 2A.53 of the Administrative Code. In addition, pursuant to Motion No. 20444, the Planning Commission granted a Conditional Use Authorization for the Development pursuant to Planning Code Sections 210.1, 240.3 and 303 to allow a hotel use within the C-2 Zoning District, the Waterfront Special Use District No. 3, and a 40-X Height and Bulk District, subject to the conditions and findings listed in the Motion No. 20444.

**U.** In Resolution No. 20443, the Planning Commission, having reviewed the FMND, concurred with the Planning Department's determination that, pursuant to the FMND, including its mitigation measures, the Project could not have a significant impact on the environment. In Motion No. 20444, the Planning Commission made the same findings as in Resolution No. 20443, and more specifically found that, based on review and consideration of the FMND and the record as a whole, there is no substantial evidence that the Project will have a significant effect on the environment with the adoption of the mitigation measures contained in the Mitigation Monitoring and Reporting Program. The Planning Commission adopted the FMND and the Mitigation Monitoring and Reporting Program and included all required mitigation measures identified in the FMND and contained in the Mitigation Monitoring and Reporting Program as conditions of approval.

**V.** On September 10, 2019, by Resolution No. 19-36, the Port Commission, among other things, adopted CEQA Findings and the Mitigation, Monitoring, and Reporting Program, made findings that the Project advanced and benefited the Public Trust ("**Public Trust Findings**"), and authorized and directed the Executive Director to (i) enter into the Lease Disposition and Development Agreement ("**LDDA**") and other Transaction Documents with Tenant and (ii) seek approval of the form of the Lease from the Board.

**W.** On [REDACTED], 201XX, by Resolution No. XX-19, the Board, among other things, adopted CEQA Findings and the Mitigation, Monitoring, and Reporting Program, and approved the form of this Lease with Tenant.

**X.** The Parties entered into the LDDA dated as of [REDACTED], 201XX, which set forth the conditions for delivery of the Premises to Tenant for development of the Improvements to be constructed on the Premises and the rights and obligations of the Tenant to develop the Improvements.

**Y.** All conditions to delivery of the Premises pursuant to the LDDA have been satisfied or waived, and the Parties now wish to enter into this Lease, upon all of the terms and conditions hereof.

ACCORDINGLY, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

**1. PREMISES.**

**1.1. Premises.** In consideration of the Rent payable by Tenant to Port, construction of the Initial Improvements, and subject to all other terms and conditions of this Lease, Port hereby leases to Tenant, and Tenant hereby leases from Port, that certain real property located in the City and County of San Francisco, as legally described in *Exhibit A-1* and depicted on the Site Plan attached as *Exhibit A-2* (the "**Real Property**"), together with all improvements now located on the Real Property and all the rights and privileges appurtenant to the Real Property and owned



by Port, and the Improvements to be hereafter constructed on the Real Property (subject to **Section 12.2** (Title to Improvements), for the Permitted Uses (the “**Premises**”).

**1.2. Unique Nature of Premises.**

Tenant acknowledges that: (a) the Premises is located in the immediate vicinity of the waterfront and the Seawall, which Seawall is in need of repair and present increased risk of damage to property and injury or death to persons from seismic events; (b) Port's regular maintenance may involve activities, such as pile driving, that create noise and other effects not normally encountered in locations elsewhere in San Francisco due to the unique nature of the Premises; (c) there is a risk that all or a portion of the Premises will be inundated with water due to floods or sea level rise; (d) there is a risk that sea level rise will increase the cost of repairs and/or prevent or limit the ability to make repairs to the Improvements; (e) the Premises is located over fill and subject to liquefaction during a seismic event and present increased risk of damage to property and injury or death to persons from seismic events; and (f) Port cannot guarantee that Improvements will be suitable for leased occupancy during the entire Term of this Lease.

The U.S. Geological Survey predicts that a major earthquake has a 72% chance of occurring in the Bay Area by 2044. An Executive Summary Report for the Seawall Earthquake Vulnerability Study of the Northern Seawall, San Francisco, California, and dated July 2016, prepared by GHD-GTC Joint Venture (the “**Vulnerability Study**”) was prepared for the Port. The Vulnerability Study summarizes the Seawall's vulnerability during an earthquake. The Vulnerability Study and information about Port and City's resiliency goals and plans and improvements can be found on the Port's website at: <https://www.sfportresilience.com>.

The Premises is located in the immediate vicinity of and bay ward along a portion of the Seawall. In the event of a major earthquake, the Premises, including the Improvements thereon, may incur significant damage (which may result in greater injury or death to persons on or near the Premises) when compared to properties that are not located on or near the Seawall. Additionally, because of the proximity to the Bay, the Premises is more vulnerable to flooding from sea level rise. Accordingly, (i) Tenant's acceptance of the Premises in its “**As Is With All Faults**” condition as described in **Section 1.3**, (ii) Tenant's independent investigation of the Premises as described in **Section 1.5**, (iii) Port's disclaimer of any representations and warranties as described in **Section 1.4**, and (iv) Tenant's release and waiver of Port from any Losses that Tenant may incur as described in **Section 1.6**, includes the direct or indirect, known or unknown, and foreseeable or unforeseeable Losses and claims (including the potential additional risks of injury or death to persons or damage to property) due to the Seawall's condition or the proximity of the Premises to the Bay and the Seawall.

**1.3. “AS IS WITH ALL FAULTS”.** TENANT AGREES THAT PORT IS LEASING THE PREMISES TO TENANT, AND THE PREMISES ARE HEREBY ACCEPTED BY TENANT, IN THEIR EXISTING STATE AND CONDITION, “AS IS, WITH ALL FAULTS.”

**1.4. Disclaimer of Representations and Warranties.** Tenant specifically acknowledges and agrees that neither the City, including its Port, nor any of the other Indemnified Parties, has made, and there is hereby disclaimed, any representation or warranty, express or implied, of any kind, with respect to the condition in, on, under, around, or pertaining to the Premises, the suitability or fitness in, on, under, around, or pertaining to the Premises or appurtenances to the Premises for the development, use or operation of the improvements, any compliance with Laws or applicable land use or zoning regulations, any matter affecting the use, value, occupancy or enjoyment in, on, under, or pertaining to the Premises, condition of the Seawall, impacts from sea level rise, or any other matter whatsoever pertaining to the Premises or the proposed Project.

**1.5. Independent Investigation by Tenant.** Tenant acknowledges and agrees that it has been afforded a full opportunity to inspect Port's records relating to conditions in, on,

around, under, and pertaining to the Premises as of the Commencement Date. Port makes no representation or warranty as to the accuracy or completeness of any matters contained in such records. Tenant is not relying on any such information. All information contained in such records is subject to the limitations set forth in **Section 1.4**. Tenant represents and warrants to Port that Tenant has performed a diligent and thorough inspection and investigation in, on, around, under, and pertaining to the Premises, either independently or through its own experts including (i) the quality, nature, adequacy and physical condition in, on, around, under, and pertaining to the Premises including the structural elements, foundation, and all other physical and functional aspects in, on, around, under, and pertaining to the Premises (including the Premises being near a portion of the Seawall); (ii) the quality, nature, adequacy, and physical, geotechnical and environmental condition in, on, around, under, and pertaining to the Premises, including the soil and any groundwater (including Hazardous Materials conditions (including the presence of asbestos or lead) with regard to the building, soils and any groundwater); (iii) the suitability in, on, around, under, and pertaining to the Premises for the Improvements and Tenant's planned use of the Premises; (iv) the zoning, land use regulations, historic preservation laws, and other Laws governing use of or construction in, on, around, under, and pertaining to on the Premises; and (v) all other matters of material significance affecting in, on, around, under, and pertaining to the Premises (including the Premises being near a portion of the Seawall) and its development and use under this Lease.

**1.6. Release and Waiver.** As part of its agreement to accept the Premises in their "As Is With All Faults" condition, Tenant, on behalf of itself and its successors and assigns, will be deemed to waive any right to recover from, and forever release, acquit and discharge, Port and the other Indemnified Parties of and from any and all Losses, whether direct or indirect, known or unknown, foreseen or unforeseen, that Tenant may now have or that may arise on account of or in any way be connected with (i) the physical, geotechnical or environmental condition in, on, under, above, or about the Premises and the Seawall, including any Hazardous Materials in, on, under, above or about the Premises (including soil and groundwater conditions), (ii) the suitability of the Premises for the development of the Improvements and the Permitted Uses, (iii) any Laws applicable thereto, including Environmental Laws, (iv) damages by death of or injury to any Person, or to property of any kind whatsoever and to whomever belonging (including due to sea level rise or the proximity of the Premises to the Seawall and the Bay), and (v) goodwill, or business opportunities arising at any time and from any cause in, on, around, under, and pertaining to the Premises, including all claims arising from the joint, concurrent, active or passive negligence of any of Indemnified Parties, but excluding any intentionally harmful acts committed solely by Port or City.

Tenant expressly acknowledges and agrees that the amount payable or expended by Tenant hereunder does not take into account any potential liability of the Indemnified Parties for any consequential, incidental or punitive damages. Port would not be willing to enter into this Lease in the absence of a complete waiver of liability for consequential, incidental or punitive damages due to the acts or omissions of the Indemnified Parties, and Tenant expressly assumes the risk with respect thereto. Accordingly, without limiting any Indemnification obligations of Tenant or other waivers contained in this Lease and as a material part of the consideration of this Lease, Tenant fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against the Indemnified Parties for consequential, incidental and punitive damages (including, without limitation, lost profits) and covenants not to sue for such damages, the Indemnified Parties arising out of this Lease or the uses authorized hereunder, including, any interference with uses conducted by Tenant pursuant to this Lease regardless of the cause, and whether or not due to the negligence of the Indemnified Parties.

Tenant understands and expressly accepts and assumes the risk that any facts concerning the claims released, waived, and discharged in this Lease might be found later to be other than or different from the facts now believed to be true, and agrees that the releases, waivers, and discharges in this Lease will remain effective. Therefore, with respect to the claims released,

waived, and discharged in this Lease, Tenant waives any rights or benefits provided by Section 1542 of the California Civil Code, which reads as follows:

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

Tenant agrees that the releases, waivers, and discharges given in and/or contemplated by this *Section 1.6* includes known and unknown claims, disclosed and undisclosed, and anticipated and unanticipated claims pertaining to the subject matter of the releases, waivers, and discharges. Accordingly, Tenant hereby waives the benefits of Civil Code Section 1542, or under any other statute or common law principle of similar effect, in connection with the releases, waivers, and discharges contained in this *Section 1.6*.

Tenant Initials: \_\_\_\_\_

**1.7. Restrictions on Encumbering Port's Reversionary Interest.** Tenant may not enter into agreements granting licenses, easements or access rights over the Premises if the same would be binding on Port's reversionary interest in the Premises, or obtain changes in applicable land use laws or conditional use authorizations or other permits for any uses not provided for hereunder, in each instance without Port's prior written consent, which consent may be withheld in Port's sole discretion. The Parties recognize that for Tenant to carry out the Permitted Uses, it may be necessary or desirable to obtain additional use, zoning, regulatory or land use approvals or conditional use authorization relating to the Premises. Port agrees, from time to time, to reasonably cooperate with Tenant, at no out of pocket cost to Port, in pursuing such aforementioned regulatory approvals or authorizations, including, but not limited to, executing documents, applications or petitions relating thereto, subject to the limitations of *Section 9.2*.

**1.8. Port's Reservation of Rights.** Without limiting Tenant's maintenance responsibilities under *Section 11.1*, Port hereby reserves, and Tenant leases and accepts the Premises subject to, Port's right of access to the Premises to the extent required to access the Flagpoles, if any, hereafter located thereon for the placement, replacement and adjustment of flags thereon, or at the Port's sole expense, to install, maintain, repair and replace any Port or City Satellite Dish, subject to the limitations described in *Section 15.3*. The foregoing notwithstanding, any interruptions or disturbance for such access purposes will be temporary only and will not unreasonably interfere with or disturb Tenant's use of the Premises, will be subject to the reasonable security procedures adopted by Tenant and may be subject to temporary interruption in cases of emergency. Tenant may require prior written consent for flagpole access occurring during regular business hours (except in cases of emergency, including Tenant's failure to comply with *Section 10.10*) and require all commercially reasonable assurances regarding the prompt restoration of any damage to persons or property caused to the roofs as a result of Port's activities.

**1.9. Title Exceptions and Defects.** The interests granted by Port to Tenant pursuant to *Section 1.1* are subject to (i) the matters reflected in *Exhibit B* (the "**Permitted Title Exceptions**"), (ii) the rights of Port and the public reserved under the terms of this Lease, and (iii) other matters as Tenant will cause or suffer to arise subject to the terms and conditions of this Lease. Port will have no liability to Tenant in the event any defect exists in Port's title to the Premises as of the Commencement Date and no such defect will be grounds for a termination of this Lease by Tenant. Tenant's sole remedy with respect to any such existing title defect will be to obtain compensation by pursuing its rights against any title insurance company or companies issuing title insurance policies to Tenant.

**1.10. Vehicular Access for Emergency Vehicles.** From and after the date a Certificate of Occupancy is issued for the Hotel until the expiration of the Term, Tenant will provide vehicular access within a portion of the Public Utility Area, as further depicted on *Exhibit C* attached hereto (“EV Access Area”), for the San Francisco Fire Department’s vehicles access through the Project to and from The Embarcadero and the western edge of the Premises. Other than in connection with any maintenance and repair of the Public Utility Area, the EV Access Area will remain paved at all times throughout the Term. Additionally, any furniture, fixtures, trees or bushes within the EV Access Area must be moveable so that emergency vehicles are able to use the EV Access Area.

**1.11. [Note: Include only if AT&T utility line will run through vacated Vallejo Street]** Tenant must grant AT&T (unless otherwise agreed to by Port), an easement encumbering Tenant’s leasehold interest or a license, to use a portion of the Public Utility Area, as further described and depicted on *Exhibit C* attached hereto (“AT&T Use Area”), for the relocation installation, maintenance and repair of an existing AT&T telecommunication line that runs through the Premises (the “AT&T Lines”). Any right granted to AT&T (a) must not interfere with the SFFD’s ability to use the EV Access Area for emergency vehicles, (b) is non-transferable (unless in connection with any merger or corporate reorganization of AT&T), (c) will terminate upon the earlier of the expiration or termination of this Lease and (d) will not encumber Port’s interest in or under the Lease or Port’s fee simple interest in the Premises or Port’s personal or other property in, on or under the Premises. **[Note: Further discussion re: use fees to be paid by AT&T, if any.]**

**1.12. Subsurface Mineral Rights.** Under the terms and conditions of Article 2 of the Burton Act, the State has reserved all subsurface mineral deposits, including oil and gas deposits, on or underlying the Premises. In accordance with the provisions of Sections 2 and 3.5(c) of the Burton Act, Tenant and Port hereby acknowledge that the State has reserved the right to explore, drill for and extract such subsurface minerals, including oil and gas deposits, solely from a single point of entry outside of the Premises, and specifically located in [Zone-3], California Grid System, at a point where X equals [ ] and Y equals [ ] provided that such right will not be exercised so as to disturb or otherwise interfere with the Leasehold Estate or the use of the Premises, including the ability of the Premises to support the Improvements, but provided further that, without limiting any remedies the Parties may have against the State or other parties, any such disturbance or interference that causes damage or destruction to the Premises will be governed by *Article 16*. Port will have no liability under this Lease arising out of any exercise by the State of such mineral rights (unless the State has succeeded to Port’s interest under this Lease, in which case such successor owner may have such liability).

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

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

**1.14. San Francisco Disability Access Disclosures.** Tenant is hereby advised that the Premises may not currently meet all applicable construction-related accessibility standards, including standards for public restrooms and ground floor entrances and exits. Tenant understands and agrees that Tenant may be subject to legal and financial liabilities if the Premises does not comply with applicable federal and state disability access Laws. As further set forth in **Section 9** (Compliance with Laws), Tenant further understands and agrees that it is Tenant's obligation, at no cost to Port, to cause the Premises and Tenant's use thereof to be conducted in compliance with the ADA and any other federal or state disability access Laws. Tenant must notify Port if it is making any Alterations or Improvements to the Premises that might impact accessibility standards required under federal and state disability access Laws.

**1.15. Memorandum of Technical Corrections.** The Parties reserve the right, upon mutual agreement of Port's Executive Director and Tenant, to enter into memoranda of technical corrections hereto to reflect any non-material changes in the actual legal description and square footages of the Premises, and upon full execution thereof, such memoranda will be deemed to become a part of this Lease.

**1.16. Relationship of Lease to LDDA.** This Lease describes the rights and obligations of Tenant and Port during the Term. This Lease also will be subject to the provisions of the LDDA until the Certificate of Completion is recorded in accordance with the LDDA. Until the recording of the Certificate of Completion, the LDDA will govern the development of the Initial Improvements in the event of any inconsistency between this Lease and the LDDA. Other than the construction of the Initial Improvements, this Lease will govern the rights and obligations of the Parties with respect to the Premises in the event of any inconsistency between this Lease and the LDDA. The recordation of a Certificate of Completion will conclusively establish, for the purposes of this Lease, that all requirements of the LDDA relating to the construction and completion of the Initial Improvements have been waived or satisfied. If at such time there exist any Deferred Items, Tenant will be responsible under this Lease for completing such Deferred Items in a timely manner and in accordance with good construction and engineering practices. Port will, within thirty (30) days following satisfactory completion of the Deferred Items, release in accordance with Tenant's instructions any security, guaranty or bond held by Port pursuant to the LDDA to secure satisfactory completion of the Deferred Items. The Parties acknowledge that any and all provisions contained in the LDDA that the Parties intend to survive the recordation of a Certificate of Completion have been inserted into this Lease.

## **2. TERM.**

**2.1. Initial Term.** The effectiveness of this Lease will commence on the date first above written (the "**Commencement Date**") and will expire fifty (50) years after the Commencement Date (the "**Initial Term**"), unless earlier terminated in accordance with the terms of this Lease or extended in accordance with **Section 2.2** (the "**Expiration Date**"). The period starting on the Commencement Date and ending on the Expiration Date is referred to as the "**Term**."

**2.2. Option to Extend Term.** Subject to Tenant's compliance with **Section 2.2(a)**, Tenant may extend the Term of this Lease for one (1) additional period of sixteen (16) years (the "**Extended Term**"), under and subject to all of the terms and conditions of this Lease, except Tenant will have no further right to extend the Term beyond the Extended Term.

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

**(i)** Tenant must give written notice to Port of its intention to extend the Term no later than two (2) years (but no earlier than three (3) years) prior to the expiration of the Term, which notice will be irrevocable by Tenant (the "**Extension Notice**");

**(ii)** Port has reviewed the Real Property's conditions, including the effects of sea level rise, the condition of the Seawall, and any anticipated improvements to

mitigate the impact of seal level rise or the potential failure of, or damage to, the Seawall in the event of a major seismic event, and is reasonably satisfied, exercised in accordance with **Section 45.2(g)**, that (1) such conditions or mitigation measures on the Premises and the City's waterfront will not (A) materially and adversely affect the economic feasibility of the operations at the Premises for the Permitted Uses during the Extended Term (for example, the reasonable expectation that the number of visitors/customers of the Venue Space or the number of Guest Rooms booked will be reduced), or (B) increase the potential for Claims against Port or the City, and (2) Port and the Public Trust will benefit from extending the Term for the Extended Term.

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

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

(b) **Rent During Extended Term.** Minimum Rent, Percentage Rent, and Excess Cash Flow Participation Rent, and Port's share of Transfer Proceeds and Refinancing Proceeds during the Extended Term will be as set forth in **Sections 3.2(g), 3.4(c)(v), 3.4(d), 3.5, 3.6, and 3.7.**

(c) **Effect of Extension of the Term.** In the event that Tenant properly and timely extends the Term of this Lease as set forth in this **Section 2.2**, the Term will be extended by the Extended Term, the Rent will be as set forth in **Section 2.2(b)**, and all other terms will remain unchanged.

### 3. RENT.

**3.1. Tenant's Covenant to Pay Rent.** During the Term, Tenant will pay Rent for the Premises to Port at the times and in the manner provided in this **Article 3**. "Rent" means Minimum Rent, Percentage Rent, Excess Cash Flow Participation Rent, Port Share of Transfer Proceeds, Port Share of Refinancing Proceeds, Additional Rent, and all other sums payable by Tenant to Port hereunder, including any Late Charges and interest assessed at the Default Rate.

#### 3.2. Minimum Rent.

(a) **Minimum Rent During Construction Period.** From and after the Commencement Date until the earlier of (i) the date a Final Certificate of Occupancy for the Hotel is issued by Port, or (ii) the date immediately prior to the date that is twenty-four (24) months after the Commencement Date (the "Construction Rent Expiration Date"), Tenant will pay to Port an annual Minimum Rent equal to One Million Dollars (\$1,000,000.00).

(b) **First Operation Period Minimum Rent.** From and after the date immediately following the Construction Rent Expiration Date (the "Operation Period Rent Commencement Date") and ending on the date immediately prior to second (2nd) anniversary of the Operation Period Rent Commencement Date ("First Operation Period"), Tenant will pay to Port an annual Minimum Rent equal to One Million and Seven Thousand Dollars (\$1,007,000.00).

(c) **Second Operation Period Minimum Rent.** From and after the second (2nd) anniversary of the Operation Period Rent Commencement Date and ending on the date immediately prior to the fifth (5th) anniversary of the Operation Period Rent Commencement Date (the "Second Operation Period"), Tenant will pay to Port an annual Minimum Rent equal to One Million Four Hundred Seventy-One Thousand Dollars (\$1,471,000.00), which amount will be increased annually on each subsequent Adjustment Date in accordance with **Section 3.3(b)**.

(d) **Third Operation Period Minimum Rent.** The "Third Operation Period" means the period from and after the fifth (5th) anniversary of the Operation Period Rent Commencement Date and ending on the date immediately prior to the tenth (10th) anniversary of the Operation Period Rent Commencement Date. On the fifth (5th) anniversary of the Operation

Period Rent Commencement Date, the Minimum Rent will be increased to equal One Million Six Hundred Twenty-Three Thousand Dollars (\$1,623,000), which amount will be further increased annually on each subsequent Adjustment Date in accordance with *Section 3.3(b)*.

(e) **Fourth Operation Period Minimum Rent.** The “**Fourth Operation Period**” means the period from and after the tenth (10th) anniversary of the Operation Period Rent Commencement Date and ending on the date immediately prior to the twentieth (20th) anniversary of the Operation Period Rent Commencement Date. On the tenth (10th) anniversary of the Operation Period Rent Commencement Date, the annual Minimum Rent will be increased in accordance with *Section 3.3(c)*. The Minimum Rent during the Fourth Operation Period will be increased annually subsequent to the tenth (10th) anniversary of the Operation Period Rent Commencement Date on each Adjustment Date in accordance with *Section 3.3(b)*.

(f) **Fifth Operation Period Minimum Rent.** The “**Fifth Operation Period**” means the period from and after the twentieth (20th) anniversary of the Operation Period Rent Commencement Date until the date immediately prior to the fiftieth (50th) anniversary of the Commencement Date. On the twentieth (20th) anniversary of the Operation Period Rent Commencement Date and on each Periodic 10-Year Adjustment Date thereafter, the annual Minimum Rent will be increased in accordance with *Section 3.3(c)*. The Minimum Rent during the Fifth Operation Period will be increased annually subsequent to each Periodic 10-Year Adjustment Date on each Adjustment Date in accordance with *Section 3.3(b)*.

(g) **Extended Term.** In the event that the Term is extended for the Extended Term in accordance with *Section 2.2*, the annual Minimum Rent will be increased on the first day of the Extended Term (“**Extended Term Commencement Date**”) and on each subsequent Periodic 10-Year Adjustment Date in accordance with *Section 3.3(c)*. The Minimum Rent during the Extended Term will be increased annually subsequent to each Periodic 10-Year Adjustment Date on each subsequent Adjustment Date in accordance with *Section 3.3(b)*.

(h) **Manner of Payment of Minimum Rent.** Tenant will pay Minimum Rent to City in advance, in equal monthly installments, beginning on the Commencement Date, and thereafter on or before the first (1st) day of each and every calendar month during the Term, without further notice or demand and without abatement, offset, rebate, credit or deduction for any reason whatsoever. If the Commencement Date occurs on a day other than the first (1st) day of a calendar month, or if the Term ends on a day other than the last day of a calendar month, then Minimum Rent for such fractional month will be computed by dividing the annual Minimum Rent by 365 (or 366, if the year in question is a leap year), and multiplying the per diem rental rate so computed by the number of days in such fractional month.

### **3.3. *Adjustments to Minimum Rent.***

#### **(a) Definitions.**

“**Adjustment Date**” during the Initial Term, means the second (2nd) anniversary date of the Operation Period Rent Commencement Date and each subsequent anniversary of the Operation Period Rent Commencement Date thereafter. “**Adjustment Date**” during the Extended Term, means the Extended Term Commencement Date and each subsequent anniversary of the Extended Term Commencement Date thereafter.

“**Current Index**” means the Index for the calendar month immediately preceding the applicable Adjustment Date.

“**Index**” means the Consumer Price Index for All Urban Consumers (base years 1982-1984 = 100) for the San Francisco-Oakland-San Jose area, published by the United States Department of Labor, Bureau of Labor Statistics. If the Index is changed so that the base year differs from that used as of the date most immediately preceding the prior Adjustment Date, the Index will be converted in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics. If the Index is discontinued during the Term,

such other government index or computation with which it is replaced will be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued; provided, however, if there is no replacement government index or computation, then Port will select another similar published index, generally reflective of increases in the cost of living, in order to obtain substantially the same result as would be obtained if the Index had not been discontinued.

“**Periodic 10-Year Adjustment Date**” during the Initial Term, means as applicable, the tenth (10th), twentieth (20th), thirtieth (30th) and fortieth (40th) anniversary of the Operation Period Rent Commencement Date. “**Periodic 10-Year Adjustment Date**” during the Extended Term, means as applicable, the Extended Term Commencement Date and the tenth (10th) anniversary of such date.

“**Prior Index**” means the Index published closest (but prior) to the month immediately prior to the applicable Adjustment Date.

(b) **Annual Adjustment to Minimum Rent.** On each Adjustment Date, the Minimum Rent payable under this Lease will be adjusted to equal the greater of (i) one hundred percent (100%) of the amount determined by multiplying the Minimum Rent in effect immediately prior to such Adjustment Date by a fraction, the numerator of which is the Current Index less the Prior Index and the denominator of which is the Prior Index, or (ii) one hundred two and one-half percent (102.5%) of the Minimum Rent payable immediately prior to the applicable Adjustment Date; but in no event will any adjusted Minimum Rent in accordance with this *Section 3.3(b)* equal more than one hundred three and one-half percent (103.5%) of the Minimum Rent payable immediately prior to such Adjustment Date. Provided further, if the Adjustment Date is also a Periodic 10-Year Adjust Date or an Extended Term Commencement Date, the Minimum Rent as of such Adjustment Date or Extended Term Commencement Date will be adjusted in accordance with *Sections 3.2(e), 3.2(f), 3.2(g)*, as applicable. An example of Minimum Rent adjustments is set forth in *Exhibit D* attached hereto.

(c) **Periodic 10-Year Adjustment of Minimum Rent.** On each Periodic 10-Year Adjustment Date, the Minimum Rent payable under this Lease will be increased to equal the higher of (i) the Minimum Rent as increased in accordance with *Section 3.3(b)*, or (ii) sixty-five percent (65%) of the average of the Percentage Rent due Port for the five (5) year period immediately prior to the applicable Periodic 10-Year Adjustment Date.

### **3.4. Percentage Rent.**

(a) **Commencement.** Commencing on the first day of the First Operation Period and continuing for the entire Term, Tenant will pay to Port, in addition to Minimum Rent, Percentage Rent in accordance with this *Section 3.4*.

#### **(b) Definitions.**

“**Gross F&B Revenues**” means all Revenues generated in connection with food and beverage services with respect to the Premises, including without limitation, banquets, room service and sales from restaurants, bars, cocktail lounges, luncheon counters and similar facilities (collectively, “**F&B**”). As long as there is a valid and effective Venue Space Sublease, if Gross F&B Revenues from the Venue Space are included in Gross Venue Space Revenues, “**Gross F&B Revenues**” will exclude Revenues from the Venue Space.

“**Gross F&B Rental Revenues**” means all Revenues received by or for the account of Tenant by any Person in connection with the use or operation of any part of the Premises for F&B purposes pursuant to a Sublease. As long as there is a valid and effective Venue Space Sublease if Gross F&B Rental Revenues from the Venue Space Sublease are included in Gross Venue Space Revenues, “**Gross F&B Rental Revenues**” will exclude Revenues from the Venue Space that would otherwise be considered Gross F&B Rental Revenues.



“**Gross Hotel Revenues**” means all Revenues, received by or for the account of Tenant from any Person in connection with the Premises, including, without limitation, all minimum rent, base rent, participation rent, percentage rent, license fees, permit fees, transfer premiums, room or lodging revenues, Gross F&B Revenues, Gross F&B Rental Revenues, telephone, data and facsimile revenues, gift shop revenues, advertising revenues, event or promotional fees or charges, parking fees, amounts transferred to the Hotel from other hotels for accommodations or other goods or services (such as food and beverage) provided by such other hotel, and all other income and revenue of any kind, after deducting sales, hotel occupancy tax, and other taxes, if applicable. If Tenant or any Affiliate of Tenant occupies any portion of the Premises for any purposes other than the operation of the Premises, Gross Hotel Revenues will also include the fair rental value of the portion of the Premises so occupied by Tenant or its Affiliate.

Only the following items are excluded from “**Gross Hotel Revenues**”:

- (i) Amounts refunded to Subtenants by Tenant for overpayment of minimum rent, percentage rent, or base rent, or other sums refunded to Subtenants in the ordinary course of business;
- (ii) Amounts refunded or credited to customers, vendors or other parties;
- (iii) Market rate commissions for hotel bookings paid to online travel agents or other travel intermediaries;
- (iv) Payments to Tenant from Subtenants in excess of such Subtenants’ base, minimum and percentage rentals that are attributable to the operating expenses of the Premises actually incurred by Tenant (without any profit to Tenant), including common area and park maintenance and operating costs, taxes and insurance;
- (v) Gratuities paid to Hotel, Venue Space or Restaurant employees;
- (vi) Proceeds from casualty or liability insurance;
- (vii) Condemnation awards payable to Tenant under this Lease;
- (viii) Interest on any Reserve Account;
- (ix) Proceeds from returns or exchanges of supplies with shippers or vendors;
- (x) Revenue from a service or item for which there is no profit mark-up (i.e., sale of postage stamp at cost to guest);
- (xi) Revenue from guests reimbursing or paying for fees or charges for services or items provided by third parties that are actually paid to such third parties by Tenant or its Manager;
- (xii) Federal, state and municipal excise, sales and use taxes collected directly from patrons and guests of Tenant or any Subtenant payable to federal, state or municipal governments that are actually paid to such governments;
- (xiii) Financing proceeds;
- (xiv) Capital contributions of Tenant's members;
- (xv) Payment of key money to Tenant by the Hotel franchisor or Manager pursuant to a franchise agreement or Management Agreement, as applicable;
- (xvi) Amounts received at the Premises for Hotel accommodations or other goods or services (such as food and beverage), which amounts received are subsequently legitimately transferred to another hotel;

(xvii) As long as there is a valid and effective Venue Space Sublease, “Gross Hotel Revenues” will exclude all Revenues payable to Tenant from the Venue Space under the Teatro Sublease or any successor Venue Space Sublease that would otherwise be considered Gross F&B Revenues, Gross F&B Rental Revenues, or Gross Hotel Revenues, as applicable;

(xviii) Transfer Proceeds, Port’s share of which will be treated in accordance with *Section 20.2*; and

(xix) Refinancing Proceeds, Port’s share of which will be treated in accordance with *Section 39.7*.

“Gross Venue Space Revenues” means all Revenues generated with respect to the Venue Space, including but not limited to admission and ticket sales, goods and merchandise revenues, on-line revenues, gift shop revenues, advertising revenues, event or promotional fees or charges, parking fees, Revenues that would otherwise be included in Gross F&B Revenues and Gross F&B Rental Revenues, and all other income and revenue of any kind, after deducting sales tax, if applicable. During any period that a valid and effective Venue Space Sublease does not exist, then all Revenues generated from the Venue Space will be included as part of Gross F&B Revenues, Gross F&B Rental Revenues, or Gross Hotel Revenues, as applicable. “Gross Venue Space Revenues” will exclude only the following items: (i) amounts refunded to customers; (ii) gratuities paid to the Venue Space Subtenant’s employees, and (iii) ticket sales service charges and commissions, including, without limitation, charges for Web, Internet, ShoWare or other similar electronic ticket services.

“Gross Revenues” means Gross Hotel Revenues and Gross Venue Space Revenues.

“Revenues” means all payments, revenues, income, fees, rentals, receipts, proceeds, sales, advertising fee, and amounts of any kind whatsoever, including without limitation any credit charges.

(c) **Percentage Rent.** From and after the Operation Period Rent Commencement Date, Tenant will pay Port Percentage Rent. “Percentage Rent” means:

(i) for each Lease Year during the First Operation Period that the Hotel has an annual occupancy rate of at least eighty percent (80%), ninety percent (90%) of the amount by which 3.5% of Gross Hotel Revenues exceeds Minimum Rent for each such Lease Year, plus subject to *Section 3.4(d)*, three and one half percent (3.5%) of Gross Venue Space Revenues;

(ii) for each Lease Year during the Second Operation Period, the amount by which the Minimum Rent for each such Lease Year is exceeded by the sum of (1) three and one half percent (3.5%) of Gross Hotel Revenues, and (2) subject to *Section 3.4(d)*, three and one half percent (3.5%) of Gross Venue Space Revenues;

(iii) for each Lease Year during the Third Operation Period, the amount by which the Minimum Rent for each such Lease Year is exceeded by the sum of (1) four and one half percent (4.5%) of Gross Hotel Revenues, and (2) subject to *Section 3.4(d)*, three and one half percent (3.5%) of Gross Venue Space Revenues;

(iv) for each Lease Year during the Fourth Operation Period, the amount by which the Minimum Rent for each such Lease Year is exceeded by the sum of (1) five and one half percent (5.5%) of Gross Hotel Revenues, and (2) subject to *Section 3.4(d)*, three and one half percent (3.5%) of Gross Venue Space Revenues;

(v) for each Lease Year during the Fifth Operation Period and the Extended Term, the amount by which the Minimum Rent for each such Lease Year is exceeded by the sum of (1) six and one half percent (6.5%) of Gross Hotel Revenues, and (2) subject to *Section 3.4(d)*, three and one half percent (3.5%) of Gross Venue Space Revenues.

An example of the calculation of Percentage Rent payable to Port is set forth in the attached *Exhibit E*.

(d) **Percentage Rent Adjustment for Venue Space After Expiration of Teatro Sublease.** With respect to the Percentage Rent owed to Port from Gross Venue Space Revenues, the Parties agree and acknowledge that if Teatro ZinZanni no longer provides the dinner-theater performance at the Venue Space and the Venue Space is either subleased to another entity or used by Tenant, the Parties will negotiate a higher percentage of Gross Venue Space Revenues owed to Port that is in line with the percentage rent owed to Port in other Port restaurant leases, but in no event will the percentage of Gross Venue Space Revenues owed to Port be less than three and one half percent (3.5%).

(e) **Payment of Percentage Rent.** On or before the twentieth (20<sup>th</sup>) day of each calendar month throughout the Term, Tenant will pay to Port 1/12<sup>th</sup> of Tenant's good faith estimate of Percentage Rent for the then current Lease Year. Tenant will provide to Port, together with Tenant's first payment of Percentage Rent in each Lease Year, a detailed calculation of Tenant's good faith estimate of Percentage Rent for such Lease Year. In the event this Lease expires or terminates on a day other than the last day of a calendar month, Percentage Rent for such fractional part of the calendar month preceding such expiration or termination date will be prorated to account for the partial calendar month and paid within twenty (20) days after such expiration or termination date, but if this Lease terminates as a result of a Tenant Event of Default, any amounts due hereunder is payable immediately upon termination.

**3.5. Port Share of Excess Cash Flow.** In addition to Minimum Rent and Percentage Rent, Tenant will pay Port Excess Cash Flow Participation Rent in accordance with this *Section 3.5*.

(a) **Definitions.**

“Actual Equity Capital Invested” means:

(i) for the original Tenant, funds expended by the original Tenant solely for and directly related to Project Costs from and after November 5, 2015 (the effective date of the ENA) through and including the Hotel Opening Date minus

(1) construction and permanent debt proceeds and any other third-party debt proceeds received by or on behalf of Tenant or its Affiliates in connection with the development and construction of the Project; and

(2) any other third party non-equity funds or Port or City funds provided for the Project or improvements within the Premises (including, but not limited to, any grants provided by other governmental or quasi-governmental agencies); provided, however, so long as Tenant deems the purchase price of the Spiegeltent as a capital contribution by Norman Langill, up to Six Hundred Twenty-Five Thousand Dollars (\$625,000) of the Spiegeltent's purchase price may be considered a Project Cost [**Note: Including \$625K as a Project Cost is conditioned on providing back up for such amount (i.e. invoice, etc.)**], or

(ii) for any Tenant subsequent to the original Tenant, the Transfer Proceeds paid by such subsequent Tenant, minus debt proceeds used for such purchase or debt proceeds from any Refinancings used to take out, offset, or reduce such subsequent Tenant's equity in the Leasehold Estate.

In no event will the total amount of “Actual Equity Capital Invested” exceed in the aggregate, Sixty Million Dollars (\$60,000,000.00).

“Actual Equity Capital Invested” excludes any funds (other than for Deferred Items) expended by the original Tenant for the Project after the Hotel Opening Date or any amount that exceeds Sixty Million Dollars (\$60,000,000.00). An example of the calculation of Actual Equity Capital Invested is set forth in the attached *Exhibit F*.

“**Capital Expenditures**” means the reasonable and actual costs of Capital Improvements to the Project after the Hotel Opening Date (by way of example, replacement of the roof and HVAC systems or total remodel or upgrade of the Hotel) paid by Tenant and approved by Port in accordance with **Section 10.7**. “**Capital Expenditures**” will be reduced by: (i) any amounts reimbursed or reimbursable by any Subtenant or any other Person (and, to the extent such amounts are incurred in dealings with Affiliates of Tenant, such amounts so paid will be no higher than fair market rates, as reasonably determined by Port, and such dealings will have been previously disclosed by Tenant to Port in writing), (ii) debt proceeds received by or on behalf of Tenant or its Affiliates in connection with such Capital Improvements, (iii) any other third party non-equity or Port or City funds provided for the Capital Improvements (including any rent credits or reductions), and (iv) any other proceeds secured by a Permitted Mortgage. “**Capital Expenditures**” specifically exclude any costs related to the development and construction of the Initial Improvements.

“**Capital Improvement Equity**” means Capital Expenditures made by Tenant and previously approved by Port in accordance with **Section 10.7**. “**Capital Improvement Equity**” excludes Tenant deposits made into any Reserve Accounts, but does include the expenditure of funds from such account for Capital Improvements so long as Port has approved the expenditure and actual cost in accordance with **Section 10.7**.

“**Capital Improvements**” means capital replacements and improvements to the Premises, as determined by GAAP or the Uniform System of Accounts for the Lodging Industry.

“**Excess Cash Flow Participation Rent**” means individually or collectively, the First Tier IRR Participation Rent and Second Tier IRR Participation Rent.

“**First Tier IRR Threshold**” means (i) for the original Tenant, that the original Tenant has achieved at least a cumulative twenty percent (20%) IRR on the Actual Equity Capital Invested from any combination of Net Cash Flow, Transfer Proceeds and Refinancing Proceeds, or (ii) for any subsequent Tenant, that the subsequent Tenant has achieved at least a cumulative sixteen percent (16%) IRR on the Actual Equity Capital Invested from any combination of Net Cash Flow, Transfer Proceeds and Refinancing Proceeds.

“**IRR**” means the internal rate of return, annualized, calculated on the Project’s Net Cash Flow by the [Excel 2013] “**XIRR**” function using cumulative Net Cash Flows. The Project’s Net Cash Flow will be adjusted to show all costs incurred and paid and all revenues received. An example of the IRR calculation is attached hereto as **Exhibit G**.

“**Limited Equity Interest**” means the simple interest earned at the Limited Equity Interest Rate on Limited Operations Equity.

“**Limited Equity Interest Rate**” means an annual interest rate equal to the lesser of (i) the then-current interest rate on the senior loan secured by a Permitted Mortgage, or (ii) ten percent (10%).

“**Limited Operations Equity**” means equity provided by Tenant’s members to fund Operating Expenses during a Market-Wide Downturn when Operating Expenses exceed Revenues from the Project, which equity amounts are (i) made in accordance with **Section 10.8** and (ii) previously approved by Port in accordance with **Section 10.8**.

“**Net Cash Flow**” means Gross Hotel Revenues less Operating Expenses.

“**Operating Expenses**” means all reasonable costs and expenses directly related to the operation, maintenance, or management of the Premises and incurred by Tenant, which in accordance with general industry practice with respect to the operation of a mixed-use hotel and retail project located in San Francisco, California (including such general industry practice as set forth in the then current version of the Uniform System of Accounts for the Lodging Industry) would be characterized as an operating expense, including, without limitation:

- (i) real property taxes and assessments;
- (ii) utilities;
- (iii) salaries and wages of Hotel employees of (1) Manager, provided any bonuses paid must be customary and in line with bonuses paid to other hotel employees of similar rank at other comparable San Francisco hotels, or (2) Tenant or its Affiliate if either of them are managing the Hotel during the period immediately following any permitted termination of the Management Agreement and before a new Management Agreement becomes effective, provided, however, in no event will bonuses to any such employees be eligible as an Operating Expense for purposes of calculating Net Cash Flow;
- (iv) advertising and marketing expenses;
- (v) hotel management fees, provided that if Tenant or an Affiliate manages the Premises, such fees do not exceed the prevailing market management fees for comparable third party hotel management companies offering comparable management services in projects similar to the Premises in class, size, age and location;
- (vi) insurance premiums and any paid deductibles;
- (vii) debt service on Permitted Mortgages and other Permissible Financing Costs incurred in connection with any Permitted Mortgage;
- (viii) maintenance and repair costs;
- (ix) Capital Expenditures;
- (x) franchise or royalty fees, if any, for hotel branding;
- (xi) deposits into the Capital Reserve Account or Reserve Accounts required by the Permitted Mortgagee;
- (xii) cost for purchase of furniture, fixtures, supplies and equipment for the Hotel and the Guest Rooms; and
- (xiii) the Minimum Rent and Percentage Rent paid to Port under this Lease.

“**Second-Tier IRR Threshold**” means (i) for the original Tenant, that the original Tenant has achieved at least a cumulative twenty-five percent (25%) IRR on the Actual Equity Capital Invested from any combination of Net Cash Flow, Transfer Proceeds and Refinancing Proceeds, (ii) for any subsequent Tenant, that the subsequent Tenant has achieved at least a cumulative eighteen percent (18%) IRR on the Actual Equity Capital Invested from any combination of Net Cash Flow, Transfer Proceeds and Refinancing Proceeds, as applicable.

(b) **Update on Tenant IRR.** Tenant will include in each Revenue Statement described in *Section 3.8*, a reasonably detailed statement to showing the cumulative annual IRR achieved from and after November 5, 2015 through the last day of the Quarter covered by the applicable Revenue Statement.

(c) **Payment of First Tier IRR Participation Rent.** Subject to *Section 3.5(d)*, if the Revenue Statement shows that Tenant has met or exceeded the First Tier IRR Threshold, then Tenant will include with the Revenue Statement, payment to Port additional rent consisting of (i) for the original Tenant only, twenty percent (20%) of Net Cash Flow generated by the Project in excess of the amount of Net Cash Flow necessary for the original Tenant to achieve the First Tier IRR Threshold, less an eleven percent (11%) IRR on the Capital Improvement Equity, if any, and repayment of any outstanding Limited Operations Equity and Limited Equity Interest, if any, and (ii) for any subsequent Tenant only, sixteen percent (16%) of Net Cash Flow generated by the Project in excess of the amount of Net Cash Flow necessary for the applicable subsequent Tenant to achieve the First Tier IRR Threshold, less an eleven percent

(11%) IRR on the Capital Improvement Equity, if any, and repayment of any outstanding Limited Operations Equity and Limited Equity Interest, if any, (in each case, the “**First Tier IRR Participation Rent**”). An example of the calculation methodology is set forth in *Exhibit H*.

(d) **Payment of Second Tier IRR Participation Rent.** Tenant will continue to submit the Revenue Statement and Accounting through the Expiration Date. If the Revenue Statement shows that Tenant has met or exceeded the Second Tier IRR Threshold without deducting any First Tier IRR Participation Rent due Port, then in lieu of paying Port the First Tier IRR Participation Rent, Tenant will include with Revenue Statement, payment to Port additional rent consisting of fifty percent (50%) of Net Cash Flow generated by the Project in excess of the amount of Net Cash Flow necessary for Tenant to achieve the Second Tier IRR Threshold, less an eleven percent (11%) IRR on the Capital Improvement Equity, if any, and repayment of any outstanding Limited Operations Equity and Limited Equity Interest, if any (the “**Second Tier IRR Participation Rent**”).

**3.6. Port Participation in Transfer Proceeds.** Tenant will pay Port’s share of Transfer Proceeds to Port in connection with any Transfer in accordance with this *Section 3.6*.

(a) **Definitions.**

(i) “**Cash Consideration**” means (i) cash, or (ii) cash equivalents.

(ii) “**Costs of Transfer**” mean only the following costs incurred by Tenant in connection with a Transfer:

(1) brokerage commissions paid to licensed real estate brokers (provided, however, that in the case of brokerage commissions paid to Affiliate brokers, such commissions must be commercially reasonable);

(2) reasonable and customary closing fees and costs including title insurance premiums, survey fees, recording fees, escrow fees, and transfer taxes;

(3) reasonable Attorneys’ Fees and Costs;

(4) amount of a termination fee, if any, required under the Hotel franchise agreement or Management Agreement, but only if (A) the transferee requires the franchise agreement or Management Agreement be terminated as a condition to the Transfer, (B) payment of a termination fee is required thereunder, and (C) the amount of such termination fee is not already included in the Purchase Price; and

(5) amount of any key money, if any, received by Tenant from either the Hotel franchisor or Manager that is repaid or repayable by Tenant, but only if (A) such key money is required to be repaid under the Hotel franchise agreement or Management Agreement as a condition to the Transfer, and (B) the amount of such repayable key money is not already included in the Purchase Price.

“**Costs of Transfer**” exclude adjustments to reflect prorations of rents, taxes or other items of income or expense customarily prorated in connection with sales of real property.

(iii) “**Net Transfer Proceeds**” means all Transfer Proceeds after subtracting the following items in the following order of priority:

(1) First, the outstanding principal amount and accrued and unpaid interest (excluding any interest accrued due to late payment) of outstanding indebtedness secured by a Permitted Mortgage, if any, including any associated fees and prepayment and defeasance costs;

(2) Second, Port’s Attorneys’ Fees and Costs associated with Port’s review of the Transfer;

- (3) Third, Costs of Transfer;
- (4) Fourth, amount of Hotel operational costs paid or incurred by Manager that are reimbursable under the Management Agreement that have not yet been paid to Manager, which amount(s) will be paid through escrow;
- (5) Fifth, the amount of Transfer Proceeds remaining, if any, after deducting the foregoing items in *Sections 3.6(a)(iii)(1)—3.6(a)(iii)(4)*, for Tenant to achieve the First Tier IRR Threshold;
- (6) Sixth, the amount of Transfer Proceeds remaining, if any, after deducting the foregoing items in *Sections 3.6(a)(iii)(1)—3.6(a)(iii)(5)*, for Tenant to achieve an eleven percent (11%) IRR on the Capital Improvement Equity made in accordance with *Section 10.7*;
- (7) Seventh, the amount of Transfer Proceeds remaining, if any, after deducting the foregoing items in *Sections 3.6(a)(iii)(1)—3.6(a)(iii)(6)*, to reimburse Tenant for any outstanding Limited Operations Equity and Limited Equity Interest, if any, as such amounts are approved in accordance with *Section 10.8*.
- (8) Eighth, if after deducting the foregoing items in *Sections 3.6(a)(iii)(1)—3.6(a)(iii)(7)*, there are Transfer Proceeds remaining, then at Port's sole and absolute discretion, the amount of remaining Transfer Proceeds necessary for Tenant to achieve the Second-Tier IRR Threshold.

(iv) “**Non-Cash Consideration**” means consideration received by Tenant in connection with a Transfer that is not Cash Consideration.

(v) “**Transfer Proceeds**” means all consideration received by or for the account of Tenant in connection with a Transfer of this Lease or Leasehold Estate or portion of the Leasehold Estate, including Cash Consideration, the principal amount of any loan made by Tenant to a purchaser as part of the purchase price, or any other Non-Cash Consideration representing a portion of the purchase price; provided, however, in no event will “**Transfer Proceeds**” include the consideration paid to Tenant for Tenant's Personal Property at the Premises (such as furniture and appliances, provided, however, for purposes of the definition of Transfer Proceeds, Personal Property does not include any fixtures that have become a part of the realty).

(b) **Port Participation in Transfer Proceeds.** Tenant and all subsequent assignees will pay to Port a percentage of all Net Transfer Proceeds as follows (“**Port Share of Transfer Proceeds**”):

- (i) Twenty percent (20%) of Net Transfer Proceeds; or
- (ii) If Tenant achieves the Second Tier IRR Threshold whether through Port's application of the remaining Transfer Proceeds in accordance with *Section 3.6(a)(iii)(8)* or prior to such application by Port, fifty percent (50%) of Net Transfer Proceeds.

An example of this calculation is shown on *Exhibit I* attached hereto.

(c) **Reporting of Transfer Proceeds.** No less than fifteen (15) days prior to a Transfer, Tenant will deliver to Port an estimated closing statement that includes the best estimate of the following items:

- (i) Estimated Transfer Proceeds;
- (ii) Estimated Costs of Transfer;
- (iii) The amount of any outstanding principal of any debt secured by a Permitted Mortgage, if any, to be paid from the Transfer Proceeds;

- (iv) Estimated Port's Attorneys' Fees and Costs associated with Port's review of the Transfer;
- (v) The amount to Tenant to be paid from the Transfer Proceeds; and
- (vi) The calculation of Port Share of Transfer Proceeds in accordance with *Section 3.6(b)*.

(d) **Manner of Payment.** The estimated closing statement will be updated as of the date of closing of the Transfer to show the actual (i) Transfer Proceeds, (ii) amounts, if any, paid from Transfer Proceeds to calculate Net Transfer Proceeds (including a separate line item for each of the costs permitted to be deducted from Transfer Proceeds to arrive at Net Transfer Proceeds), and (iii) calculation of Port Share of Transfer Proceeds. If escrow is opened for the Transfer, then the Port Share of Transfer Proceeds will be distributed through escrow. If no escrow is opened for the Transfer, the Port Share of Transfer Proceeds will be paid upon the closing of or execution of the documents evidencing such Transfer. Port may reference in any estoppel certificate or other representation requested from Port that payment of Port's share of Transfer Proceeds is a material obligation under the Lease, due and owing upon the closing of any Transfer hereunder, provided, however, failure to reference such obligation will in no way negate Tenant's obligation to pay, and Port's right to receive, Port Share of Transfer Proceeds. Within forty-five (45) days after any such Transfer, transferor Tenant will submit to Port a statement prepared in accordance with generally accepted accounting principles consistently applied, and certified by Tenant's chief executive officer or chief financial officer (or equivalent position), as complete and correct in all material respects, confirming the actual amount of Transfer Proceeds received, the Costs of Transfer, any deductions from Transfer Proceeds to calculate Net Transfer Proceeds, and the amount of Transfer Proceeds due to Port. At Port's option, any overpayments may be either refunded to transferor Tenant or applied to any other amount then due and unpaid. Tenant will accompany the statement of Transfer Proceeds with the amount of any underpayments. The statements delivered to Port under this Section are subject to the audit provisions of *Section 3.10* for determination of the accuracy of Tenant's reporting of the Port Share of Transfer Proceeds.

(e) **Survival.** The provisions of this *Section 3.6* will survive the earlier termination or expiration of this Lease. Additionally, any release by Port of Tenant's obligations under this Lease in connection with any Transfer is conditioned on Port's receipt of the Port Share of Transfer Proceeds.

**3.7. *Port Participation in Refinancing Proceeds.*** Tenant will pay Port's share of Refinancing Proceeds to Port in connection with any Refinancing in accordance with this *Section 3.7*.

(a) **Definitions.**

(i) "Net Refinancing Proceeds" means all Refinancing Proceeds after subtracting the following items in the following order of priority:

(1) First, to pay all actual lenders' costs of such Refinancing paid by Tenant including application fees, closing costs, points and other customary lenders' fees such as lenders' Attorneys' Fees and Costs and title insurance costs paid at close of escrow for such Refinancing, and other customary closing costs including brokerage commissions, consultant and professional fees, and recording fees;

(2) Second, to:

(A) pay down the amount of outstanding indebtedness secured by a Permitted Mortgage;

(B) pay for Capital Improvements, or furniture, fixtures or equipment for the Hotel;



(C) pay for the maintenance and repair costs of the Improvements (including any deferred maintenance or required repairs or replacements under such Refinancing);

(D) fund any required reserves in connection with such Refinancing.

(3) Third, to pay Port's Attorneys' Fees and Costs associated with Port's review of the Refinancing;

(4) Fourth, to pay Tenant's Attorneys' Fees and Costs associated with the Refinancing; and

(5) Fifth, the amount of Refinancing Proceeds remaining, if any, after deducting the foregoing items in *Sections 3.7(a)(i)(1)—3.7(a)(i)(4)*, for Tenant to achieve the First Tier IRR Threshold;

(6) Sixth, the amount of Refinancing Transfer Proceeds remaining, if any, after deducting the foregoing items in *Sections 3.7(a)(i)(1)—3.7(a)(i)(5)*, for Tenant to achieve an eleven percent (11%) IRR on the Capital Improvement Equity made in accordance with *Section 10.7*; and

(7) Seventh, the amount of Refinancing Proceeds remaining, if any, after deducting the foregoing items in *Sections 3.6(a)(iii)(1)—3.6(a)(iii)(6)*, to reimburse Tenant for any outstanding Limited Operations Equity and Limited Equity Interest, if any, as such amounts are approved in accordance with *Section 10.8*;

(8) Eighth, if after deducting the foregoing items in *Sections 3.7(a)(i)(1)—3.7(a)(i)(6)*, the remaining Refinancing Proceeds are sufficient for Tenant to achieve the Second Tier IRR Threshold, then at Port's sole and absolute discretion, the amount of such remaining Refinancing Proceeds necessary for Tenant to achieve the Second-Tier IRR Threshold.

(ii) “**Refinancing**” means any debt financing (including any permanent take-out financing for financing the construction of the Initial Improvements) or refinancing incurred by Tenant and secured by a Permitted Mortgage, other than the (1) portion of loan proceeds used for Hard Costs and Soft Costs in connection with the design and construction of the Initial Improvements, or (2) portion of any loan proceeds used solely by a subsequent Tenant to purchase the prior tenant's Leasehold Estate.

(iii) “**Refinancing Proceeds**” means all sums actually disbursed by a Bona Fide Institutional Lender in connection with a Refinancing, but does not include any funds that are disbursed but required to be, and are deposited into, any required reserves, holdback accounts or other retains reserve account.

(b) **Port's Participation in Refinancing Proceeds.** Tenant will pay to Port a percentage of all Net Refinancing Proceeds as follows (“**Port Share of Refinancing Proceeds**”):

(i) Twenty percent (20%) of Net Refinancing Proceeds; or

(ii) If Tenant achieves the Second Tier IRR Threshold whether through Port's application of the remaining Refinancing Proceeds in accordance with *Section 3.7(a)(i)(8)* or prior to such application by Port, at Port's sole and absolute election, forty percent (40%) of Net Refinancing Proceeds.

An example of the calculation and payment of Net Refinancing Proceeds set forth in this *Section 3.7* is shown on *Exhibit J* attached hereto.

(c) **Reporting of Proceeds from Refinancing.** No less than fifteen (15) days prior to the close of escrow for the applicable Refinancing, Tenant will deliver to Port, an estimated closing statement that includes the best estimate of the following items:

- (i) Gross proceeds from Refinancing;
- (ii) The estimated Net Refinancing Proceeds, including a separate line item for each of the costs permitted to be deducted from the gross proceeds from Refinancing to arrive at Net Refinancing Proceeds; and
- (iii) The estimated Net Refinancing Proceeds allocated to Port and Tenant.

(d) **Manner of Payment.** The estimated closing statement will be updated as of the date for close of escrow of the Refinancing to show the actual (i) Refinancing Proceeds, (ii) amounts, if any, paid from Refinancing Proceeds to calculate Net Refinancing Proceeds (including a separate line item for each of the costs permitted to be deducted from Refinancing Proceeds to arrive at Net Refinancing Proceeds), and (iii) calculation of Port Share of Refinancing Proceeds. Port may reference in any estoppel certificate or other representation requested from Port by a Mortgage lender, that payment of Port of the Port Share of Refinancing Proceeds is a material obligation under the Lease, due and owing at close of escrow of any Refinancing hereunder, provided, however, failure to reference such obligation will in no way negate Tenant's obligation to pay, and Port's right to receive, the Port Share of Refinancing Proceeds. Within forty-five days (45) after any such Refinancing, Tenant will submit to Port a statement, prepared in accordance with generally accepted accounting principles consistently applied, and certified by Tenant's chief executive officer or chief financial officer (or equivalent position) as complete and correct in all material respects, confirming the actual amount Refinancing Proceeds received, the calculation of Net Refinancing Proceeds (including a separate line item for each of the costs permitted to be deducted from the gross proceeds from Refinancing to arrive at Net Refinancing Proceeds), and the Port Share of Refinancing Proceeds due and actually paid to Port. At Port's option, any overpayments will be either refunded to Tenant, applied to any other amount then due and unpaid, or credited against Rent due. Tenant will accompany the statement with the amount of any underpayments. The statements delivered to Port under this *Section 3.7(d)* will be subject to the audit provisions of *Section 3.10* for determination of the accuracy of Tenant's reporting of Net Refinancing Proceeds.

(e) **Survival.** The provisions of this *Section 3.7* will survive the earlier termination or expiration of this Lease.

### 3.8. *Submission of Revenue Statements.*

(a) **Quarterly Revenue Statement.** From and after the Operation Period Rent Commencement Date, Tenant will furnish to Port by the twentieth (20<sup>th</sup>) day of each calendar month immediately following the end of each Quarter, a complete statement (the "**Quarterly Revenue Statement**") setting forth in reasonable detail:

- (i) its Gross Hotel Revenues and Gross Venue Space Revenues for such immediately preceding Quarter;
- (ii) Percentage Rent for the immediately preceding Quarter, if any;
- (iii) Transfer Proceeds and the Port Share of Transfer Proceeds, if any;
- (iv) Refinancing Proceeds and the Port Share of Refinancing Proceeds, if any;
- (v) Excess Cash Flow Participation Rent, if any;
- (vi) the total amount of Actual Equity Capital Invested to date;
- (vii) the total amount of Capital Improvement Equity invested during such immediately preceding Quarter and invested to date, if any;
- (viii) the total amount of Limited Operations Equity invested during such immediately preceding Quarter and invested to date, if any;

(ix) Tenant's IRR on Actual Equity Capital Invested and Capital Improvement Equity, as applicable, achieved to date; and

(x) Limited Equity Interest earned on eligible Limited Operations Equity, if any, during the immediately preceding Quarter and to date.

(b) **Annual Revenue Statement.** From and after the Operation Period Rent Commencement Date, within ninety (90) days after the end of each calendar year, Tenant will furnish to Port a complete statement (the "Annual Revenue Statement") setting forth in reasonable detail:

(i) its Gross Hotel Revenues and Gross Venue Space Revenues for the immediately preceding calendar year;

(ii) Percentage Rent for the immediately preceding calendar year, if any;

(iii) Transfer Proceeds and the Port Share of Transfer Proceeds, if any;

(iv) Refinancing Proceeds and the Port Share of Refinancing Proceeds, if any;

(v) Excess Cash Flow Participation Rent, if any;

(vi) the total amount of Actual Equity Capital Invested to date;

(vii) the total amount of Capital Improvement Equity invested during the immediately preceding calendar year and invested to date, if any;

(viii) , the total amount of Limited Operations Equity invested during the immediately preceding calendar year and invested to date, if any;

(ix) Tenant's IRR achieved on Actual Equity Capital Invested and Capital Improvement Equity, as applicable, as of December 31 of the immediately preceding calendar year; and

(x) Limited Equity Interest earned on eligible Limited Operations Equity, if any, during the immediately preceding calendar year and to date.

(c) **Accounting.** "Revenue Statement" means either collectively or individually, the Quarterly Revenue Statement and the Annual Revenue Statement. Each Revenue Statement will be accompanied by a complete accounting and computations setting forth the basis of each Percentage Rent, Port Share of Transfer Proceeds, Port Share of Refinancing Proceeds, Excess Cash Flow Participation Rent, as applicable, to be paid, together with a narrative description of the methodology employed to calculate each payment to be due (the "Accounting"). The Accounting will be in conformance with GAAP where applicable, or with respect to the Revenue Statement, in conformance with appropriate industry standards. Port will either approve each Accounting in writing or provide written notice providing reasonable detail of its objections to or queries of the Accounting within thirty (30) days of receipt thereof. An example of the Revenue Statement is attached hereto as *Exhibit K*.

(d) **Certification.** A financial officer or other accountant employed by Tenant who is authorized and competent to prepare the Revenue Statement must certify each Revenue Statement as accurate, complete and current.

(e) **Failure to Deliver Revenue Statement.** If Tenant fails to deliver a Revenue Statement within the time period set forth in this *Section 3.6* then the following will occur:

(i) Such failure, until cured, will be treated as a late payment of Percentage Rent or Excess Cash Flow Participation Rent, as applicable, subject to a Late Charge

(irrespective of whether any Percentage Rent or Excess Cash Flow Participation Rent is actually paid or payable by Tenant to Port); and

(ii) If such failure continues for thirty (30) days after the date Port delivers to Tenant written notice of such failure, Port has the right, among its other remedies under this Lease, to have a Port Representative examine Tenant's Books and Records (and the Books and Records of any other occupant of the Premises) as may be necessary to determine the amount of Gross Revenues and Net Cash Flow generated for the period in question and Percentage Rent and Excess Cash Flow Participation Rent, as applicable, due to Port for the period in question. The determination made by Port Representative will be binding upon Tenant, absent manifest error, and Tenant must promptly pay to Port the total cost of the examination, and if applicable, together with the full amount of Percentage Rent and Excess Cash Flow Participation Rent, if applicable, due and payable for the period in question, including any Late Charge.

**3.9. Books and Records.** Tenant will keep books and records in accordance with generally accepted accounting principles or such other industry standard consistently applied. "Books and Records" means all of Tenant's (or other person's) books, records, and accounting reports or statements relating to this Lease (and with respect to Tenant Affiliates subleasing all or a portion of the Premises, the Books and Records of such Tenant Affiliates' relating to the applicable sublease and the operation and maintenance of such subleased premises), the operation and maintenance of the Premises, Percentage Rent, Excess Cash Flow Participation Rent, Tenant's IRR to date, Transfer Proceeds, Refinancing Proceeds, Net Refinancing Proceeds, Gross Hotel Revenues, Gross Venue Space Revenues, Net Cash Flow, Operating Expenses, deductions and exclusions from Gross Hotel Revenues and Gross Venue Space Revenues, including cash journals, rent rolls, general ledgers, income statements, bank statements, income tax schedules relating to the Premises, closing and escrow statements, and any other bookkeeping documents used in business operations for the Premises. Tenant will maintain a separate set of accounts, including bank accounts, to allow a determination of expenses incurred and revenues generated directly from the Premises, from the Transfer of this Lease, or from any Refinancing. If Tenant operates all or any portion of the Premises through a Subtenant or Agent, Tenant will cause such Subtenant or Agent to adhere to the foregoing requirements regarding books, records, accounting principles and the like.

**3.10. Audit.** Tenant agrees to make (i) its Books and Records, (ii) the Books and Records of any Subtenant or Agent if Tenant operates all or a portion of the Premises through such Subtenant or Agent, (iii) to the extent within Tenant's control, the Books and Records of any other person relating to the matters identified in *Section 3.9*, and (iii) the Books and Records of any Venue Space Subtenant (by including a requirement in each Venue Space Subleases that the Venue Space Subtenant make its Books and Records available to Port) available to Port or to any accountant employed or retained by Port or the City who is competent to examine and audit the Books and Records (hereinafter collectively referred to as "**Port Representative**"), for the purpose of examining said Books and Records to determine the accuracy of Tenant's reporting of Gross Hotel Revenues, Gross Venue Space Revenues, Net Cash Flow, Operating Expenses, Tenant's IRR to date, Excess Cash Flow Participation Rent, Capital Improvement Equity, Transfer Proceeds, Port Share of Transfer Proceeds, Refinancing Proceeds, Port Share of Refinancing Proceeds, and any other item required to be included in a Revenue Statement, as applicable, for a period of five (5) years after the applicable report was delivered to Port. Tenant will reasonably cooperate with Port Representative during the course of any audit; provided however, once commenced, such audit will be diligently pursued to completion by Port within a reasonable time of its commencement. If an audit has commenced and Port claims that errors or omissions have occurred, Tenant will retain the Books and Records and make them available until those matters are resolved. If Tenant operates the Premises through a Subtenant or Agent or with respect to any Venue Space Subtenant, Tenant will require such Subtenant, Agent, or

Venue Space Subtenant, as applicable, to provide Port with the foregoing audit right with respect to the books and records of such Subtenant or Agent.

If an audit reveals that Tenant has underpaid Port for said audit period, Tenant will pay Port, within fifteen (15) days after receipt of such audit results, the difference between the amount Tenant has paid and the amount it should have paid to Port, plus interest at the Default Rate. If Tenant understates its Gross Hotel Revenues, Gross Venue Space Revenues, Excess Cash Flow Participation Rent, Tenant's IRR, Port's share of Net Transfer Proceeds or Net Refinancing Proceeds, as applicable, for any audit period by five percent (5%) or more of Tenant's understated amount, Tenant will pay Port's cost of the audit. Any overpayments revealed by an audit will be credited towards Rent payments due subsequent to the audit until credited in full.

**3.11. *Manner of Payment.*** Tenant will pay all Rent to Port in lawful money of the United States of America at the address for notices to Port specified in this Lease, or to such other Person or at such other place as Port may from time to time designate by notice to Tenant. Minimum Rent, Percentage Rent, Excess Cash Flow Participation Rent, and Port's share of Net Transfer Proceeds and Net Refinancing Proceeds are payable without prior notice or demand. Rent is due and payable at the times provided in this Lease, provided that if no date for payment is otherwise specified, or if payment is stated to be due "upon demand," "promptly following notice," "upon receipt of invoice," or the like, then such Additional Rent is due thirty (30) days following the giving by Port and the receipt by Tenant of such demand, notice, invoice or the like to Tenant specifying that such sum is presently due and payable.

**3.12. *No Abatement or Setoff.*** Tenant will pay all Rent at the times and in the manner provided in this Lease without any abatement, setoff, credit, deduction, or counterclaim.

**3.13. *Interest on Delinquent Rent.*** If any installment of Minimum Rent or Percentage Rent or Port's share of Transfer Proceeds or Net Refinancing Proceeds, is not paid within five (5) days following the date such amount is due, or if any Additional Rent is not paid within thirty (30) days following written demand for payment of such Additional Rent, such unpaid amount will bear interest from the date due until paid at an annual interest rate equal to the greater of (i) ten percent (10%) or (ii) five percent (5%) in excess of the Prime Rate that is in effect as of the date payment is due (the "**Default Rate**"). However, interest will not be payable on Late Charges incurred by Tenant or to the extent such payment would violate any applicable usury or similar law. Payment of interest will not excuse or cure any default by Tenant.

**3.14. *Late Charges.*** Tenant acknowledges and agrees that late payment by Tenant to Port of Rent, or Tenant's failure to provide the applicable Revenue Statement to Port, will cause Port increased costs not contemplated by this Lease. The exact amount of such costs is extremely difficult to ascertain. Such costs include processing and accounting charges. Accordingly, without limiting any of Port's rights or remedies hereunder and regardless of whether such late payment results in a Tenant Event of Default, Tenant will pay a late charge (the "**Late Charge**") equal to the higher of (a) five percent (5%) of all Rent or any portion thereof which remains unpaid more than five (5) days following the date it is due (or with respect to a failure by Tenant to deliver the Revenue Statement to Port within five (5) days following the date it is due, five percent (5%) of the applicable Percentage Rent or Excess Cash Flow Participation Rent due for the subject period of the Revenue Statement), or (b) one hundred dollars (\$100), which one hundred dollars (\$100) will be increased by an additional one hundred dollars (100) each Periodic 10-Year Adjustment Date. The Parties agree that such Late Charge represents a fair and reasonable estimate of the cost that Port will incur by reason of a late payment by Tenant or failure by Tenant to deliver the applicable Revenue Statement, as applicable.

**3.15. *Source of Payment Limited to Revenues from the Premises.*** Tenant agrees and acknowledges that the source for Tenant to (i) recoup any portion of its Actual Equity Capital Invested, or (ii) achieve the First Tier IRR Threshold or any return on its investment, may be limited solely to Revenues generated from the Project and Third-Party financing. Port and City

have no obligation to fund, reimburse, credit, or loan Tenant or any of its Affiliates, any funds for Tenant to recoup any portion of the Actual Equity Capital Invested or to obtain any return on such amount. Accordingly, Tenant hereby releases Port and City from any obligation or liability for Tenant's failure to recoup any portion of its Actual Equity Capital Invested or achieve a positive IRR of any amount on the Actual Equity Capital Invested.

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

#### **4. USES.**

Tenant will use and operate the Premises in accordance with this Lease. Tenant will not allow any changes or additions to the Permitted Uses, or changes in its use or operation of the Premises that would be inconsistent with this Lease without the prior written consent of Port Commission approval by resolution of the Port Commission.

##### **4.1. *Permitted Uses.***

(a) Tenant will use the Premises solely as (i) a Hotel operating at the Approved Operating Standards in the Hotel Space, (ii) subject to **Section 20.4(b)**, a dinner-theater venue for Teatro to perform its live dinner-theater shows in the Venue Space, (iii) so long as Tenant is in compliance with **Section 20.4(b)**, other artistic, cultural, restaurant or retail use in the Venue Space after expiration or termination of the Teatro Sublease, (iv) public open space in the Open Space Area, and (v) related activities, including administrative offices, specialty retail stores within the Hotel, and public access uses substantially in accordance with this Lease (collectively, the "**Permitted Uses**") and for no other use without the prior written consent of Port, which consent will not be unreasonably withheld. The Parties agree that it will be reasonable for Port to withhold its consent in accordance with **Section 4.5**.

**4.2. *Prohibited Uses within the Premises.*** Tenant will not conduct or permit on the Premises any of the following activities ("**Prohibited Uses**"):

(a) Any activity, or the maintaining of any object, which is not within or consistent with the Permitted Uses or otherwise previously approved by Port;

(b) Subject to temporary closures for maintenance, replacement, and repair in accordance with **Section 11**, any activity, or the maintaining of any object, which would restrict pedestrian flow through the Public Access Areas or Open Space Areas adjacent to the Premises, or unreasonably interfere or impede the use of such areas by the public, Port, or other Port tenant, licensee, or other user.

(c) Any activity, or the maintaining of any object, which will increase the existing rate of, affect or cause a cancellation of, any fire or other insurance policy covering the Premises, any part thereof or any of its contents and such activity or maintenance of such object is not insured by Tenant pursuant to *Article 23*;

(d) Any activity which constitutes waste or nuisance (including the preparation, manufacture or mixing of anything that emits any objectionable odors, noises or lights onto adjacent properties), any use of loudspeakers or sound apparatus which can be heard or seen outside the Premises that exceed levels permitted under the Noise Ordinance, or any use of light apparatus (excluding interior and exterior building lighting and lighting along pathways in outdoor Public Access Areas) which can be seen outside the Premises;

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

(f) Any activity or object that will overload or cause damage to the Premises;

(g) Any use of the Premises for sleeping or personal living quarters other than the Guest Rooms and use by limited managerial personnel for overnight quarters in accordance with usual and customary practices for a Hotel operating at the Approved Operating Standards;

(h) The sale, lease, or use of any of the Guest Rooms as a timeshare, condominium, or apartment;

(i) Reserving a Guest Room at a rate that is not fair market for more than fifteen (15) consecutive days specifically for a Teatro ZinZanni visiting artist.

(j) Any auction, distress, fire, bankruptcy or going out of business sale on the Premises without the prior written consent of Port, which consent may be granted, conditioned, or withheld in the sole and absolute discretion of Port;

(k) Any vehicle and equipment maintenance, including fueling, changing oil, transmission or other automotive fluids;

(l) The storage of any and all excavated materials, including dirt, concrete, sand, asphalt, and pipes;

(m) The storage of any and all aggregate material, or bulk storage, such as wood or of other loose materials;

(n) The washing or rinsing of any vehicles or equipment; and

(o) The operation of any private membership clubs or private eating or drinking establishments requiring nominations or recommendations for membership.

In the event Port determines after inspection of the Premises that Prohibited Uses are occurring on the Premises, then Tenant must immediately cease the Prohibited Use and pay to Port, as Additional Rent, an amount equaling Three Hundred Dollars (\$300.00) (which amount will be increased by one hundred dollars (\$100.00) every Periodic 10-Year Adjustment Date) upon delivery of written notice to Tenant to cease the Prohibited Use (“**Notice to Cease Prohibited Use**”). In the event Port determines in subsequent inspection(s) of the Premises that Tenant has not ceased the Prohibited Use, then Tenant must pay to Port, as Additional Rent, an amount equaling Four Hundred Dollars (\$400.00) (which amount will be increased by one hundred dollars (\$100.00) every Periodic 10-Year Adjustment Date), for each additional Notice to Cease Prohibited Use delivered to Tenant. The parties agree that the charges associated with each inspection of the Premises and delivery of the Notice to Cease Prohibited Use, if applicable, represent a fair and reasonable estimate of the administrative cost and expense which Port will incur by reason of Port’s inspection of the Premises and Tenant’s failure to comply with the

applicable Notice to Cease Prohibited Use and that Port's right to impose the foregoing charges is in addition to and not in lieu of any and all other rights under this Lease, at law or in equity.

By placing their initials below, each Party specifically confirms the accuracy of the statements made in this Section and the reasonableness of the amount of the charges described in this Section.

Initials: \_\_\_\_\_ Port \_\_\_\_\_ Tenant

**4.3. Signs.** Tenant may place, construct or maintain Signs on the exterior of the Improvements with Port's prior written consent. All Signs must comply with *Section 10.12*, all Laws, including building permit requirements and Port's Sign Guidelines attached hereto as *Exhibit L-1*. As of the Commencement Date, Port has approved the installation of the Sign(s) described in the attached *Exhibit L-2*. Port makes no representation with respect to Tenant's ability to obtain such Regulatory Approval. The design, fabrication, installation, maintenance, repair, replacement, and removal of all Signs installed on and off the Premises, will be at Tenant's sole cost and expense. Tenant will promptly remove, at its sole cost and expense, Signs that are not in compliance with this *Section 4.3* and at the expiration or earlier termination of this Lease. **[Note: The approved Sign(s) exhibit must include design, dimensions, location, color, etc.]**

**4.4. Required Public Park and Open Space and Public Utility Areas.** Tenant must maintain throughout the Term, a public park within the Open Space Area ("Public Park Area") and a Public Utility Area, all as depicted on *Exhibit C* attached hereto. Tenant must maintain the Public Park Area and the Public Utility Area in accordance with, and in compliance with this Lease and as required by any other Regulatory Approval or applicable Law. The Public Park Area will be operated and maintained in accordance with *Sections 10.1 and 10.15*.

**4.5. Benefits to Public Trust.** In approving this Lease, the Port Commission has made certain findings that the proposed development contemplated under this Lease and the LDDA promotes and provides numerous public benefits to the Public Trust, including, (a) new hotel, dinner-theater and other visitor-serving uses that will enhance public use and enjoyment of the waterfront, (b) creation of new public open space, (c) elimination of barriers to the waterfront and uniting the landside with the waterfront, (d) enhanced pedestrian, bicycle and transit access along the Waterfront, and (e) increased rent revenues to the Harbor Fund that will exceed the current and projected revenues from existing parking operations at the Premises. Consequently, the Parties agree that it is reasonable for Port to withhold its consent with respect to any change in any Permitted Uses if such changes would result in a violation of Port's authority as trustee under the Burton Act, adversely affect the Public Trust, diminish the benefits to the Public Trust or run contrary to the Public Trust Findings made by the Port Commission on September 10, 2019, pursuant to Resolution 19-36, a copy of which is attached hereto as *Exhibit M*, as reasonably determined by Port.

## **5. PARKING.**

Tenant agrees and acknowledges that (i) the Premises does not include any parking spaces, (ii) Tenant is solely responsible for securing any parking required or needed for the Project, the Hotel, the Venue Space, and its Subtenants and Invitees, (iii) Port and City do not have any obligation or responsibility to provide or make available any parking spaces within Port or City property or within its control, and (iv) Port and City have not provided any guaranties, representations, or statements that parking spaces will be made available for Tenant's, its Subtenants' or Invitees' use at any Port or City property. Additionally, Tenant will comply with all the mitigation and improvements measures related to parking as set forth in the FMND or MMRP, as applicable. Tenant will also provide Port a copy of the TDM Plan for the Project approved by the Planning Department. For the convenience of the parties, a copy of the improvement measures related to parking obligations are set forth in *Exhibit N* attached hereto, including a copy of the TDM Plan approved by the Planning Department.



## 6. DEVELOPMENT PROJECTS.

A portion of the seawall, constructed more than a century ago, is the foundation of over three (3) miles of San Francisco waterfront stretching from approximately Pier 45/Fisherman's Wharf and Telegraph Hill to South Beach and Mission Creek (the "Seawall"). The Seawall requires significant improvements to survive the next major earthquake and to mitigate increasing flood risk from sea level rise and climate change. The Seawall requires significant improvements to survive the next major earthquake and to mitigate increasing flood risk from sea level rise and climate change. Improvements to the Seawall under consideration include: (i) strengthening the ground below the Seawall, (ii) improving the ground landside of the Seawall, (iii) constructing a new Seawall, (iv) strengthening or replacing bulkhead walls and wharves, and (v) relocating or replacing critical utilities (the "Seawall Improvements"). If requested by Port, Tenant will reasonably cooperate with Port in connection with the Seawall Improvements.

Tenant further acknowledges that during the Term, the affordable housing project on SWL 322-1, the SFPUC's Embarcadero/Drumm/Jackson Street project, the Seawall Improvements, the Downtown San Francisco Ferry Terminal Expansion Project generally between the Ferry Building and Pier 14, and Piers 17, 19, 19½ 23, and 29, may be developed or constructed in the immediate vicinity of the Premises, and other Port or City projects on or near Port property (such as the possible future development of Piers 17, 19, 23, and 29) also may be constructed in the vicinity of the Premises (collectively, "City Projects"). Tenant is aware that construction of the City Projects and other construction projects of Port tenants, licensees or occupants or projects of third parties in the vicinity of the Premises and the activities associated with such construction may generate adverse impacts on construction of the Initial Improvements or any Subsequent Construction, use and/or operation of the Premises after construction, or may result in inconvenience to or disturbance of Tenant and its Agents and Invitees. Said impacts may include increased vehicle and truck traffic, closure of traffic lanes on the Embarcadero Roadway, re-routing of traffic, traffic delays, loss of street and public parking, dust, dirt, construction noise, and visual obstructions (collectively, "Construction Impacts").

Tenant hereby waives any and all Losses against the Indemnified Parties arising out of any inconvenience or disturbance to Tenant, its Agents or Invitees, from Construction Impacts. The Parties will each use reasonable efforts to coordinate its construction efforts with each other and with others engaged in construction on such other projects in a manner that will seek, to the extent reasonably possible, to reduce construction conflicts.

## 7. TAXES AND ASSESSMENTS.

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

(a) **Payment of Taxes.** Subject to Tenant's rights under *Article 8*, Tenant will pay to the proper authority prior to delinquency, all Impositions levied, assessed, confirmed or imposed on the Premises, on any of the Improvements or Personal Property located on the Premises (excluding the personal property of any Subtenant whose interest is separately assessed), on Tenant's Leasehold Estate (but excluding any such taxes separately assessed, levied, or imposed on any Subtenant), or on any use or occupancy of the Premises hereunder, to the full extent of installments or amounts payable or arising during the Term whether in effect at the Commencement Date or which become effective thereafter. Tenant further recognizes and agrees that its leasehold interest may be subject to the payment of special taxes, including without limitation a levy of special taxes to finance energy efficiency, water conservation, water pollution control and similar improvements under the Special Tax Financing Law in Chapter 43 Article X of the Administrative Code. Tenant will not permit any such Impositions to become a defaulted lien on the Premises or the Improvements thereon; provided, however, that in the event any such Imposition is payable in installments, Tenant may make, or cause to be made, payment in installments; provide, however, Tenant has the right to contest the validity, applicability or amount of any Imposition in accordance with *Article 8*. In the event of any such dispute, Tenant

will Indemnify and hold the Indemnified Parties harmless from and against all losses, damages, costs, or expenses, including attorneys' fees, resulting therefrom.

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

(ii) **Reporting Requirements.** San Francisco Administrative Code Sections 23.38 and 23.39 (or its successor) require that certain information relating to the creation, renewal, extension, assignment, sublease, or other transfer of this Lease be reported to the County Assessor within sixty (60) days after any such transaction. Accordingly, Tenant must provide a copy of this Lease to the County Assessor not later than sixty (60) days after the Effective Date, and any failure of Tenant to timely provide a copy of this Lease to the County Assessor will be a default under this Lease. Tenant will also timely provide any information that Port or City may request to ensure compliance with this or any other reporting.

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

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

**7.2. Infrastructure Financing District.** Tenant acknowledges that the Premises is located within the City and County of San Francisco Infrastructure Financing District No. 2 (Port of San Francisco) ("**Port IFD**"), established by Ordinance 27—16 and passed by the Board on March 1, 2016. As a result, a portion of the Impositions (i.e. property tax increment) paid by Tenant may be allocated to finance certain public facilities within the Port IFD. Allocation of property tax increment to finance certain public facilities within the Port IFD in and of itself will not increase the property tax or possessory interest tax payable by Tenant on the Premises or its leasehold estate under this Lease. Additionally, Tenant agrees that it will benefit from improvements to public facilities within the Port IFD. Accordingly, Tenant agrees that it will not oppose or hinder the creation of a separate project area within the Port IFD that includes the Premises or the allocation of property tax increment from the Premises for public facilities within the Port IFD.

**7.3. Community Facilities Districts; Assessments.** Tenant acknowledges that Port may cause the City to form a community facilities district and a maintenance community facilities district under state or local law to provide financing for the Seawall Improvements or construction, operation, and maintenance of the Seawall or public facilities and infrastructure, a portion of which will benefit the Premises directly. If the Port determines that it is desirable or necessary for the City to levy and collect special taxes and maintenance special taxes against the Premises, Tenant will cooperate with Port to provide information needed to determine the appropriate special tax and maintenance special tax rates that will apply to the Premises, Tenant consents to the imposition of such taxes against the Premises and Tenant agrees to pay its equitable share of any such Seawall Improvements, public facilities, or infrastructure costs, costs.

**7.4. Port's Right to Pay.** Unless Tenant is exercising its right to contest in accordance with the provisions of **Article 8**, if Tenant fails to pay and discharge any Imposition (including fines, penalties and interest) prior to delinquency, Port, at its sole option, may (but is not

obligated to) pay or discharge the same; provided that prior to paying any such delinquent Imposition, Port will give Tenant written notice specifying a date that is at least ten (10) days following the date such notice is given after which Port intends to pay such Impositions. If Tenant fails, on or before the date specified in such notice, either to pay the delinquent Imposition or to notify Port that it is contesting such Imposition pursuant to **Article 8**, then Port may thereafter pay such Imposition, and the amount so paid by Port (including any interest and penalties thereon paid by Port), together with interest at the Default Rate computed from the date Port makes such payment, will be payable by Tenant as Additional Rent.

## 8. CONTESTS.

Tenant has the right to contest the amount, validity or applicability, in whole or in part, of any Imposition, mechanics' lien, or encumbrance (including any arising from work performed or materials provided to Tenant or any Subtenant to improve all or a portion of the Premises) by appropriate proceedings conducted in good faith and with due diligence, at no cost to Port, provided that, prior to commencement of such contest, Tenant notifies Port of such contest. Tenant must notify Port of the final determination of such contest within fifteen (15) days after such determination. Nothing in this Lease requires Tenant to pay any Imposition, mechanics' lien, or encumbrance so long as Tenant contests the validity, applicability or amount of such Imposition, mechanics' lien, or encumbrance in good faith, and so long as it does not allow the portion of the Premises affected by such Imposition, mechanics' lien, or encumbrance to be forfeited to the entity levying such Imposition, mechanics' lien, or encumbrance as a result of its nonpayment. If any Law requires, as a condition to such contest, that the disputed amount be paid under protest, or that a bond or similar security be provided, Tenant must comply with such condition as a condition to its right to contest. Tenant is responsible for the payment of any interest, penalties or other charges that may accrue as a result of any contest, and Tenant must provide a statutory lien release bond or other security reasonably satisfactory to Port in any instance where Port's interest in the Premises may be subjected to such lien or claim. Tenant is not required to pay any Imposition, mechanics' lien, or encumbrance being so contested during the pendency of any such proceedings unless payment is required by the court or agency conducting such proceedings. Port, at its own expense and at its sole option, may elect to join in any such proceeding whether or not any Law requires that such proceedings be brought by or in the name of Port or any owner of the Premises. Except as provided in the preceding sentence, Port will not be subjected to any liability for the payment of any fines, penalties, costs, expenses or fees, including Attorneys' Fees and Costs, in connection with any such proceeding. Without limiting **Article 21**, Tenant will Indemnify the Indemnified Parties for all Losses resulting from Tenant's contest of any imposition.

## 9. COMPLIANCE WITH LAWS.

### 9.1. *Compliance with Laws and Other Requirements.*

(a) **Tenant's Obligation to Comply.** During the Term, Tenant will comply with, at no cost to Port, (i) all applicable Laws (taking into account any variances or other deviations properly approved), (ii) the LDDA (so long as the LDDA remains in effect), and (iii) the Mitigation Monitoring and Reporting Program, if any. The foregoing sentence will not be deemed to limit Port's ability to act in its legislative or regulatory capacity, including the exercise of its police powers. In particular, Tenant acknowledges that the Permitted Uses do not limit Tenant's responsibility to obtain Regulatory Approvals for such Permitted Uses, nor do such Permitted Uses limit Port's responsibility in the issuance of any such Regulatory Approvals to comply with applicable Laws. It is understood and agreed that Tenant's obligation to comply with Laws includes the obligation to make, at no cost to Port, all additions to, modifications of, and installations on the Premises that may be required by any Laws relating to or affecting the Premises.

(b) **Unforeseen Requirements.** The Parties acknowledge and agree that Tenant's obligation under this **Section 9.1** to comply with all Laws and the other requirements

set forth in **Section 9.1(a)** is a material part of the bargained-for consideration under this Lease. Tenant's obligation to comply with Laws and the other requirements set forth in **Section 9.1(a)** includes the obligation to make substantial improvements (including any barrier removal work or other work required to all or any portion of the Premises under Disability Laws as a result of Tenant's specific use of the Premises, the Improvements or any Subsequent Construction performed by or on behalf of Tenant, or substructural repairs to the Premises), regardless of, among other factors, the relationship of the cost of curative action to the Rent under this Lease, the length of the then remaining Term, the relative benefit of the repairs to Tenant or Port, the degree to which curative action may interfere with Tenant's use or enjoyment of the Premises, the likelihood that the Parties contemplated the particular Law involved, or the relationship between the Law involved and Tenant's particular use of the Premises. No occurrence or situation arising during the Term, nor any Law or the other requirements set forth in **Section 9.1(a)**, however extraordinary, relieves Tenant of its obligations hereunder, nor gives Tenant any right to terminate this Lease in whole or in part or to otherwise seek redress against Port. Tenant waives any rights now or hereafter conferred upon it by any Law or the other requirements set forth in **Section 9.1(a)** to terminate this Lease, to receive any abatement, diminution, reduction or suspension of payment of Rent, or to compel Port to make any repairs to comply with any such Laws or the other requirements set forth in **Section 9.1(a)**, on account of any such occurrence or situation.

## **9.2. Regulatory Approvals.**

(a) **Port Acting as Owner of Property.** Tenant understands and agrees that Port is entering into this Lease in its proprietary capacity as the holder of fee title to the Premises (subject to the Public Trust) and not as a Regulatory Agency with certain police powers. Tenant agrees and acknowledges that Port has made no representation or warranty that the necessary Regulatory Approvals to allow for the development of the Initial Improvements can be obtained. Tenant agrees and acknowledges that although Port is an agency of the City, Port staff and executives have no authority or influence over officials or Regulatory Agencies responsible for the issuance of any Regulatory Approvals, including Port and/or City officials acting in a regulatory capacity. Accordingly, there is no guarantee, nor a presumption, that any of the Regulatory Approvals required for the approval or development of the Initial Improvements will be issued by the appropriate Regulatory Agency, and Tenant understands and agrees that neither entry by Port into this Lease nor any approvals given by Port under this Lease will be deemed to imply that Tenant will obtain any required approvals from Regulatory Agencies which have jurisdiction over the Initial Improvements and/or the Premises, including Port itself in its regulatory capacity. Port's status as an agency of the City in no way limits the obligation of Tenant, at Tenant's own cost and initiative, to obtain Regulatory Approvals from Regulatory Agencies that have jurisdiction over the Initial Improvements. By entering into this Lease, Port is in no way modifying or limiting Tenant's obligations to cause the Premises to be developed, Rehabilitated, Restored, used and occupied in accordance with all Laws. Tenant further agrees and acknowledges that any time limitations on Port review or approval within this Lease applies only to Port in its proprietary capacity, not in its regulatory capacity. Without limiting the foregoing, Tenant understands and agrees that Port staff have no obligation to advocate, promote or lobby any Regulatory Agency and/or any local, regional, state or federal official for any Regulatory Approval, for approval of the Initial Improvements or other matters related to this Lease, and any such advocacy, promotion or lobbying will be done by Tenant at Tenant's sole cost and expense. Tenant hereby waives any claims against the Indemnified Parties, and fully releases and discharges the Indemnified Parties to the fullest extent permitted by Law, from any liability relating to the failure of Port, the City or any Regulatory Agency from issuing any required Regulatory Approval or from issuing any approval of the Initial Improvements.

(b) **Regulatory Approval; Conditions.** Tenant understands that construction of the Initial Improvements and Tenant's contemplated uses and activities on the Premises, any subsequent changes in Permitted Uses, and any Subsequent Construction, may require

Regulatory Approvals from Regulatory Agencies, which may include RWQCB, SHPO, NPS, State Lands, the City's Planning Commission and/or Zoning Administrator, SFPUC, and other Regulatory Agencies. Tenant is solely responsible for obtaining any such Regulatory Approvals, as further provided in this Section. Tenant will not seek any Regulatory Approval without first obtaining the approval of Port. Throughout the Term, Tenant will submit all applications and other forms of request for required Regulatory Approvals on a timely basis and will consult and coordinate with Port in Tenant's efforts to obtain Regulatory Approvals.

Port will cooperate reasonably with Tenant in its efforts to obtain such Regulatory Approvals. However, Tenant will not agree to the imposition of conditions or restrictions in connection with its efforts to obtain a Regulatory Approval if: (1) Port is required to be a co-permittee under such permit and such conditions and/or restrictions could create any obligations on the part of Port off-Premises or could otherwise encumber, restrict or change the use of Port property (other than the Premises), unless in each instance Port has previously approved, in Port's sole and absolute discretion, such conditions or restrictions; or (2) Port is required to be a co-permittee under such permit and the conditions or restrictions could create any obligations on the part of Port on-Premises, or could otherwise encumber, restrict or change the use of the Premises, unless in each instance Port has previously approved, in Port's reasonable discretion, such conditions and/or restrictions. Port will provide Tenant with its approval or disapproval thereof in writing to Tenant within fifteen (15) business days after receipt of Tenant's written request, or if Port's Executive Director determines that Port Commission or Board action is necessary, at the first Port and subsequent Board hearings after receipt of Tenant's written request subject to notice requirements and reasonable staff preparation time, not to exceed forty-five (45) days for Port Commission action alone and sixty (60) days if both Port Commission and Board action is required, provided such period may be extended to account for any recess or cancellation of board or commission meetings. Port will join in any application by Tenant for any required Regulatory Approval and execute such permit where required, provided that Port has no obligation to join in any such application or sign the permit if Port does not approve the conditions or restrictions imposed by the Regulatory Agency under such permit as set forth above.

Tenant will bear all costs associated with (1) applying for and obtaining any necessary Regulatory Approval, and (2) complying with any and all conditions or restrictions imposed by Regulatory Agencies as part of any Regulatory Approval, including the economic costs of any development concessions, waivers, or other impositions, and whether such conditions or restrictions are on-Premises or require off-Premises improvements, removal, or other measures. Tenant has the right to appeal or contest any condition in any manner permitted by Law imposed by any such Regulatory Approval. Tenant will provide Port with prior notice of any such appeal or contest and keep Port informed of such proceedings. Tenant will pay or discharge any fines, penalties or corrective actions imposed as a result of the failure of Tenant to comply with the terms and conditions of any Regulatory Approval. No Port Approval will limit Tenant's obligation to pay all the costs of complying with any conditions or restrictions.

Without limiting any other Indemnification provisions of this Lease, Tenant will Indemnify the Indemnified Parties from and against any and all Losses which may arise in connection with Tenant's failure to obtain or seek to obtain in good faith, or to comply with the terms and conditions of any Regulatory Approval or to pursue in good faith the appeal or contest of any conditions of any Regulatory Approval except to the extent that such Losses arise solely from the gross negligence or willful acts or omissions of Port acting in its proprietary capacity.

## **10. TENANT'S MANAGEMENT AND OPERATING COVENANTS.**

### **10.1. *Approved Operating Standards.***

(a) **Generally.** Tenant will be exclusively responsible, at no cost to Port, for managing and operating the Project, including the Improvements, the Hotel, the Venue Space, and the Public Access Areas, at the Approved Operating Standards. In connection with

managing and operating the Project, Tenant will provide (or require others, including, without limitation, Subtenants of the Project, to provide), such services as may be necessary or appropriate to achieve and maintain the Approved Operating Standards, including, but not limited to, (a) repair and maintenance of the Improvements, as more fully described in **Section 11**, (b) utility and telecommunications services, (c) cleaning, janitorial, extermination, recycling, composting, and trash and garbage removal, (d) landscaping and grounds keeping, including the Public Access Areas, (e) security services for the Premises, and (f) maintenance and repair of the Public Access Areas.

**(b) Additional Definitions.**

**“Approved Hotel Operating Standards”** means the operation and maintenance of the Hotel at a level that (i) meets or exceeds hospitality and service standards at other comparably sized Hotels in the City of San Francisco of high quality at the time of assessment (examples of which are, at the Effective Date hereof, Hotel Vitale, Hotel Zelos, Villa Florence, Argonaut Hotel, Hotel Zetta, The Marker, Chancellor Hotel on Union Square, and Hotel Zephyr), and (ii) attains, from and after the second anniversary of the Operation Period Rent Commencement Date, an overall rating of at least three (3) diamonds from the American Automobile Association’s (the “AAA’s”) at least three years out of each and every consecutive four year period during the Term, and (iii) incorporates three (3) diamond standards, as established by AAA, into the design, furniture, fixtures, equipment, utilities, finishes and ambiance of the lobby and guest room areas, and (iv) complies with Port’s good neighbor policy and the Approved Public Access Operating Standards. With respect to subsections (ii) and (iii) above, in the event that AAA ceases to publish hotel ratings in substantially the same manner as it does on the Effective Date hereof, the applicable hotel rating standard will be a rating substantially similar to the rating set forth in subsections (ii) and (iii) above, respectively, awarded by a national hotel rating service with a reputation and with experience comparable to AAA, as of the Effective Date, which hotel rating service will be selected by Port in its reasonable discretion and reasonably approved by Tenant. While the original Tenant anticipates operating an upscale food and beverage experience within the Hotel Space, the **“Approved Hotel Operating Standards”** shall not be deemed to require Tenant or any third party to operate a Restaurant within the Hotel Space so long as Tenant can reasonably demonstrate to Port the benefits to the Project in not operating a Restaurant within the Hotel do not exceed the direct and indirect cost of operating such Restaurant within the Hotel.

**“Approved Open Space Area Operating Standards”** means the comprehensive operation and maintenance of the Open Space Area in a first-class condition for public use and enjoyment, as described further detail in **Exhibit O-1**, and that also complies with the Good Neighbor Policy attached as **Exhibit O-2**.

**“Approved Operating Standards”** means Approved Hotel Operating Standards, Approved Restaurant Operating Standards, and Approved Open Space Area Operating Standards.

**“Approved Restaurant Operating Standards”** means the operation and maintenance of the Restaurant in the Venue Space or the Hotel at a level that (i) meets or exceeds the service standards at other comparably sized restaurants in the City of San Francisco of high quality at the time of assessment with respect to the Restaurant, and (ii) complies with Port’s Good Neighbor Policy.

**“Dinner Theater Restaurant”** means a Restaurant in the Venue Space that also includes live theater performance during the meal, such as Teatro.

**“Hotel”** means a public, independent lodging establishment having approximately 100-200 separately keyed Guest Rooms that provides superior services, facilities and amenities for its guests at the Approved Operating Standards, who are primarily short-term destination and business travelers looking for design, service, location and amenities, but which do not necessarily provide all of the services of a full-service hotel, such as full-service conference,

meeting and catering facilities, a full-service health club and spa, or other full-service recreational facilities.

“**Hotel Space**” means the area within the Premises identified as the Hotel Space on *Exhibit A-2* and where the Hotel is generally located. Hotel Space includes any rooftop deck approved by Port.

“**Restaurant**” means a restaurant that offers table service to the public during some or all of the service hours when the restaurant is open for business, and may also include a bar, take-out service, roof-top service, live-theater performances in conjunction with the table service (such as Teatro), incidental retail sales associated with the restaurant or restaurant/live theater use, and occasional private events.

“**Venue Space**” means the area within the Premises identified as the Venue Space on *Exhibit A-2*.

### 10.2. *Continuous Operation.*

(a) **Hotel.** Following issuance by Port of a Certificate of Occupancy for the Hotel, Tenant will open, maintain and continuously operate (or cause to be maintained and operated) the Improvements within the Hotel Space as a Hotel at the Approved Hotel Operating Standards, subject to the provisions of *Sections 16* and *17* relating to Casualty and Condemnation. Tenant may, however, from time to time (but in no event no more than once every five (5) years), temporarily cease operation of the Hotel if required to make commercially reasonable renovations, redecorations or replacements to the Hotel for a period of time that is no longer than is (i) commercially reasonable for such renovations, redecorations or replacements and (ii) customary for Hotels in the City of San Francisco undergoing similar renovations, redecorations or replacements.

(b) **Venue Space.** Following issuance by Port of a Final Certificate of Occupancy for the Venue Space or any other Restaurant at the Premises, Tenant will, or cause Teatro (or any subsequent Subtenant of the Venue Space after the expiration or earlier termination of the Teatro Sublease) or any other operator of a Restaurant at the Project to, open, maintain and continuously operate at the Approved Restaurant Operating Standards, subject to the provisions of *Sections 16* and *17* relating to Casualty and Condemnation. Tenant may, however, from time to time, (i) temporarily keep the Venue Space or the Restaurant vacant for a commercially reasonable period after a Subtenant of such space has vacated such space so long as Tenant is working diligently to enter into a new Sublease prior to Subtenant’s surrender of such space, as applicable, or (ii) temporarily cease operation (but in no event no more than once every three (3) years) if required to make commercially reasonable renovations, redecorations or replacements for a period of time that is no longer than is (1) commercially reasonable for such renovations, redecorations or replacements and (2) customary for Restaurants in the City of San Francisco undergoing similar renovations, redecorations or replacements. Teatro will be deemed to have satisfied the obligation of “**continuous operations**” for so long as it presents the show at least four times per week or 16 times per month, excluding time between runs, which time will not exceed forty-five continuous days.

(c) **Renewal of Teatro Sublease.** Tenant will use its commercially reasonable efforts to renew the Sublease with Teatro in accordance with *Section 20.4(c)*.

**10.3. Economic Activity.** Tenant will cause Manager to operate the Hotel in a commercially reasonable manner that maximizes Gross Hotel Revenues, and Tenant will, or cause the Venue Space Subtenant and any other third-party Restaurant Subtenant, if any, to, operate the applicable Restaurant in a commercially reasonable manner that maximizes gross Revenues from such space, all subject to prevailing market conditions and circumstances with respect to the profitability of Hotels, Restaurants, and Dinner-Theater Restaurants, as applicable, in San Francisco at the Approved Operating Standards, and consistent with maintaining a commercially reasonable cost structure that permits Tenant and if applicable, the Venue Space

Subtenant or other Restaurant Subtenant, to pay all reasonable operating expenses, maintain required debt service coverage ratios, and a reasonable return on Tenant's Actual Equity Capital Invested in the Project.

#### **10.4. Hotel Management.**

(a) **Manager.** In furtherance, and not in limitation of Tenant's obligations under this *Section 10.4*, Tenant will enter into a management agreement ("**Management Agreement**") with a Qualified Operator (in its capacity as manager under the Management Agreement, the "**Manager**") in accordance with this *Section 10.4*. Before Tenant enters into a Management Agreement with Manager, Port must have approved in writing in its reasonable discretion both the Management Agreement and selection of the Manager. Within three (3) months following the Commencement Date, Tenant will forward for Port's review, Tenant's proposed Manager of the Hotel. Tenant will use all commercially reasonable efforts to enforce the Management Agreement in accordance with its terms; provided, however, that no act or omission of the Manager pursuant to the Management Agreement, or otherwise, will in any manner excuse Tenant's failure to perform any of its obligations under this Lease or the LDDA.

#### **(b) Amendment or Termination of Management Agreement; Replacement of Manager.**

(i) Tenant will not materially modify or terminate the Management Agreement, nor will Tenant replace the Manager at any time during the Term without the prior written consent of Port, which consent will not be unreasonably withheld, delayed or conditioned; provided, however, Port's consent to any termination of the Management Agreement will not be required if Tenant terminates the Management Agreement due to Manager's non-performance, the Permitted Mortgagee has consented to such termination, and day-to-day operations of the Hotel are not materially and adversely impacted by such termination. Port will have thirty (30) days to respond to Tenant's written request for Port's approval of such a modification, termination or replacement with respect to the Management Agreement.

(ii) If Port fails to respond to the request within such thirty (30) day period, then Tenant will submit a second written notice to Port requesting Port's approval or disapproval ("**Second Notice**"). The Second Notice must display prominently in at least 16 point font on the envelope enclosing such request and on the first page of such request, substantially the following: "APPROVAL REQUEST FOR CHANGE IN HOTEL MANAGER/HOTEL MANAGEMENT AGREEMENT OF TEATRO/HOTEL PROJECT. IMMEDIATE ATTENTION REQUIRED; FAILURE TO RESPOND WITHIN FIVE (5) BUSINESS DAYS WILL RESULT IN THE REQUEST BEING DEEMED APPROVED." If Port fails to approve or disapprove the requested changes within five (5) business days following receipt of the Second Notice, then such requested changes will be deemed approved by Port.

(iii) With respect to a request to replace the Manager, it will be reasonable for Port to refuse to consent to replacing the Manager with any Person who is not a Qualified Operator. "**Qualified Operator**" means a Person who has at least ten (10) years of reputable experience operating at the Approved Hotel Operating Standards, no less than three (3) Hotels in downtown areas of major cities in the United States.

(c) **Assignment.** Tenant hereby assigns to Port all of its right, title and interest in and to the Management Agreement in order to secure the performance by Tenant of Tenant's obligations under this Lease; provided, however, the foregoing assignment will be subject and subordinate to any assignment made to a Mortgagee of which Port has been made aware in writing until such time as Port has terminated this Lease, at which time the rights of Port assigned pursuant to this *Section 10.4* will become prior and superior in right. Such subordination will be self-operative. However, in confirmation thereof, Port, will, upon the request of a Mortgagee, execute a subordination agreement reflecting the subordination



described in this **Section 10.4** in form and substance reasonably satisfactory to such Mortgagee and to Port. Notwithstanding the foregoing, if this Lease terminates by reason of a Tenant Event of Default, any Mortgagee which actually collected any Revenues from the Manager pursuant to any assignment thereof in its favor will promptly remit to Port the amounts so collected (less the actual and reasonable cost of collection) to the extent necessary to pay Port any Rent through the date of termination of this Lease.

**10.5. Personal Property.** Tenant will, at no cost to Port, furnish and equip the Hotel with such Personal Property as would ordinarily be required for a Hotel operating at the Approved Hotel Operating Standards. Tenant will, at no cost to Port, furnish and equip (or cause the Restaurant Subtenant to furnish and equip) the Restaurant within the Venue Space with such Personal Property as would ordinarily be required for a restaurant operating at the Approved Restaurant Operating Standards. Tenant will keep all such Personal Property in good working order, condition and repair and, subject to **Sections 16** and **17**, promptly, at Tenant's cost and expense, make or cause to be made all necessary repairs, replacements and renewals thereof, including any such as may be required as the result of any damage or destruction. Tenant hereby grants to Port a lien and security interest in all Personal Property (other than any Subtenant's Personal Property) to secure the performance by Tenant of all of Tenant's obligations under this Lease. Tenant will execute, deliver, file and refile, at Tenant's expense, any financing statements, continuation statements, or other security agreements that Port may require from time to time to confirm the lien granted herein.

Tenant hereby warrants, represents and covenants that such Personal Property is and will remain free and clear of all other liens and encumbrances except only a lien granted to a Mortgagee and any purchase money lien related to such Personal Property. In the event that any such Personal Property is leased from third parties, Tenant agrees to collaterally assign its leasehold interest to Port pursuant to an assignment document acceptable to Port in form and substance in order to secure the performance by Tenant of all of Tenant's obligations under this Lease. Tenant will execute from time to time such additional documents as may be reasonably necessary to effectuate and evidence such assignments and the lien created hereby if requested by Port. Tenant will notify Port of all third parties from which Tenant leases Personal Property.

Subject to the rights of a Permitted Mortgagee, upon the occurrence of a Tenant Event of Default, Port will have the immediate right of possession of all such Personal Property and the right to assume the leasehold interests of Tenant in such Personal Property. Port hereby subordinates its interest in the Personal Property to the interests of a Permitted Mortgagee, which subordination is self-operative. However, in confirmation thereof, Port will, upon the request of a Permitted Mortgagee, execute a subordination agreement reflecting the subordination described in this Section in form and substance reasonably satisfactory to such Mortgagee and to Port.

**10.6. Reserve Accounts.**

(a) Additional Definitions.

“**Capital Reserve Account**” means funds in a bank account where all funds will be used solely to install, repair, and improve Capital Improvements within the Premises.

“**Reserve Accounts**” means funds in a bank account where all funds will be used solely to install, repair, and improve Capital Improvements within the Premises, and install, repair, improve or replace furniture, fixtures, and equipment for the Hotel (including the Guest Rooms), maintain insurance coverage, satisfy tax obligations, or for other costs and expenses that are customarily set aside in reserve accounts in the San Francisco hotel industry or as required by a Mortgagee. Reserve Accounts include the Capital Reserve Account.

“**Capital Reserve Deposits**” means the deposits into an account for Capital Reserves.

(b) **Mortgagee Reserve Account Requirement.** Tenant will establish and maintain Reserve Accounts to the extent and on the terms and conditions required by Tenant's

Mortgagee. If Tenant's Mortgagee does not require the establishment of such Reserve Accounts, then Tenant will establish and maintain Capital Reserves and make Capital Reserve Deposits pursuant to *Section 10.6(c)*.

(c) **No Mortgagee Capital Reserves Requirement.** From and after Completion of the Initial Improvements, if there is no Mortgagee or a Mortgagee does not require Tenant to maintain Capital Reserves, Tenant will establish and maintain Capital Reserves with a depository institution reasonably acceptable to Port. Throughout the Term, Tenant will maintain commercially reasonable Capital Reserves, comparable to the levels maintained by owners of comparable buildings in the City and County of San Francisco; provided, however, after preparation and approval of each Facilities Condition Report, the Parties will agree on whether an annual Capital Reserve Deposit is necessary to reflect the agreed upon schedule and budget for the maintenance, repair, or replacement of Capital Improvements called for in the applicable Facilities Condition Report. Tenant will use the Capital Reserves only for the repair and/or replacement of Capital Improvements.

(d) **Reserve Account Statements.** Within fifteen (15) days following the end of each Quarter following the first deposit into Reserve Accounts, Tenant will deliver, or caused to be delivered, to Port a statement from the depository institution in which each Reserve Account is held, showing the then current balance in each Reserve Account and any activity on such Reserve Account that occurred during the immediately prior Quarter. In the event that Tenant has withdrawn funds from the Reserve Account within the immediately prior Quarter, Tenant will include with the delivery of such statement, an explanation for such withdrawal, along with detailed statements (marked paid) relating to the expenditure of such funds. In connection with any such expenditure, Tenant will provide Port with any other documentation related thereto reasonably requested by Port.

(e) **Liens in Capital Reserve Account.** Subject and subordinate to any lien or security interest made to a Mortgagee pursuant to *Section 39*, Tenant hereby grants to Port a lien and security interest in the Capital Reserve Account to secure the performance by Tenant of its obligations to maintain and repair the Capital Expenditures. Tenant will execute, deliver, file and refile, at Tenant's expense, any instruments, financing statements, continuation statements, or other security agreements that Port may require from time to time to effectuate and evidence the lien granted herein. Tenant hereby warrants and represents that the Capital Reserve Account will be free and clear of all other liens and encumbrances.

(f) **Funds in Capital Reserve Account at End of Term.** Subject and subordinate to any lien or security interest made to a Mortgagee pursuant to *Section 39*, provided Tenant has maintained the Improvements and the Premises in accordance with its maintenance and repair obligations, upon expiration of this Lease (including performing the repairs and the making the replacements, if any, set forth in the then most recent Facility Condition Report required under *Section 11.2*, Tenant will have the right to any funds remaining in the Capital Reserve Account or the amount allocated for Capital Improvements per any Mortgagee requirement.

#### ***10.7. Port Approval Required for Capital Expenditures to Earn a Return.***

(a) **Port Approval Required.** In order for a particular Capital Expenditure to be deemed Capital Improvement Equity, Tenant must obtain Port's prior consent in accordance with this *Section 10.7*. Port will have no less than sixty (60) days to review Tenant's request and Tenant cannot commence construction of the Capital Improvement that Tenant desires include as part of Capital Improvement Equity until it obtains Port's consent.

(b) **Scope and Budget.** Tenant will provide Port with Tenant's proposed scope and budget for the requested Capital Improvement. Port and Tenant will meet as many times as necessary to finalize the scope and budget for the requested Capital Improvement. If the Parties are unable to finalize the scope and budget for the requested Capital Improvement within

ninety (90) days after Tenant's delivery of its proposed scope and budget for the same, then the Capital Expenditure for such Capital Improvement will not be deemed Capital Improvement Equity.

(c) **Completion; of Capital Improvement.** Once the scope and budget for the requested Capital Improvement are finalized and agreed to between the Parties, Tenant will promptly commence such work and diligently pursue such work to completion in accordance with the terms and conditions of this Lease. Tenant will perform each Capital Improvement in accordance with *Article 13*.

(d) **Certification of Capital Expenditure.** Within sixty (60) days following completion of the Capital Improvement, Tenant will provide Port with a statement ("**Capital Expenditure Statement**") setting forth in detail the total Capital Expenditure incurred by Tenant, including as line items, increases over (or decreases under) the items listed in the agreed upon scope and budget, certified as true, accurate and complete by a financial officer of Tenant. Tenant will also include with such statement, documentation reasonably satisfactory to Port evidencing the Capital Expenditure. Such appropriate proofs of expenditure will include, without limitation, (i) copies of canceled checks, (ii) copies of executed contracts, (iii) invoices for labor services and/or materials marked "Paid"; or otherwise evidenced as having been paid; bills of lading marked "Paid"; other bills, contracts and receipts for goods, materials and/or services marked "Paid", (iv) and such other proofs of expenditure as may be reasonable approved by Port, (v) unconditional lien waivers from all the general contractors and all subcontractors and suppliers; and (vi) a copy of the record documents for the requested Capital Improvement. All such proofs of expenditure must be attributable directly to work or materials performed, constructed or installed in connection with the requested Capital Improvement. Port will notify Tenant within thirty (30) days following Port's receipt of the Capital Expenditure Statement of Port's agreement or disagreement with such statement. If Port disagrees with the Capital Expenditure Statement, the Parties will meet to resolve the disagreement. If the Parties are unable to resolve their disagreement, Port may request that such records be audited by a Port Representative. If Port agrees with the Capital Expenditure Statement or the records are audited, as applicable, then the total amount of Capital Expenditure will be as set forth in the Capital Expenditure Statement, or as determined by the Port Representative, as applicable ("**Certified Capital Expenditure**") and the Certified Capital Expenditure may be deemed Capital Improvement Equity.

**10.8. *Circumstances When Tenant Equity During Market-Wide Downturn May Earn Interest.***

(a) **General.** When Operating Expenses exceed Revenues from the Project due to a Market-Wide Downturn (as opposed to mismanagement or other reasons) such that Tenant's members provide Limited Operations Equity to fund Operating Expenses, then such amount may be eligible to earn a Limited Interest Rate if all conditions set forth in this *Section 10.8* are satisfied.

(b) **Definitions.**

"**Base Year**" means the starting point calendar year that is used to measure a decrease in RevPAR for any particular Market-Wide Downturn. There is only one Base Year for any particular Market-Wide Downturn. An example determining the Base Year is set forth in *Exhibit P-1* attached hereto.

"**Market-Wide Downturn**" means that there is at least a five percent (5%) decrease in SF RevPAR from the Base Year, as measured by the most current against the prior year's annual STR Trend Report for the San Francisco hospitality industry ("**SF STR Trend Report**"). If STR no longer publishes the annual SF STR Trend Report, then the Parties will agree on other publicly available and credible substitute provider of SF RevPAR.

“RevPAR” means revenue per available hotel room and is calculated by multiplying a hotel's average daily room rate by its occupancy rate.

“SF RevPAR” means RevPAR for hotels in the City and County of San Francisco.

(c) **Port Approval Required and Notice.** Tenant must obtain Port’s prior approval if Tenant desires for any Limited Operations Equity to earn Limited Equity Interest. Tenant must deliver Port a request for approval that includes the following (“**Downturn Approval Request**”): (i) evidence of a Market-Wide Downturn, (ii) the Project’s financial statements and other evidence showing that Operating Expenses have exceeded Revenues during such period, (iii) amount of Limited Operations Equity funding such shortfall to date, and (iv) additional amount of Limited Operations Equity anticipated to fund any continuing shortfalls. Port will have no less than forty-five (45) days to review the Downturn Approval Request.

(d) **Limited Equity Interest.** The amount of Limited Operations Equity first used to offset Operating Expenses from and after Port’s receipt of the Downturn Approval Request will be eligible to earn a Limited Interest Rate upon satisfaction of all of the following conditions:

- (i) Port agrees there is a Market-Wide Downturn;
- (ii) Tenant provides Port quarterly and annual reports (each, an “**Operations Equity Report**”) that include:
  - (1) The Project’s financial statements and other evidence showing that Operating Expenses have exceeded Revenues during such period;
  - (2) amount of Limited Operations Equity since Port’s receipt of the Downturn Approval Request funding such shortfall to date;
  - (3) additional amount of Limited Operations Equity anticipated to fund any continuing shortfalls; and
  - (4) other evidence, if any, reasonably requested by Port to support the need for Limited Operations Equity into the Project.
- (iii) Tenant must submit (1) each quarterly Operations Equity Report by the 20<sup>th</sup> day immediately following the end of the applicable calendar quarter, and (2) each annual Operations Equity Report by the February 15<sup>th</sup> immediately following the end of the applicable calendar year.
- (iv) Port approves of each Operations Equity Reports, as applicable. Port will have forty-five (45) days after receipt of the complete package to review and approve or disapprove such reports. If there are any disagreements between the Parties about such reports, the Parties will work together to resolve the dispute until they are resolved and Port approves the reports unconditionally.

(v) The total amount of additional Limited Operations Equity invested into the Project does not exceed the amount of anticipated Limited Operations Equity set forth in the most recent Operations Equity Report approved by Port unless such additional amount is previously approved by Port.

(vi) The total principal amount of Limited Operations Equity to date is less than the Limited Operations Equity Cap.

An example of the calculation of determining Limited Operations Equity (including interest) is set forth in *Exhibit P-2*.

(e) **Interest Rate and Cap on Limited Operations Equity.** Outstanding Limited Operations Equity will earn simple interest (not compounded) at the Limited Equity Interest Rate. The total principal amount of Limited Operations Equity during the Term that can

accrue Limited Equity Interest is Twenty Million Dollars (\$20,000,000.00), as increased in accordance with *Exhibit Q* attached hereto (“**Limited Operations Equity Cap**”).

(f) **Delay in Payment.** Limited Operations Equity and Limited Equity Interest will continue remain unpaid until Tenant has achieved the First IRR Threshold and eleven percent (11%) IRR on Capital Improvement Equity from Net Cash Flow, Transfer Proceeds or Refinancing Proceeds, as applicable.

(g) **When Limited Operations Equity is No Longer Eligible to Earn Limited Equity Interest.** During any period when Port has agreed there is a Market-Wide Downturn, any additional Limited Operation Equity will no longer be eligible to earn Limited Equity Interest from and after the earlier of the date that (i) the then current SF STR Trend Report shows there is less than a five percent (5%) decrease in SF RevPAR from the Base Year, or (ii) the most recent monthly or quarterly report, as applicable, shows that Revenues exceed Operating Expenses and the Parties reasonably believe additional Limited Operating Equity is no longer necessary during the then current Market-Wide Downturn.

**10.9. Liquor License.** Tenant will at all times during the Term, hold or cause to be held, for the benefit of the Premises in connection with the operation of the Hotel and any Restaurant operating at the applicable Approved Operating Standards, a valid liquor license in compliance with all applicable Laws; provided however, the Subtenant of the Venue Space may have a separate liquor license.

**10.10. Compliance with Special City and Port Provisions.** Tenant must comply (and will cause its Manager to comply) with the Special City and Port provisions described in *Article 43* in connection with its operation and management of the Premises, including the prohibition on tobacco and alcoholic beverages advertising (*Sections 43.6 and 43.7*), restrictions on use of pesticides (*Section 43.8*), card check agreement (*Section 43.22*), compliance with the Food Service Waste Reduction Ordinance (*Section 43.23*), consideration of criminal history in hiring and employment decisions (*Section 43.24*), restrictions on sale or distribution of bottled water (*Section 43.26*), Nutritional Standards Requirements for vending machine food and beverages (*Section 43.27*), and all-gender toilet facilities (*Section 43.28*).

**10.11. Flags.** Throughout the Term, a Port flag will fly on each flagpole within the Premises (“**Flagpoles**”). Port will provide the Port flag to Tenant. Tenant will promptly, at no charge, install, raise, lower and remove Port flags at Port’s request. The dimensions of Port flags will be similar to the dimensions of Port flags flown on the roofs of Port buildings in the Northern Waterfront. Tenant also may use the Flagpoles to fly other flags on each Flagpole, provided that such other flags, other than the flags of the United States and the State of California, must be placed beneath the Port flag and Port must first reasonably approve the dimensions, color, text, design, and materials for such flag. If Port determines that Tenant’s response to Port’s request to raise or lower Port flags is inadequate, then at Port’s election, Port will exercise its access rights to the Flagpoles to permit Port to adjust the Port flags accordingly, as further described in *Section 1.8*.

Tenant will have no responsibility to maintain any Port flags. Port will provide Tenant with replacement Port flags to replace worn Port flags on the Flagpoles. If Port does not provide a replacement flag to replace a worn flag, then Tenant will provide Port with notice requesting that a replacement flag be provided (“**Replacement Notice**”). If Port reasonably believes the flag in question is not worn sufficiently enough to warrant its replacement, Port will notify Tenant within five (5) days following receipt of the Replacement Notice, and such flag will remain in place and not be replaced. If Port has not timely notified Tenant that Port disputes the need to replace the flag and if Port does not provide Tenant with a replacement flag within thirty (30) days following the Replacement Notice, then Tenant will deliver to Port a second notice, which notice will include a statement in bold, all caps and underlined that if Port does not provide Tenant with a replacement flag within ten (10) days of such second notice, then Tenant will have the right to remove the worn flag. If Port does not provide Tenant with a replacement flag within

five (5) days of such second notice, then Tenant will have the right to remove the worn flag; provided, however, if Port notifies Tenant that Port cannot provide Tenant with a replacement flag due to unavailability of a replacement flag, Tenant will not remove the worn flag until Port is able to obtain a replacement flag, but in no event will Port have more than sixty (60) days from delivery of the first Replacement Notice to respond to Tenant. If Tenant removes Port's flag, then Tenant will promptly fly any replacement flag provided by Port to Tenant.

**10.12. Exterior Improvements.** Other than any Exterior Improvements previously approved by Port, Tenant will not install any Exterior Improvements without Port's prior consent. Tenant will provide to Port the size, height, design, color, dimensions, text (if any), materials, location, and method of installation of the Exterior Improvements to enable Port to evaluate the proposed Exterior Improvement. Within twenty (20) days following Port's receipt of the proposed Exterior Improvement, Port will notify Tenant if Port requires the proposed Exterior Improvement to be reviewed by the WDAC or another Port advisory body, in Port's sole discretion, and Tenant will incorporate Port's requested changes, if any, into the proposed Exterior Improvement so long as such changes do not materially increase Tenant's cost or materially delay installation of the proposed Exterior Improvement. Construction of the Exterior Improvements will be in accordance with *Article 13* (Subsequent Construction).

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

Tenant agrees to remove all graffiti from the Premises within forty-eight (48) hours of the earlier of Tenant's: (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the San Francisco Department of Public Works. This *Section 10.13* is not intended to require Tenant to breach any lease or other agreement that it may have concerning its use of the Premises. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and that is visible from the public right-of-way, but does not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the Planning Code, or the Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (Calif. Civil Code §§ 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.).

**10.14. Mitigation Monitoring and Reporting Program.** In order to mitigate any potential significant environmental impacts of the Initial Improvements and operation of the Premises, Tenant agrees that the development and operation of the Initial Improvements will be in accordance with mitigation measures set forth in the Mitigation Monitoring and Reporting Program attached as *Exhibit R*. As appropriate, Tenant will incorporate the Mitigation Monitoring and Reporting Program into any contract for the development and/or operation of the Initial Improvements and the Premises.

**10.15. Public Park Area.** Within eight (8) months following issuance of a Final Certificate of Occupancy for the Hotel, Tenant must open the Public Park Area to the general

public for its use and enjoyment on a daily basis. Tenant will operate and maintain the Public Access Area in accordance with the Approved Open Space Operating Standards.

**10.16. Good Neighbor Policy.** Tenant will comply with the good neighbor policy (“Good Neighbor Policy”) attached as *Exhibit O-2*.

## **11. REPAIR AND MAINTENANCE; FACILITIES CONDITION REPORT; CAPITAL RESERVES.**

**11.1. Covenants to Repair and Maintain the Premises.** Throughout the Term, Tenant will maintain and repair, at no cost to Port, the Premises and all Improvements thereon in condition and repair as is appropriate to maintain a Hotel, Restaurant and Public Access Areas at the applicable Approved Operating Standards and in compliance with all applicable Laws and the requirements of this Lease. Tenant will with reasonable promptness make (or cause others to make) all necessary or appropriate repairs, renewals and replacements, whether structural or non-structural, interior or exterior, ordinary or extraordinary, foreseen or unforeseen, except as set forth in *Articles 16* or *17*. Tenant will make such repairs with materials, and quality of workmanship, comparable to that as originally installed under the LDDA or this Lease, or, if not commercially available, with materials at least equal in quality, appearance and durability to the materials repaired, replaced or maintained. All such repairs and replacements made by Tenant will be at least equivalent in quality, appearance, public safety, and durability to and in all respects consistent with the Improvements installed at the time of issuance of the Certificate of Final Completion and Occupancy.

### **11.2. Facilities Condition Report.**

(a) Within ninety (90) days following the twentieth (20<sup>th</sup>) Anniversary Date and continuing every ten (10) years thereafter during the remainder of the Term, Tenant will deliver to Port a facilities condition report (the “**Facilities Condition Report**”), prepared by a qualified team of construction professionals including, without limitation, a structural and mechanical engineer, acceptable to both Parties. Tenant also will provide with its submittal of the Facilities Condition Report, an anticipated schedule of and budget for, the repairs identified in the Facilities Condition Report. The Facilities Condition Report will describe at a minimum the condition and integrity of the Premises, the foundation and structural integrity of the Improvements, and all Material Systems serving the Improvements. If Port reasonably believes the Facilities Condition Report does not adequately describe the condition and integrity of the Premises, the foundation and structural integrity of the Improvements, and all Material Systems serving the Improvements, or the timing and budget for the required repairs proposed by Tenant, then Port will notify Tenant of such deficiency within forty-five days following receipt of the Facilities Condition Report and Tenant will revise the Facilities Condition Report, the budget and schedule, or both, if applicable, to address Port’s concerns within thirty days. If Tenant fails to provide a Facilities Condition Report, a revised Facilities Condition Report, or the budget and schedule (as revised if applicable), to Port within such period of time, Port after giving thirty (30) days’ notice to Tenant will have the right, but not the obligation, to cause the preparation of a Facilities Condition Report by a team of construction professionals of Port’s choice, at Tenant’s sole cost. Tenant will perform the repairs within the timeframe set forth in the Facilities Condition Report approved by Port, and if applicable, make the Capital Reserve Deposits agreed to between the Parties in accordance with *Section 10.6(c)*.

(b) In addition to the preparation and delivery of Facilities Condition Reports to Port in accordance with *Section 11.2(a)*, if any Facilities Condition Report is prepared by or on behalf of Tenant in connection with any Refinancing, Transfer, or for any other reason or purpose, Tenant will promptly provide Port with a copy of such Facilities Condition Report.

**11.3. No Obligation of Port; Waiver of Rights.** From and after the Commencement Date, Tenant will be solely responsible for the condition, operation, repair, maintenance and management of the Premises, including the Initial Improvements, Subsequent Construction, and any and all other Improvements. Port will not, as a result of this Lease, have any obligation to

make repairs or replacements of any kind or maintain the Premises or any portion of any of them. Tenant waives the benefit of any Law that would permit Tenant to make repairs or replacements at Port's expense, or abate or reduce any of Tenant's obligations under, or terminate, this Lease, on account of the need for any repairs or replacements. Without limiting the foregoing, Tenant hereby waives any right to make repairs at Port's expense as may be provided by Sections 1932(1), 1941 and 1942 of the California Civil Code, as any such provisions may from time to time be amended, replaced or restated.

**11.4. Port's Right to Repair.** In the event Tenant fails to maintain and repair the Premises, the foundation, the structural integrity of the Improvements, the roofs, and building systems (including plumbing, sewer, mechanical, electrical and other utility systems) (collectively, "Material Systems") in accordance with *Section 11.1* and such failure is likely to result in deterioration to or damage of a Material System, Port may repair the same at Tenant's cost and expense and Tenant will reimburse Port therefor as provided in this *Section 11.4*. Except in the event of an emergency, Port will first provide no less than fifteen (15) days prior notice to Tenant and the senior Mortgagee before commencing any maintenance to or repair of a Material System ("Port's Repair Notice"). If Tenant or the senior Mortgagee does not commence maintenance or repair of the affected Material System or provide assurances reasonably satisfactory to Port that Tenant or the senior Mortgagee will commence maintenance or repair of the same within such fifteen (15) day period, then Port may proceed to take the required action. If Port elects to proceed with such repair or maintenance, then promptly following completion of any work taken by Port pursuant to this *Section 11.4*, Port will deliver a detailed invoice of the work completed, the materials used and the costs relating thereto. Tenant also will pay to Port an administrative fee equal to ten percent (10%) of the total "hard" costs of the work. "Hard" costs include the cost of materials and installation, but exclude any costs associated with design, such as architectural fees. Tenant will pay to Port the amount set forth in the invoice within thirty (30) days after delivery of Port's invoice.

In the event Port notifies Tenant of a failure to maintain and repair the Premises ("Maintenance Notice"), Tenant will pay to Port, as Additional Rent, an amount equaling Two Hundred Dollars (\$200), which amount will be increased by One Hundred Dollars (\$100.00) on each Periodic 10-Year Adjustment Date, upon delivery of the Maintenance Notice. In the event Port determines during subsequent inspection(s) that Tenant has failed to so maintain the Premises in accordance with this *Article 11*, then Tenant will pay to Port, as Additional Rent, an amount equaling Three Hundred Dollars (\$300), which amount will be increased by One Hundred Dollars (\$100.00) on each Periodic 10-Year Adjustment Date, for each additional Maintenance Notice, if applicable, delivered by Port to Tenant following each inspection. The Parties agree that the charges associated with each inspection of the Premises and delivery of each Maintenance Notice represent a fair and reasonable estimate of the administrative cost and expense which Port will incur by reason of Port's inspection of the Premises and issuance of each Maintenance Notice. Tenant's failure to comply with the applicable Maintenance Notice and Port's right to impose the foregoing charges is in addition to and not in lieu of any and all other rights and remedies of Port under this Lease, at law or in equity. The amounts set forth in this *Section 11.4* are due within five (5) days following delivery of the applicable Maintenance Notice.

Initials: \_\_\_\_\_ Tenant

## 12. INITIAL IMPROVEMENTS.

**12.1. Tenant's Obligation to Construct the Initial Improvements.** Tenant will construct the Initial Improvements in accordance with, and subject to all the terms, covenants, conditions and restrictions in the LDDA. Port's issuance and recordation of a Certificate of Completion pursuant to the LDDA conclusively establishes Tenant's satisfactory completion of such construction, except for completion of any Deferred Items. Any Subsequent Construction will be performed in accordance with *Article 13*.



**12.2. Title to Improvements.** During the Term, Tenant will own all of the Improvements, including all Subsequent Construction and all appurtenant fixtures, machinery and equipment installed therein (except for trade fixtures, and other Personal Property of Subtenants). At the expiration or earlier termination of this Lease, title to the Improvements, including appurtenant fixtures (but excluding trade fixtures, Tenant's Personal Property and any Subtenant's Personal Property), will vest in Port without further action of any Party, and without compensation or payment to Tenant. Tenant and its Subtenants have the right at any time during the Term, to remove Personal Property from the Premises; provided, however, that if the removal of Personal Property causes damage to the Premises, Tenant will promptly cause the repair of such damage at no cost to Port.

### **13. SUBSEQUENT CONSTRUCTION.**

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

##### **(a) Construction Requiring Port's Approval in Port's Sole Discretion.**

Tenant has the right during the Term to perform Subsequent Construction in accordance with the provisions of this *Article 13*, provided that Tenant cannot do any of the following without Port's prior approval, which approval may be withheld by Port in its sole discretion:

- (i) Construct additional buildings or other additional structures;
- (ii) Rehabilitate or Restore any of the Improvements (except as otherwise required under *Section 16.3* or as otherwise allowed pursuant to *Section 13.2*);
- (iii) Increase or decrease the bulk or height of any Improvements beyond the bulk or height approved for the Initial Improvements;
- (iv) Materially alter the exterior architectural design of any Improvements (other than changes reasonably required to conform to changes in applicable Law);
- (v) Perform Subsequent Construction to the Public Access Areas that would adversely affect (other than temporarily during the period of such Subsequent Construction) the public access to, or the use or appearance of such Public Access Areas;
- (vi) Materially increase or decrease either the building area or the rentable area by more than ten percent (10%) of any of the buildings after issuance of the Final Certificate of Occupancy for the Hotel;
- (vii) Perform Subsequent Construction that affects the Material Systems or structural integrity of the Improvements (except as otherwise required under *Section 11.1* or as otherwise allowed pursuant to *Sections 13.2* or *16.3*); or
- (viii) Change the colors or materials of the exterior façades of the buildings and the Exterior Improvements approved by Port, unless materials originally installed are not reasonably available or do not meet current code requirements, and Tenant uses materials of equal quality, durability, design standards, and appearance to the materials originally installed, as determined by Port.

**(b) Construction Requiring Port's Reasonable Approval.** For any Subsequent Construction (other than a Minor Alteration) that is not described in *Section 13.1(a)*, Port's prior approval is required, which approval will not be unreasonably withheld.

**(c) Notice by Tenant and Schematic Drawings.** Before commencing any Subsequent Construction that requires Port's approval, Tenant will notify Port of such planned Subsequent Construction. Schematic Drawings must accompany such notice. Port may waive the submittal requirement of Schematic Drawings if it determines in its sole discretion that the scope of the Subsequent Construction does not warrant such initial review. With respect to any Subsequent Construction not requiring a building permit, Tenant has no obligation to prepare or

provide Port with any Construction Documents related to such work. Within twenty (20) days after receipt of such notice from Tenant, Port will approve or disapprove any such Subsequent Construction and inform Tenant whether in Port's sole discretion, design review of the proposed Subsequent Construction by WDAC or another Port advisory body is necessary. If Port determines that design review by WDAC or another Port advisory body is necessary, then the period to approve or disapprove the proposed Subsequent Construction will be extended by a reasonable time necessary to obtain WDAC's or another Port advisory body's review and recommendation of the proposed Subsequent Construction, and Port's approval of Subsequent Construction may be conditioned upon incorporation by Tenant of those changes recommended by WDAC or another Port advisory body and approved by Port. If Port fails to approve or disapprove the Schematic Drawings which have been revised or supplemented and resubmitted within the times specified within this **Section 13.1(c)**, Tenant will provide Port with notice requesting Port's approval or disapproval of the submitted Schematic Drawings within the following ten (10) days. Port's failure to approve or disapprove within such ten (10) day period following Tenant's notice will be deemed Port's disapproval of the submitted Schematic Drawings.

**(d) Regulatory Approvals.** Tenant acknowledges that Port's approval of Subsequent Construction (or the fact that Tenant is not required to obtain Port's approval) does not alter Tenant's obligation to obtain all required Regulatory Approvals from Regulatory Agencies, including, where applicable, from Port itself in its regulatory capacity, and to obtain any signed asbestos notification acknowledgement form from Tenant's employees, contractors or Subtenants.

**13.2. *Minor Alterations.*** Unless otherwise required under **Section 13.1(a)**, Port's approval will not be required for (a) the installation, repair, modification, alteration or replacement of furnishings, fixtures, equipment or decorative improvements within the interior of the Improvements which do not materially and adversely affect the structural integrity or the Material Systems of the Improvements, (b) recarpeting, repainting, altering the wall coverings or window treatments, or similar alterations within the interior of the Improvements which do not materially and adversely affect the structural integrity or the Material Systems of the Improvements, or (c) any other Subsequent Construction costing Two Hundred Fifty Thousand Dollars (\$250,000) or less, which amount will be increased by \$100,000 on each Periodic 10-Year Adjustment Date (collectively, "**Minor Alterations**").

**13.3. *Construction Documents in Connection with Subsequent Construction.***

**(a) Preparation of Construction Documents.** Following Port's approval of the Schematic Drawings (unless such requirement has been waived by Port), Tenant will prepare and submit for Port's approval, Preliminary Construction Documents that are consistent with the approved Schematic Drawings and Final Construction Documents that are consistent with the approved Preliminary Construction Documents (collectively, Preliminary Construction Documents and Final Construction Documents are referred to as "**Construction Documents**"). Construction Documents will be prepared by a qualified architect duly licensed in the State or Qualified Engineer, as applicable.

**(b) Progress Meetings; Coordination.** From time to time at the request of either Party during the preparation of Construction Documents, Port and Tenant will hold regular progress meetings to coordinate the preparation, review and approval of the Construction Documents. Port and Tenant will communicate and consult informally as frequently as is necessary to ensure that the formal submittal of any Construction Documents to Port can receive prompt and speedy consideration.

**13.4. *Port Approval of Construction Documents.*** Port will approve or disapprove Construction Documents submitted to it for approval within sixty (60) days after submission. Any disapproval will state in writing the reasons for disapproval. If Port notifies Tenant that the Construction Documents are incomplete, such notification will constitute a disapproval of such

Construction Documents. If Port disapproves the Construction Documents and Tenant revises or supplements, as the case may be, and resubmits such Construction Documents for Port's approval, Port will review the revised or supplemented Construction Documents to determine whether the revisions or supplements satisfy the objections or deficiencies cited in Port's previous notice of rejection, and Port will approve or disapprove the revisions or supplements to the Construction Documents within thirty (30) days after resubmission. If Port fails to approve or disapprove Construction Documents (including Construction Documents which have been revised or supplemented and resubmitted) within the times specified within this **Section 13.4**, Tenant will provide Port with notice requesting Port's approval or disapproval of the submitted Construction Documents within the following ten (10) days. Port's failure to approve or disapprove within such ten (10) day period following Tenant's notice will be deemed Port's disapproval of the submitted Construction Documents. If Tenant desires to make any change to the Final Construction Documents after Port's approval, then Tenant will submit the proposed change to Port for its reasonable approval. Port will notify Tenant of its approval or disapproval of the requested change within twenty-one (21) days after submission to Port. Any disapproval will state, in writing, the reasons therefor, and will be made within such twenty-one (21) day period. Notwithstanding any of the foregoing to the contrary, if Port determines that the proposed Subsequent Construction must be approved by the City's Environmental Review Officer, SHPO, or NPS, any approval provided by Port will be subject to obtaining approval from the City's Environmental Review Officer, SHPO, or NPS, as applicable, and the time periods set forth above for Port to reject, approve or conditionally approve the submissions will be extended as necessary to obtain said approval or disapproval.

### **13.5. Construction.**

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

(i) Port has approved the Final Construction Documents (other than for Minor Alterations);

(ii) Tenant has obtained and paid for all Regulatory Approvals necessary to commence such construction in accordance with **Article 9**; and

(iii) Tenant has submitted to Port in writing its good faith estimate of the anticipated total construction costs of the Subsequent Construction. If such good faith estimate exceeds Five Hundred Thousand Dollars (\$500,000), Tenant will submit evidence reasonably satisfactory to Port of Tenant's ability to pay such costs as and when due and also provide to Port, at Tenant's sole cost and expense (i) a payment and performance bond in form acceptable to Port from Tenant's contractor naming Port as co-obligee, in a principal amount equal to one hundred percent (100%) of the estimated costs of Subsequent Construction, or (ii) at Port's sole option, a guaranty provided by a guarantor of sufficient financial worth acceptable to Port in its sole discretion, to ensure Port against any liability for mechanics' and materialmen's liens, stop notices and to ensure completion of work, unless the Port, through its Executive Director, has waived or partially waived such requirement.

(b) **Construction Standards.** All Subsequent Construction will be performed by duly licensed and bonded contractors or mechanics and will be accomplished expeditiously, diligently to completion and in accordance with good construction and engineering practices and applicable Laws. Tenant will undertake commercially reasonable measures in accordance with good construction practices to minimize damage or disruption caused by such work (including to areas adjoining portions of the Premises and Improvements and the surrounding property), minimize risk of injury to members of the general public, and to make adequate provision for the safety of Persons affected by any Subsequent Construction. Dust, noise and other effects of such work will be controlled in accordance with any applicable dust control ordinance or plan or if there is not such ordinance or plan, dust, noise and other effects of such work will be controlled using commercially-accepted methods customarily used to control deleterious effects associated

with construction projects in populated or developed urban areas. Tenant will erect appropriate construction barricades to enclose the areas of such construction and maintain them until the Subsequent Construction has been substantially completed, to the extent reasonably necessary to minimize the risk of hazardous construction conditions. In addition, Tenant will comply with the Mitigation Monitoring and Reporting Program, if any.

(c) **Reports and Information.** During periods of construction, Tenant will submit to Port written progress reports when and as reasonably requested by Port.

(d) **Costs of Construction.** Port will have no responsibility for costs of any Subsequent Construction and Tenant will pay (or cause to be paid) all such costs.

(e) **Rights of Access.** During any period of Subsequent Construction, Port (in its proprietary capacity) and its Agents will have the right to enter areas in which Subsequent Construction is being performed, upon reasonable prior written notice during customary construction hours, subject to the rights of Subtenants, to inspect the progress of Subsequent Construction; provided, however, that Port and its Agents will use commercially reasonable efforts to conduct their activities in such a way as to minimize interference with Tenant and its operations to the extent feasible. Nothing in this Lease, however, will be interpreted to impose an obligation upon Port to conduct such inspections or impose any liability in connection therewith.

(f) **Prevailing Wages.** Tenant agrees that any person performing labor in the construction of Subsequent Construction will be paid not less than the highest prevailing rate of wages as required by Section 6.22(E) of the San Francisco Administrative Code (and any successor statute), will be subject to the same hours and working conditions, and will receive the same benefits as in each case are provided for similar work performed in San Francisco, California. Tenant will include, in any contract for construction of such Subsequent Construction, a requirement that all persons performing labor under such contract will be paid not less than the highest prevailing rate of wages for the labor so performed. Tenant will require any contractor to provide, and will deliver to City every month during any construction period, certified payroll reports with respect to all persons performing labor in the construction of any Improvements or any Subsequent Construction.

### **13.6. Record Drawings.**

(a) **Record Drawings.** With respect to any Subsequent Construction requiring a building permit, Tenant will furnish to Port one set of design/permit drawings in their finalized form and Record Drawings with respect to such Subsequent Construction within ninety (90) days following completion of the applicable Subsequent Construction. Record Drawings must in the form of full-size, hard paper copies and converted into electronic format as (1) full-size scanned TIF files, and (2) AutoCad files of the completed and updated Construction Documents, as further described below, and in such format as is reasonably required by Port's building department at the time of submittal. As used in this Section "**Record Drawings**" means drawings, plans and surveys showing the Subsequent Construction as built on the Premises and prepared during the course of construction (including all requests for information, responses, field orders, change orders and other corrections to the documents made during the course of construction). If Tenant fails to provide such Record Drawings to Port within the time period specified herein, and such failure continues for an additional ten (10) days following written request from Port, Port will thereafter have the right to cause an architect or surveyor selected by Port to prepare Record Drawings showing such Subsequent Construction, and the cost of preparing such Record Drawings must be reimbursed by Tenant to Port as Additional Rent. Nothing in this Section will limit Tenant's obligations, if any, to provide plans and specifications in connection with Subsequent Construction under applicable regulations adopted by Port in its regulatory capacity.

(b) **Record Drawing Requirements.** Record Drawings must be no less than (24" x 36"), with mark-ups neatly drafted to indicate modifications from the original design drawings, and scanned at 400 dpi. Each drawing will have a Port-assigned number placed onto the title block prior to scanning. An index of drawings must be prepared correlating drawing titles to the numbers. A minimum of ten (10) drawings will be scanned as a test, prior to execution of this requirement in full.

(c) **AutoCad Requirements.** The AutoCad files must be contained in Release 2006 or a later version, and drawings must be transcribed onto a compact disc(s) or DVD(s) as requested by Port. All X-REF, block and other referenced files must be coherently addressed within the environment of the disc(s). Discs containing files that do not open automatically without searching or reassigning X-REF addresses will be returned for reformatting. A minimum of ten (10) complete drawing files, including all referenced files, is required to be transmitted to Port as a test, prior to execution of this requirement in full.

(d) **Changes in Technology.** Port reserves the right to revise the format of the required submittals set forth in this **Section 13.6** as technology changes and new engineering/architectural software is developed.

#### 14. UTILITIES.

**14.1. Utility Services.** Tenant agrees and acknowledges that Port, in its proprietary capacity as owner of the Premises and landlord under this Lease, will not provide any utility services to the Premises or any portion of the Premises. Except as provided in **Section 14.2**, Tenant, at its sole expense, must (i) arrange for the provision and construction of all on-site and off-site utilities necessary to construct, operate and use the Improvements and any other portion of the Premises for their intended use, (ii) be responsible for contracting with, and obtaining, all necessary utility and other services, as may be necessary and appropriate to the uses to which all of the Improvements and the Premises are put (it being acknowledged that City (including its SFPUC) is the sole and exclusive provider to the Premises of certain public utility services), and (iii) maintain and repair all utilities serving the Premises to the point provided by the respective utility service provider (whether on or off the Premises). Tenant will purchase all electrical service (to the extent not provided by the PV System, if any) for the Improvements and the Premises from SFPUC unless SFPUC determines that such service is not feasible for the Premises. Tenant also must coordinate with the respective utility service provider with respect to the installation of utilities, including providing advance notice to appropriate parties of trenching requirements.

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

**14.2. Photovoltaic Panels.** Tenant may install or cause to be installed on the roof(s) of the Improvements, a photovoltaic energy generation facility for the generation and delivery of

electrical energy to the Premises (the “PV System”) upon the prior consent of Port, which consent will not be unreasonably withheld, conditioned or delayed. If excess energy is available from the PV System, then such excess energy may be used by Port without any additional charge, for other sites within Port’s jurisdiction. Prior to commencing installation of the PV System, Tenant must obtain all required permits and Regulatory Approvals for the PV System. The design, construction and installation of the PV System will be done in accordance with *Section 13*.

**14.3. SFPUC Power.** Other than electricity provided by the PV System, if any, Tenant must procure all electricity for the Premises from SFPUC at rates to be determined by SFPUC. If SFPUC determines that it cannot feasibly provide service to Tenant, Tenant may seek another provider.

**14.4. Waiver.** Tenant hereby waives any benefits of any applicable Law, including the provisions of California Civil Code Section 1932(1) permitting the termination of this Lease due to any interruption or failure of utility services. The foregoing will not constitute a waiver by Tenant of any claim it may now or in the future have (or claim to have) against any public utility provider relating to the provision of (or failure to provide) utilities to the Premises.

## **15. ROOFTOP EQUIPMENT.**

**15.1. Telecommunications Equipment and Satellite Dish.** No Satellite Dish may be installed on the Premises without the prior written approval of Port (including approval of WDAC or any other advisory body to Port, if Port determines in its sole discretion that such approval is necessary), which approval will not be unreasonably withheld, conditioned or delayed. Port’s approval rights also extend to the size, location, dimensions, color, text (if any), screening, reflectivity, and method of installation of each Satellite Dish. The Parties will cooperate in connection with the location of any Satellite Dish installed pursuant to this *Section 15.1* and the location of any Satellite Dish installed by Port or City pursuant to *Section 15.3* so as to minimize interference with the systems serviced by such Satellite Dish.

**15.2. Other Rooftop Equipment.** Except as set forth in *Section 15.1* and *Section 14.2* or as permitted for rooftop mechanical and/or elevator authorized to be located on the roof of the Hotel by the Project’s entitlements. Tenant may not install any equipment (including photo-voltaic panels) on the roof of the Improvements without first obtaining Port’s review and approval and all required Regulatory Approvals. Tenant will provide to Port the size, location, dimensions, design, color, text (if any), screening, materials, reflectivity, and method of installation of the rooftop equipment to enable Port to evaluate the proposed rooftop equipment.

**15.3. Port Satellite Dish.** Tenant agrees, at the request of Port, to permit Port or City to install, at Port’s or City’s sole cost, Satellite Dish(es) reasonably required for Port’s or City’s operations, including facilities for City’s emergency or 700-Mhz and 800-Mhz City-wide radio system communications facilities (or its successor), on the roof of the Hotel in a location reasonably acceptable to Tenant and provided that Port (i) complies with all applicable Laws and obtains all required Regulatory Approvals for the installation of such Satellite Dish(es), (ii) obtains Tenant’s prior approval with respect to the size, location, dimensions, color, text (if any), screening, reflectivity, and method of installation of such Satellite Dish(es). If the installation of any such Satellite Dish requires the relocation of any photo-voltaic panels or any other Satellite Dish previously installed on the roof of the Premises by Tenant in accordance with this Lease, such relocation shall be at Port’s sole cost and expense, and Port shall promptly repair, at its sole cost, any damage to the Premises or the photo-voltaic panel from such relocation or installation if Port performs such relocation. All aspects and phases of Port’s installation, other equipment, wiring, conduit, roof mount and base, shall at all times be subject to supervision and approval by Tenant, not to be unreasonably withheld, conditioned or delayed. Port will be responsible for procuring, prior to any installation, and maintaining in force at all times thereafter, any and all Regulatory Approvals as may be required for the lawful installation, use and operation of Port’s or City’s system. Subject to *Section 1.8*, Port shall be permitted access to the areas on the roof of the Hotel where any such installation is made, as necessary for

the installation, repair, maintenance, and replacement thereof. Any access, interruptions or disturbance for the foregoing purposes shall be temporary only. Port's access to the roof shall not unreasonably interfere with or disturb Tenant's or Subtenants' use and enjoyment of the Premises, shall be subject to the reasonable building security procedures adopted by Tenant, and shall require prior written consent for access occurring during regular business hours (except in cases of emergency). Port's access may be subject to temporary interruption in cases of emergency. Port shall promptly repair and restore any damage to persons or property caused directly as a result of Port's access to and activities on the roof. Any Port or City Satellite Dish installed pursuant to this Section will remain Port or City's, as applicable personal property.

## **16. DAMAGE OR DESTRUCTION..**

### **16.1. General; Notice; Waiver.**

(a) **General.** If at any time during the Term any damage or destruction occurs to all or any portion of the Premises from fire or other casualty event (each a "Casualty"), the rights and obligations of the Parties are as set forth in this *Article 16*.

(b) **Notice.** If there is any Casualty (i) which would materially impair use or operation of any material portion of the Improvements for their intended purpose for a period of thirty (30) days or longer, or (ii) the repair of which would exceed in an individual instance the amount of One Hundred Thousand Dollars (\$100,000), or aggregate amount of Two Hundred Fifty Thousand Dollars (\$250,000) (which amounts includes both hard and soft costs of a Restoration and which amounts will each be increased by One Hundred Thousand Dollars (\$100,000.00) on each Periodic 10-Year Adjustment Date), Tenant will promptly, but not more than ten (10) days after the occurrence of any such Casualty, give written notice thereof to Port describing with as much specificity as is reasonable, the nature and extent of the damage from such Casualty ("Casualty Notice").

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

**16.2. No Release of Tenant's Obligations.** Except as set forth in *Section 16.4*, no damage to or destruction of the Premises or any part thereof from any Casualty event will permit Tenant to surrender this Lease or relieve Tenant from any obligations, including the obligation to pay Rent. In the event of any damage or destruction to the Improvements that does not result in a termination of this Lease, and at all times before completion of Restoration, Tenant will pay to Port all Rent at the times and in the manner described in this Lease. If this Lease does not terminate pursuant to this *Article 16*, proceeds of rental interruption or business interruption insurance will be applied first to unpaid Rent due or coming due before completion of the Restoration and then to costs of Restoring the Premises with any remaining balance to be retained by Tenant. If this Lease terminates pursuant to this *Article 16*, proceeds of rental interruption or business interruption insurance will be applied first to unpaid Rent coming due before termination of this Lease and then such proceeds will be distributed pursuant to *Section 16.4(b)*.

**16.3. Tenant's Obligation to Restore.** Except in the event of an Uninsured Casualty or a Major Casualty for which Tenant elects to terminate this Lease under *Section 16.4*, if all or any portion of the Improvements are damaged or destroyed by Casualty, Tenant will promptly (allowing for securing necessary Regulatory Approvals), commence and diligently Restore the Improvements to the condition they were in immediately before such Casualty in accordance with then applicable Laws (including any required code upgrades), without regard to the amount or availability of insurance proceeds, subject to Force Majeure. All Restoration must be at Tenant's sole expense and performed in accordance with the procedures set forth in *Article 13* relating to Subsequent Construction if the Casualty occurs after the recordation of the Certificate

of Completion or the LDDA if the LDDA is still in effect. In connection with any Restoration, the Improvements may be redesigned, made larger or smaller, reconfigured, or otherwise modified, provided that the Improvements as so redesigned are at least equivalent in quality, appearance, public safety, and durability to and in all respects consistent with the Improvements, and is a first-class project affording similar public benefit as the original Initial Improvements, subject to the Permitted Uses. If insurance proceeds are available for such Restoration and Tenant is obligated to Restore or elects to Restore, then subject to the rights of Mortgagee, Tenant will have the right to negotiate an insurance settlement for claims in connection with such Restoration, provided however, that Tenant will use commercially reasonable efforts to ensure that such settlement does not materially interfere with or delay Tenant's obligation and ability to pay Rent to Port or otherwise meet its obligations hereunder; and further provided the settlement of any insurance claims in excess of Two Million Dollars (\$2,000,000), which amount will be increased by Two Hundred Fifty Thousand Dollars (\$250,000) on each Periodic 10-Year Adjustment Date, is subject to the reasonable approval of Port.

**16.4. Termination due to Major Casualty or Uninsured Casualty.**

(a) **Tenant's Election to Terminate.** If an event of Major Casualty occurs during the last ten (10) years of the Term or if, in connection with an event of Major Casualty occurring at any time during the Term, a change in Laws has occurred which prohibits the Premises from being rebuilt as a Hotel, or if an event of Uninsured Casualty occurs at any time during the Term (other than as set forth in *Section 16.4(c)*), then within sixty (60) days following Tenant's delivery to Port of the Casualty Notice, Tenant must notify Port of Tenant's election to: (1) commence and complete Restoration of the Improvements, or (2) terminate this Lease (subject to *Section 16.4(b)*). If Tenant elects to terminate this Lease in accordance with this *Section 16*, then the date this Lease terminates will be the date Tenant completes the demolition of the Improvements (including the period it takes to obtain any Regulatory Approval evidencing such completion) or if Port elects in its sole election not to have Tenant demolish the Improvements, the date Tenant satisfies all provisions (other than demolition of the Improvements) under this *Section 16*. All Restoration must be in accordance with the procedures set forth in *Article 13* relating to Subsequent Construction and must be at Tenant's sole expense, except as set forth in *Section 16.4(c)*.

"Major Casualty" means damage to or destruction of all or any portion of the Premises to the extent that the hard costs of Restoration will exceed sixty percent (60%) of the hard costs to replace the Premises in their entirety. The calculation of such percentage will be based upon replacement costs and requirements of applicable Laws in effect as of the date of the event causing such Major Casualty.

"Uninsured Casualty" means any of the following: (i) a Casualty event occurring at any time during the Term for which the costs of Restoration (including the cost of any required code upgrades) are not insured or insurable under the policies of insurance that Tenant is required to carry under *Article 23* and such costs exceed one hundred fifty percent (150%) of the then applicable annual Minimum Rent due, or (ii) a Casualty event occurring at any time during the Term which is covered under Tenant's policies of insurance that Tenant is required to carry under *Article 23* but where the cost of Restoration (including the cost of any required code upgrades) will exceed the sum of (A) the net proceeds of any insurance payable and actually received by Tenant, (B) the amount of any applicable policy deductibles, and (c) one hundred fifty percent (150%) of the then applicable annual Minimum Rent due. Any Casualty event not insured due to Tenant's failure to maintain the requisite insurance policies under *Article 23* will not be considered an Uninsured Casualty. Notwithstanding anything contained herein to the contrary, in the event any Permitted Mortgagee, in accordance with the loan documents applicable to the Permitted Mortgage, does not remit all or any portion of any insurance proceeds to Tenant under its insurance policies or otherwise prohibits Tenant from applying all or any portion of such insurance proceeds to the costs of Restoration, then the amount of such insurance



proceeds retained or restricted by such Permitted Mortgagee shall expressly not constitute “net proceeds” under subsection (ii) (A) above.

**(b) Conditions to Termination.** As a condition precedent to Tenant’s right to terminate this Lease in accordance with *Section 16.4(a)*, there will be no uncured Tenant Event of Default and Tenant will do all of the following:

**(i)** Tenant will provide Port the estimated cost of Restoration, and, with respect to the Uninsured Casualty only, the amount by which the estimated cost of Restoration plus the amount of any applicable policy deductible (subject to the limitations on the policy deductible for damage or destruction caused by earthquake or flood as set forth in *Section 23.1(a)(ii)*) exceeds insurance proceeds payable (or those proceeds which would have been payable but for Tenant’s default in its obligation to maintain insurance required to be maintained hereunder); and

**(ii)** Pay or cause to be paid the following amounts from insurance proceeds arising from each Casualty promptly following receipt of such proceeds, in the following order of priority:

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

**(2)** Second, to Port, for all accrued and unpaid amounts owed to Port, if any, by Tenant;

**(3)** Third, to each non-affiliated Mortgagee, in order of priority, a portion of the remaining insurance proceeds arising out of or in connection with the Casualty in an amount not to exceed the aggregate amounts that are secured by the applicable Permitted Mortgage then owed to each such non-affiliated Mortgagee;

**(4)** Fourth,  
**(A)** If Port elects not to have the Improvements demolished, then the balance of the insurance proceeds will be divided proportionately between Port, for the value of Port’s reversionary interest in the Premises and Improvements (in their condition immediately prior to the Casualty event) as of the date the Term would have expired but for the Casualty event, and Tenant, for the value of the Improvements for the remaining unexpired portion of the Term (in their condition immediately prior to the event of damage or destruction) less any proceeds distributed in repayment of any Mortgages as provided in *Section 16.4(b)(ii)(3)*; and

**(B)** If Port elects, in its sole discretion, that the Improvements should be demolished, then the remaining insurance proceeds will be disbursed as follows:

**(i)** First, to Port, an amount equal to the Rent that would have been payable immediately prior to the Casualty event (A) for the period from and after the Casualty event until demolition of the Improvements is complete (including the period it takes to obtain any required Regulatory Approval for such completion), or (B) if Port elects in its sole election not to have Tenant demolish the Improvements, for the period of time it would reasonably take from and after the Casualty event to obtain all Regulatory Approvals for demolition of the Improvements and complete such demolition (including the period it takes to obtain any required Regulatory Approval for such completion);

**(ii)** Second, to Port, an amount necessary to obtain all Regulatory Approvals and complete the demolition of the Improvements (including obtaining

any required Regulatory Approval evidencing such completion), which amount will be disbursed to Tenant if Tenant performs the demolition or retained by Port if Port elects for another party to perform the demolition;

(iii) Third, if any insurance proceeds remain, to Tenant, an amount equal to the outstanding and unpaid amount of Actual Equity Capital Invested as of the date of Casualty (in other words, insurance proceeds will not pay or be used for any unpaid or accrued return on Actual Equity Capital Invested);

(iv) Fourth, if any insurance proceeds remain, to Port, an amount equal to one hundred fifty percent (150%) of the Rent that would have been payable to Port immediately prior to the Casualty event for the twelve (12) month period following the Casualty event; and

(v) Fifth, if any insurance proceeds remain, the balance of the insurance proceeds will be split as follows: seventy-five percent (75%) to Tenant and twenty-five percent (25%) to Port.

(5)

(iii) Pay to Port (1) any Rent due and payable as of the date Tenant completes the demolition of the Improvements (including obtaining any Regulatory Approval evidencing such completion) or (2) if Port elects in its sole election not to have Tenant demolish the Improvements, any Rent due and payable for the period of time it would reasonably take from and after the Casualty event to obtain all Regulatory Approvals for demolition of the Improvements and complete such demolition (including the period it takes to obtain any required Regulatory Approval for such completion) (in either event, to the extent any Rent due and payable remains unpaid after application of insurance proceeds pursuant to **Section 16.4(b)(ii)(4)**); and

(iv) Upon termination in accordance with this **Article 16**, Tenant will deliver possession of the Premises to Port and quitclaim to Port all right, title and interest in the Premises and in any remaining Improvements.

(c) **Port's Election upon Notice of Termination.** Notwithstanding **Section 16.4(a)**, if Tenant elects to terminate this Lease solely due to an Uninsured Casualty, then within sixty (60) days after Port's receipt of the Casualty Notice, Port may elect by giving written notice to Tenant, to continue this Lease and pay the amount to Tenant by which the cost of Restoration will exceed the net proceeds of any insurance proceeds (or which would have been payable but for Tenant's failure to maintain such insurance) by more than one hundred fifty percent (150%) of the then applicable Minimum Rent. If Port elects to continue this Lease as set forth in this **Section 16.4(c)**, then notwithstanding Tenant's election to terminate this Lease, this Lease will not terminate and Tenant will be obligated to Restore the Premises in accordance with **Section 16.3**.

**16.5. Date and Effect of Termination.** If Tenant elects to terminate this Lease under **Section 16.4(a)** and Port elects not to continue this Lease under **Section 16.4(c)**, then on the date that Tenant fully complies with all provisions of **Section 16.4(b)** to the satisfaction of Port, this Lease will terminate. Upon such termination, the Parties will be released thereby without further obligations to the other Party as of the effective date of such termination; provided, however, that the Indemnification provisions and any other provisions that state they will survive expiration or earlier termination of this Lease will survive any such termination. The rights of any Mortgagee to a New Lease and any rights of Tenant or Port to receive insurance proceeds in accordance with the provisions of this Lease will survive the termination of this Lease.

**16.6. Distribution upon Tenant Event of Default.** Subject to **Article 39**, if a Tenant Event of Default (or Unmatured Event of Default) occurs that has not been waived in writing by

Port, Port will receive all insurance proceeds to the extent required to satisfy Tenant's obligations under this Lease.

**16.7. Use of Insurance Proceeds.**

(a) **Restoration.** Except in the event of termination of this Lease in accordance with *Section 16.4*, all insurance proceeds paid to Tenant by reason of Casualty (other than business or rental interruption insurance), must be first used by Tenant for Restoration of the Premises.

(b) **Payment to Trustee.** Except as otherwise expressly provided to the contrary in this *Article 16*, if Tenant Restores the Premises and there is a Permitted Mortgage encumbering this Lease, then any insurer paying insurance proceeds in excess of One Million Dollars (\$1,000,000), which amount will be increased by Two Hundred Fifty Thousand Dollars (\$250,000) on each Periodic 10-Year Adjustment Date, will pay such proceeds to Mortgagee that is the holder of the most senior lien against the Improvements or an insurance trustee reasonably acceptable to Port designated by such Mortgagee, in accordance with the Permitted Mortgage. If there is no Permitted Mortgage encumbering this Lease, then the insurance proceeds will be paid to a trustee (which will be a savings bank, a savings and loan association, a commercial bank or trust company or branch thereof, or an insurance company, designated by Port within twenty (20) days after written request by Tenant, having an office in San Francisco). Unless agreed otherwise by the Parties, and subject to the requirements of such Mortgagee, the insurer will pay Real Property Insurance proceeds of One Million Dollars (\$1,000,000), which amount will be increased by \$Two Hundred Fifty Thousand Dollars (\$250,000) on each Periodic 10-Year Adjustment Date] or less directly to Tenant for purposes of Restoration in accordance with this Lease. If there is no Permitted Mortgage encumbering the Lease and a trustee is holding the proceeds, Port will instruct the trustee to pay Tenant the cost of any emergency repairs necessitated by the Casualty event in advance of the actual Restoration within thirty (30) days after such request. If the funds are paid to a trustee in accordance herewith, the trustee will hold all Real Property Insurance proceeds in an interest-bearing federally insured account (with interest added to the proceeds). Such trustee or Mortgagee will pay to Tenant, from time to time as the work of Restoration progresses, in amounts designated by certification by architects licensed to do business in the State, showing the application or intended application of such amounts as payment for such Restoration. Payment to Tenant will not be construed as relieving Tenant from the necessity of promptly Restoring the Premises in accordance with the terms of this Lease. Tenant will pay all reasonable fees of the trustee, bank or trust company for its services. Provided that all Rent due and payable to Port has been paid and no uncured Tenant Event of Default (or Unmatured Tenant Event of Default) exists upon completion of the Restoration in accordance with the provisions of this *Article 16*, any excess Real Property Insurance proceeds remaining with the trustee or Mortgagee after completion of the Restoration of the Premises will be paid to Tenant.

**17. CONDEMNATION.**

**17.1. General; Notice; Waiver.**

(a) **General.** If, at any time during the Term, there is any Condemnation of all or any part of the Premises, the rights and obligations of the Parties will be determined pursuant to this *Article 17*.

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

(c) **Waiver.** Except as otherwise provided in this *Article 17*, the Parties intend that the provisions of this Lease will govern their respective rights and obligations in the event of a Condemnation. Accordingly, but without limiting any right to terminate this Lease in accordance with this *Article 17*, Tenant waives any right to terminate this Lease upon the occurrence of a Partial Condemnation under Sections 1265.120 and 1265.130 of the California Code of Civil Procedure, as such sections may from time to time be amended, replaced or restated.

**17.2. Total Condemnation.** If there is a Condemnation of the entire Premises or Tenant's leasehold interest therein (a "Total Condemnation"), this Lease will terminate as of the Condemnation Date. Upon such termination, except for any obligations that survive the expiration or earlier termination of this Lease, the Parties will be released without further obligations to the other Party as of the Condemnation Date, subject to the payment to Port of accrued and unpaid Rent, up to the Condemnation Date.

**17.3. Substantial Condemnation; Partial Condemnation; Rent Abatement.** If there is a Condemnation of any portion but less than all of the Premises, the rights and obligations of the Parties will be as follows:

(a) **Substantial Condemnation.**

(i) Subject to *Section 17.3(a)(ii)*, if there is a Substantial Condemnation this Lease will terminate at Tenant's option (which must be exercised, if at all, at any time within ninety (90) days after the Condemnation Date by delivering written notice of termination to Port) in accordance with this *Section 17.3(a)*. "Substantial Condemnation" means a Condemnation of (i) less than the entire Premises which renders the Premises untenable, unsuitable or economically unfeasible for the Permitted Uses as reasonably determined by Tenant, or (ii) property located outside the Premises that substantially and materially eliminates access to the Premises where no alternative access can be constructed or made available.

(ii) Tenant has no right to terminate this Lease under this *Section 17.3(a)* if (1) the Condemnation is for less than one year

(1) unless such Condemnation occurs during the last five (5) years of the Term), or

(2) Tenant reasonably anticipates, based upon a schedule of performance for such Restoration prepared by Tenant in consultation with Port and a licensed general construction contractor experienced in construction projects in San Francisco, that at the time of completion of the Restoration, less than five (5) years would remain in the Term) and the cost of such Restoration (less the portion of the Award fairly allocable to severance damages suffered by Tenant) is greater than one hundred fifty percent (150%) of the then applicable Minimum Rent, , unless Port (in its sole and absolute discretion and without any obligation to do so) gives written notice to Tenant within thirty (30) days (subject to extension as provided below) after receipt of Tenant's termination notice that Port agrees, at its cost and expense, to pay such amount.

In either such case, this Lease will not terminate, and, upon a determination that this Lease will continue based on amount of the Award, Tenant will perform such Restoration, subject to the provisions of *Article 13*. Port's right to exercise the option described in clause (2) above is conditioned upon Port and Tenant reaching an agreement, with respect to the schedule for performance of required work, on the timing of payments of Port's contribution to the costs of such work (to the extent not available from Port's share of the Award), and any other related issues which may be necessary or appropriate for resolution in connection with such work and the payment for such work. If no satisfactory agreement is reached within such period, Port has no right to exercise such right, and such Condemnation will be deemed a Substantial Condemnation for which Tenant may terminate this Lease. Notwithstanding anything contained herein to the contrary, in the event any Permitted Mortgagee, in accordance with the loan

documents applicable to the Permitted Mortgage, does not remit all or any portion of any Award to Tenant or otherwise prohibits Tenant from applying all or any portion of such Award to the costs of Restoration, then the amount of such Award retained or restricted by such Permitted Mortgagee shall expressly be excluded from the amount of “severance damages” received by Tenant.

(b) **Partial Condemnation.** If there is a Condemnation of any portion of the Premises which does not result in a termination of this Lease under *Sections 17.2* or *17.3(a)* (a “**Partial Condemnation**”), this Lease will terminate only as to the portion of the Premises taken in such Partial Condemnation effective as of the Condemnation Date and this Lease will remain in full force and effect as to the portion of the Premises remaining immediately after such Condemnation. Tenant will promptly commence and complete any necessary Restoration of the remaining portion of the Premises, at no cost to Port. Any such Restoration will be performed in accordance with the provisions of *Article 13*.

(c) **Rent Abatement.** In the case of a Partial Condemnation, or in the case of a Substantial Condemnation which does not result in a termination of this Lease, the Minimum Rent payable from the Condemnation Date will be equitably reduced to reflect the diminution in value of the remaining portion of the Premises as of the Condemnation Date. Such Minimum Rent adjustment will be separately computed with respect to (i) the temporary period during which any necessary Restoration will be performed; and (ii) the period following completion of any necessary Restoration. The Parties will first negotiate in good faith in an attempt to determine by agreement the appropriate adjustment. If the Parties do not reach agreement within thirty (30) days following the Condemnation Date, the adjustment(s) will be determined by the same court of law that establishes the Award.

**17.4. Awards.** Except as provided in *Sections 17.5* and *17.6*, Awards and other payments to either Port or Tenant on account of a Condemnation, less costs, fees and expenses of either Port or Tenant (including reasonable Attorneys’ Fees and Costs) incurred in the collection thereof (“**Net Awards and Payments**”) will be allocated between Port and Tenant as follows:

(a) In the event of a Partial Condemnation, first, to pay costs of Restoration, in which case, the portion of the Net Awards and Payments allocable to Restoration will be payable to Tenant, Mortgagees, or trustee in accordance with the requirements governing payment of insurance proceeds set forth in *Section 16.7(b)*;

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

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

(d) Fourth, to each Mortgagee, if any, in order of priority, for payment of all outstanding amounts of the loan secured by such Permitted Mortgage, together with its reasonable out of pocket expenses and charges in collecting the Net Awards and Payments, including without limitation, its reasonable Attorneys’ Fees and Costs incurred in the Condemnation;

(e) Fifth, to Tenant in an amount equal to the value of Tenant’s leasehold interest in this Lease, not including the value of the Improvements on the Premises, for the remaining unexpired portion of the Term to the original scheduled Expiration Date; and

(f) Sixth, the balance of the Net Awards and Payment will be divided proportionately between Port, for the value of Port’s reversionary interest in the Improvements (based on the date the Term would have expired but for the event of Condemnation), and Tenant,

for the value of the Improvements for the remaining unexpired portion of the Term to the original scheduled Expiration Date.

(g) Notwithstanding anything to the contrary set forth in this **Section 17.4**, any portion of the Net Awards and Payments which has been specifically designated by the condemning authority or in the judgment of any court to be payable to Port or Tenant on account of any interest in the Premises or the Improvements separate and apart from the Condemned Land Value, the value of Port's reversionary interest in the Improvements, Tenant's leasehold interest in this Lease, or the value of the Improvements on the Premises for the remaining unexpired portion of the Term, will be paid to Port or Tenant, as applicable, as so designated by the condemning authority or judgment.

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

**17.6. Personal Property.** Notwithstanding **Section 17.4**, Port will not be entitled to any portion of any Net Awards and Payments payable in connection with the Condemnation of the Personal Property of Tenant or any of its Subtenants.

## **18. LIENS.**

**18.1. Liens.** Tenant will not create or permit the attachment of, and will promptly discharge at no cost to Port, any lien, security interest, or encumbrance on the Premises or Tenant's Leasehold Estate, other than (i) this Lease, permitted Subleases, and Permitted Title Exceptions, (ii) liens for non-delinquent Impositions (excluding Impositions which may be separately assessed against the interests of Subtenants or are being contested in accordance with **Article 8**), and (iii) Permitted Mortgages.

**18.2. Mechanics' Liens.** Tenant will keep the Premises and Tenant's leasehold interest free from any liens arising out of any work performed, materials or services furnished, or obligations incurred by Tenant or any of its Agents. Tenant will provide thirty (30) days' advance written notice to Port of any Subsequent Construction to allow Port to post a notice of non-responsibility on the Premises. If Tenant does not, within sixty (60) days following the imposition of any such lien, cause the same to be released of record or post a bond or take such other action reasonably acceptable to Port, it will constitute a Tenant Event of Default, and Port will have, in addition to all other remedies provided by this Lease or by Law, the right but not the obligation to cause the same to be released by such means as it deems proper, including payment of the claim giving rise to such lien. All sums paid by Port (including interest at the Default Rate computed from the date of payment) for such purpose and all expenses incurred by Port in connection therewith must be reimbursed to Port by Tenant within ten (10) days following demand by Port. Port will include with its demand, supporting documentation.

## **19. SECURITY DEPOSIT.**

**19.1. Security Deposit.** On or before the Commencement Date, Tenant will pay to Port, in addition to Minimum Rent, the Environmental Financial Performance Deposit, if any, and the Environmental Oversight Deposit, if any, a security deposit (as adjusted from time to time, the "**Minimum Rent Deposit**") for the Premises in an amount equal to two (2) monthly installments of Minimum Rent calculated under **Section 3.2** as of the Commencement Date (collectively, "**Security Deposit**"). Additionally, Tenant will deliver to Port, the difference between the Minimum Rent Deposit currently held by Port and an amount equal to two (2) monthly installments of the then Minimum Rent, as adjusted in accordance with **Sections 3.2(b)** and **3.3** on or prior to (i) the Operation Period Rent Commencement Date, (ii) the second (2nd) anniversary of the Operation Period Rent Commencement Date and each Adjustment Date thereafter, and (iii) the Extended Term Commencement Date and each Adjustment Date thereafter.

**19.2. Environmental Financial Performance Deposit.** On or prior to the [Commencement Date/Hotel Opening Date], Tenant will deliver to Port [XXX] (“**Environmental Financial Performance Deposit**”) for increased potential environmental liability to Port arising out of Tenant’s use of the Premises and as additional collateral for the full and faithful performance by Tenant of its obligations under *Article 22* of this Lease. Port’s determination of the amount of the Environmental Financial Performance Deposit will be consistent with the Port Commission’s adoption of the Environmental Risk Policy and Financial Assurance Requirements for Real Property Agreements on November 13, 2007, pursuant to Resolution No. 07-81, as may be amended from time to time. The Environmental Financial Performance Deposit will not be deemed an advance of Rent, an advance of any other payment due to Port under this Lease, or a measure of Port’s damages upon a Tenant Event of Default concerning Tenant’s obligations under *Article 22*. In the event Port determines in its sole and absolute discretion that any proposed change(s) to Tenant’s (or its Subtenants’) operations on the Premises or increase Port’s risk of Loss, then prior to consenting to any change to Tenant’s operations, Port may require Tenant to increase the Environmental Financial Performance Deposit accordingly. Port also has the right to increase every five years the amount of the Environmental Financial Performance Deposit if Port reasonably believes after review of Tenant’s operations that the then current amount is insufficient. **[Note: Port will make determination on whether Sections 19.2 and 19.3 is applicable before lease execution.]**

**19.3. Environmental Oversight Deposit.**

(a) On or before the Commencement Date, Tenant will deliver to Port an environmental oversight deposit (“**Environmental Oversight Deposit**”) in cash, in an amount equaling Ten Thousand Dollars (\$10,000), as security for Port’s recovery of costs of inspection, monitoring, enforcement, and administration during Tenant’s operations under this Lease of Tenant’s performance of its obligations under *Article 22*; provided, however, the Environmental Oversight Deposit will not be deemed an advance of Rent, an advance of any other payment due to Port under this Lease, a security deposit subject to the California Civil Code, or a measure of Port’s damages upon a Tenant Event of Default concerning Tenant’s obligations under *Article 22*.

(b) Port at its option may demand reimbursement from Tenant within five (5) days following demand, or use, apply, or retain the Environmental Oversight Deposit in whole or in part to reimburse Port, for Port’s costs incurred if an Environmental Regulatory Agency delivers a notice of violation or order regarding a Hazardous Material Condition (“**Environmental Notice**”) to Tenant and either: (i) the actions required to cure or comply with the Environmental Notice cannot be completed within fourteen (14) days after its delivery; or (ii) Tenant has not begun to cure or comply with the Environmental Notice or is not working actively to cure or comply with the Environmental Notice within fourteen (14) days after its delivery. Under these circumstances, Port’s costs may include staff time corresponding with and responding to Regulatory Agencies, Attorneys’ Fees and Costs, and inspection, collection, and laboratory analysis of environmental samples and monitoring the Hazardous Material Condition.

(c) If an Environmental Notice is delivered to Tenant, and Tenant has cured or complied with the Environmental Notice within fourteen (14) days after its delivery, Port at its option may demand payment from Tenant within five (5) days following demand, or apply the sum of Five Hundred Dollars (\$500) (which amount will be increased by one hundred dollars (\$100) on each Periodic 10-Year Adjustment Date) from the Environmental Oversight Deposit, as Additional Rent for each Environmental Notice delivered to Tenant to reimburse Port for its administrative costs.

(d) Tenant must pay to Port immediately upon demand a sum equal to any portion of the Environmental Oversight Deposit Port properly expends or applies in compliance with this *Section 19.3*. Provided that no Environmental Notices are then outstanding and Port has been reimbursed for its costs related to such Environmental Notices, Port will return the

balance of the Environmental Oversight Deposit, if any, to Tenant within thirty (30) days after expiration or earlier termination of this Lease. Port's obligations with respect to the Environmental Oversight Deposit are those of a debtor and not a trustee, and Port may commingle the Environmental Oversight Deposit or use it in connection with its business.

**19.4. General.** The Security Deposit must be made in all cash. Tenant agrees that Port may, but will not be required to, apply the Security Deposit in whole or in part to (a) remedy any failure by Tenant to pay Rent as and when due, (b) cure, or attempt to cure, any default by Tenant in the performance of the terms, covenants and conditions of this Lease, (c) repair, or attempt to repair, any damage to the Premises caused by Tenant, its Subtenants, Agents or Invitees, or (d) compensate Port for any expense incurred or damage caused by Tenant, its Subtenants, Agents, or Invitees. Should Port use any portion of the Security Deposit, Tenant must replenish the Security Deposit to the full extent of the required amount within five (5) days following Port's demand. Port will not be required to keep the Security Deposit separate from its general funds. Tenant will not be entitled to any interest on the Security Deposit. The amount of the Security Deposit will not be deemed to limit Tenant's liability for the performance of any of its obligations under this Lease. Port may apply the Security Deposit as provided herein without waiving any of Port's other rights and remedies hereunder or at Law or in equity. Upon the expiration or earlier termination of this Lease, Port will return the unused balance of the Security Deposit to Tenant (less any amounts then due and payable from Tenant to Port under this Lease) within thirty (30) days after Tenant surrenders possession of the Premises to Port.

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

## **20. ASSIGNMENT AND SUBLETTING.**

### **20.1. Assignment.**

(a) **Consent of Port.** Except as permitted in *Sections 20.1(b)* and *20.1(h)*, Tenant, its successors and permitted assigns will not (i) suffer or permit any Significant Change to occur, or (ii) assign, encumber, hypothecate, pledge, or sell any interest in this Lease either voluntarily or by operation of law (for both (i) and (ii) above, a "Transfer"), without the prior written consent of Port, which consent may be withheld by Port in its sole discretion prior to issuance of the Certificate of Completion. After issuance of the Certificate of Completion, Port will not unreasonably withhold, condition or delay its consent.

(b) **Mortgaging of Leasehold.** Notwithstanding anything herein to the contrary, Tenant has the right, without Port's consent, to assign, encumber, hypothecate, pledge, or sell its interest in this Lease to Mortgagees or other purchasers at a foreclosure sale, transfer its interest pursuant to a deed in lieu of foreclosure or any other transfer made pursuant to a default under the provisions of a Permitted Mortgage in accordance with *Article 39* and any such assignment, encumbrance, hypothecation, pledge or sale will not be deemed a Transfer so long as such assignment, encumbrance, hypothecation, pledge or sale is effected in accordance with and otherwise complies with the terms and conditions set forth in *Article 39*.

(c) **Conditions.** Any Transfer is further subject to the satisfaction of all of the following conditions precedent, each of which is hereby agreed to be reasonable as of the date hereof:

(i) Any proposed transferee, for itself and its successors and assigns, must expressly assume all of the obligations of (A) Tenant under this Lease, (B) Tenant under the LDDA (if in effect), and (C) Tenant under any other agreements or documents entered into



by and between Port and Tenant relating to the overall Project contemplated under those agreements to the extent of the transferred interest;

(ii) All instruments and other legal documents involved in effectuating the Transfer has been submitted to Port for review and Port has approved such documents;

(iii) There is no Tenant Event of Default or an Unmatured Tenant Event of Default on the part of Tenant, where Tenant or the proposed transferee has not made provisions to cure the default prior the effective date of the Transfer, which provisions are reasonably satisfactory to Port;

(iv) If the LDDA is in effect, there is no Developer Event of Default or an Unmatured Developer Event of Default (as such terms are defined in the LDDA) on the part of Developer under the LDDA, where Tenant or the proposed transferee has not made provisions to cure the default, which provisions are reasonably satisfactory to Port;

(v) The proposed transferee (A) has demonstrated to Port's satisfaction, in Port's sole discretion if the effective date of the Transfer is prior to issuance of a Certificate of Completion, that the proposed transferee is capable, financially and otherwise, of performing each of Tenant's obligations under this Lease and Developer's obligations under the LDDA, (B) has demonstrated to Port's reasonable satisfaction, that it is capable, financially and otherwise, of performing each of Tenant's obligations under this Lease and Tenant's obligations under any other documents to be assigned, and (C) is subject to the jurisdiction of the courts of the State;

(vi) Tenant deposits sufficient funds to reimburse Port for its Attorneys' Fees and Costs to review the proposed Transfer, which amount is disbursed to Port through the escrow closing for the Transfer; and

(vii) Port Share of Transfer Proceeds is disbursed to Port through the escrow closing for the Transfer.

(d) **Assignment and Assumption Agreement.** Any Transfer or Significant Change Approved or otherwise permitted under *Section 20.1(a)* must be pursuant to an Assignment and Assumption Agreement, in form and substance reasonably satisfactory to Port, under which the transferee assumes and agrees to be bound by all obligations of Tenant under this Lease, including, without limitation, all of the Indemnifications and releases by Tenant in this Lease, Developer's obligations under the LDDA (if in effect), and Tenant's and Developer's obligations under other assigned documents ("**Assignment and Assumption Agreement**"); provided, however, that the failure of any transferee to assume all of Tenant's and Developer's obligations under this Lease, or the LDDA (if in effect), or any other assigned documents, as applicable, will not relieve such transferee from such obligations or limit Port's rights or remedies under this Lease, the LDDA (if in effect), any other assigned documents, or under applicable Law.

(e) **Delivery of Executed Assignment.** 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 Tenant entered into the Assignment and Assumption Agreement with the transferee, a fully executed copy of such Assignment and Assumption Agreement.

(f) **No Release of Tenant's Pre-Transfer Liability or Waiver by Virtue of Consent.** The consent by Port to a Transfer hereunder is not in any way to be construed to, from and after the date of such assignment, relieve Tenant of any liability arising out of or with regard to the performance of any covenants or obligations to be performed by Tenant hereunder or under the LDDA before the date of such assignment, or relieve any transferee of Tenant from its obligation to obtain the express consent in writing of Port to any further Transfer; provided, however, (i) if Port consents to such Transfer pursuant to this *Section 20.1*, (ii) there are no Tenant Event of Defaults or Unmatured Tenant Events of Default existing as of the effective date of the Transfer, (iii) Port has received the fully executed and Approved Assignment and

Assumption Agreement, and (iv) Port has received Port Share of Transfer Proceeds, , to the extent the following obligations are expressly Transferred to and assumed by the transferee in the Approved Assignment and Assumption Agreement, Tenant will be released from those obligations under this Lease that arise from and after the effective date of the Transfer: all Tenant obligations under this Lease, including, without limitation, all of the Indemnifications and releases by Tenant in this Lease, Developer's obligations under the LDDA (if in effect), and Tenant's and Developer's obligations under any other assigned documents.

**(g) Notice of Significant Changes; Reports to Port. Tenant will promptly notify Port of any and all Significant Changes.** At such time or times as Port may reasonably request, Tenant must furnish Port with a statement, certified as true and correct by an officer of Tenant, setting forth all of the constituent members of Tenant and the extent of their respective holdings, and in the event any other Persons have a beneficial interest in Tenant, their names and the extent of such interest.

**(h) Scope of Prohibitions on Assignment.** The prohibitions provided in this *Section 20.1* will not be deemed to prevent Tenant from entering into any Subleases so long as such subletting is done in accordance with *Section 20.4* or from granting a Permitted Mortgage so long as the granting of such Permitted Mortgage is done in accordance with *Article 39*.

**(i) Assignment to Tenant Affiliate.**

**(i)** At any time prior to the issuance of a Certificate of Completion, Port's consent will not be required in the event of a Transfer to a Tenant Affiliate provided (i) Kenwood and Presidio Control the Tenant Affiliate, (ii) Darius Anderson, Sushil Patel, Rikesh Patel, and Norman Langill continue to provide day-to-day operations management of the Project and construction of the Initial Improvements, and (iii) Tenant gives Port written notice of its intent thereof at least fifteen (15) days before the proposed effective date of such Transfer and copies of all documentation evidencing such Transfer within fifteen (15) days after the effective date of such Transfer to a Tenant Affiliate.

**(ii)** If after Transfer to a Tenant Affiliate and prior to issuance of a Certificate of Completion, (x) Kenwood and Presidio no longer Control the Tenant Affiliate, or (y) Darius Anderson, Sushil Patel, Rikesh Patel, or Norman Langill no longer provides day-to-day operations management of the Project and construction of the Initial Improvements, then at Port's option, such Transfer will be deemed to be a Transfer made in violation of this *Section 20.1(i)* and a Tenant Event of Default without the need for delivery of any notice to Tenant and Port will be entitled to all its remedies available under this Lease, at law or in equity. Tenant engaging a hotel management company to manage the day-to-day operations of the Hotel will not in and of itself be deemed a Transfer and such trigger the payment of any Transfer Proceeds.

**(iii)** From and after issuance of a Certificate of Completion, Port's consent will not be required in the event of a Transfer to a Tenant Affiliate provided Tenant gives Port written notice of its intent thereof at least fifteen (15) days before the proposed effective date of such Transfer and copies of all documentation evidencing such Transfer within fifteen (15) days after the effective date of such Transfer to a Tenant Affiliate.

**20.2. *Port Participation in Transfer Proceeds.*** Port Share of Transfer Proceeds calculated in accordance with *Sections 3.6* must be disbursed to Port at the escrow closing of the Transfer or if there is no escrow, on or prior to the effective date of the Transfer, except in the event of a Transfer to a Tenant Affiliate made in accordance with *Section 20.1(i)*, or in connection with a Permitted Mortgagee's exercise of its rights in accordance with *Section 39.12*.

**20.3. *Assignment of Rents.*** Tenant hereby assigns to Port all Rents and other payments of any kind, due or to become due from any present or future Subtenant as security for Tenant's obligations hereunder prior to actual receipt thereof by Tenant; provided, however, the foregoing assignment is subject and subordinate to any assignment made to a Mortgagee under *Article 39*

until such time as Port has terminated this Lease (subject to Port's agreement to enter into a New Lease with Mortgagee and all other provisions of this Lease protecting Mortgagee's interests in this Lease), at which time the rights of Port in all rents and other payments assigned pursuant to this **Section 20.3** will become prior and superior in right. Such subordination is self-operative. However, in confirmation thereof, Port will, upon the request of each Mortgagee, execute a subordination agreement in form and substance reasonably satisfactory to such Mortgagee and to Port. Notwithstanding the foregoing, if this Lease terminates by reason of an Event of Default, any Mortgagee which actually collected any rents from any Subtenants pursuant to any assignment of rents or subleases made in its favor will promptly remit to Port the rents so collected (less the actual cost of collection) to the extent necessary to pay Port any Rent, including any and all Additional Rent, through the date of termination of this Lease. Such assignment is subject to the right of Tenant to collect such rents except during the happening of any Tenant Event of Default under the provisions of this Lease. Port will apply any net amount collected by it from such Subtenants to the payment of Rent due under this Lease and remit any balance to Tenant.

#### **20.4. Subletting by Tenant.**

(a) **Subleases.** Other than a Pre-Approved Sublease for the Venue Space and the Restaurant within the Hotel, if any, Tenant will not Sublease any portion of the Premises, including a Sublease to a Tenant Affiliate, without the prior written consent of Port, which consent will not be unreasonably withheld. All Subleases must be in full compliance with all of the terms and provisions of this **Section 20.4**. A Sublease without Port's consent will be voidable by Port, in its sole discretion.

(b) **Pre-Approval of Teatro Sublease.** Tenant is permitted to enter into the following Subleases without Port's prior written consent provided each satisfies all of the following conditions (each a "Pre-Approved Sublease"):

(i) For the Teatro Sublease only, the Teatro Sublease term is at least twenty (20) years and does not exceed the Term of this Lease and for the Restaurant Sublease only, the term is no more than ten (10) years, including any extension options;

(ii) Teatro is required to use the Venue Space as a Dinner-Theater Restaurant for the entirety of the Teatro Sublease term;

(iii) Each Sublease contains a provision similar to **Section 3.10** granting Port and Port's Representative the right to review and audit each Subtenant's Books and Records;

(iv) For the Teatro Sublease only, the Teatro Sublease contains a provision whereby Teatro acknowledges that once the historic Spiegel tent is installed and placed within the Premises, it will form a part of the Real Property and will remain at the Premises at the expiration or earlier termination of the Teatro Sublease; and

(v) Each Sublease complies with all of the conditions set forth in **Section 20.4(f)**.

"Teatro Sublease" means the Sublease for the Venue Space between Tenant, as sublessor, and Teatro, as sublessee.

(c) **Renewal of Teatro Sublease.** At least two (2) years' prior to expiration of the Teatro Sublease, so long as Teatro uses the Venue Space as a Dinner-Theater Restaurant throughout the entirety of the renewal term, Tenant will use its commercially reasonable efforts to renew the Sublease with Teatro. If after good faith negotiations between Tenant and Teatro, the parties are unable to agree on the terms for renewal, then Tenant may commence negotiations for a sublease of the Venue Space with another party. If the terms of the Sublease with a subsequent proposed Subtenant are more financially beneficial to the subsequent proposed Subtenant than the terms last offered to Teatro, then Tenant must first re-offer to Teatro a

sublease for the Venue Space on such terms offered to the subsequent proposed Subtenant. If Teatro rejects such terms, then Tenant may enter into a Sublease with the subsequent proposed Subtenant on the terms rejected by Teatro. Commercially reasonable efforts include providing Teatro sufficient term to amortize tenant improvements or other improvements to the Venue Space reasonably necessary to maximize Gross Venue Space Revenues from the Venue Space that is used as a Dinner-Theater Restaurant, and sublease rental rates similar to the ratio between sublease rental rates and projected gross revenues from Teatro's operations at the Venue Space as of the Commencement Date or the then prevailing ratios of occupancy cost against revenues for comparable tenants in the City and County of San Francisco.

**(d) Request for Sublease.**

**(i)** Except for the Pre-Approved Sublease, Tenant must give Port at least thirty (30) days written notice before entering into a proposed Sublease (herein "**Notice of Request to Sublease**") and provide Port with the following information in writing: (a) the name, address, legal composition and ownership of the proposed Subtenant, (b) the current balance sheet and profit and loss statements (herein "**financial statements**") for the proposed Subtenant, financial statements covering a period of three (3) years prior to the proposed effective date of the Sublease (or for such shorter period as the proposed Subtenant may have been in existence), (c) a full description of the terms and conditions of the proposed Sublease, including copies of any and all proposed agreements concerning the proposed Sublease, (d) a description of the proposed use by the proposed Subtenant, including any required or desired alterations or improvements to the subleased premises that may be undertaken, (e) the material terms of any proposed Sublease, including all payments to be made or other consideration to be given in connection with the Sublease; (f) the material terms of a sublease offered to and rejected by Teatro and the difference between such offered and rejected terms against the terms of the proposed Sublease, (g) a list of personal, business and credit references of the proposed Subtenant, (h) a pre-screening and leasing application, or other similar document, completed by the proposed Subtenant and delivered to Port, and (i) any other information, documentation or evidence as may be reasonably requested by Port, all in sufficient detail to enable Port to evaluate the proposed Sublease and the prospective Subtenant.

**(ii)** Until such time as Tenant has provided to Port all information set forth hereinabove, Tenant's Notice of Request to Sublease will not be deemed to have been served or given. Port will promptly notify Tenant of any deficiencies in the information provided to Port. Tenant will immediately notify Port of any modifications to the proposed terms of the Sublease. Each Notice of Request to Sublease must include a statement in bold that pursuant to **Section 20.4** of the Lease, Port is obligated to promptly notify Tenant of any deficiencies in the information related to the proposed Sublease submitted by Tenant.

**(e) Port's Options.** Upon receiving a Notice of Request to Sublease, Port will have the right to do either of the following:

**(i)** Consent. Port may consent to the proposed Sublease, subject to any reasonable conditions upon such Sublease, and such consent and conditions imposed will be in writing. It will be reasonable for Port to condition its consent on Tenant's agreement that the Percentage Rent owed to Port from Gross Venue Space Revenues under the new Sublease will be at least equal to or greater than the percentage rent owed to Port from other retail/restaurant tenants in the Port's Northern Waterfront; provided in no event will the Percentage Rent owed to Port from Gross Venue Space Revenues under the new Sublease be reduced.

**(ii)** Deny Consent. Port may deny its consent to the proposed Sublease on any reasonable ground. Reasonable grounds may include any of the following: (1) that the proposed Subtenant's financial condition is insufficient to support all of the financial and other obligations of the proposed Sublease; (2) that the use to which the Premises will be put by the proposed Subtenant is inconsistent with the terms of this Lease or is not for retail or restaurant use; (3) that the nature of the proposed Subtenant's intended or likely use of the Premises would

involve an increased risk of the use, Release or mishandling of Hazardous Materials or otherwise increase the risk of fire or other casualty; (4) that the Sublease rental rate is below the fair market rent for similar use and type of premises in the Northern Waterfront; (5) that the Sublease term (including any renewal term) for uses that are not consistent with the Public Trust is greater than ten (10) years; (6) that Port has not received assurances acceptable to Port in its sole discretion that all past due amounts owing from Tenant to Port (if any) will be paid and all other Tenant defaults (if any) will be cured prior to the effective date of the proposed Sublease; (7) the terms of the proposed Sublease is better financially for the proposed Subtenant than the terms last offered to Teatro, or (8) Tenant does not agree to increase the Percentage Rent owed to Port from Gross Venue Space Revenues such that the Percentage Rent owed to Port from the new Sublease will be at least equal to or greater than the percentage rent owed to Port from other retail/restaurant tenants in the Port's Northern Waterfront.

(f) **Required Provisions in Every Sublease.** Each and every Sublease must contain all the following provisions:

(i) An Indemnification clause and waiver of claims provision identical to that set forth in *Article 21* except that the term “**Tenant**” in such provisions means Subtenant; and

(ii) A requirement that under all liability and other insurance policies, “**THE CITY AND COUNTY OF SAN FRANCISCO, THE SAN FRANCISCO PORT COMMISSION AND THEIR OFFICERS; AGENTS, EMPLOYEES AND REPRESENTATIVES**” are additional insureds by written endorsement and acknowledging Port's rights to demand increased coverage to normal amounts consistent with the Subtenant's business activities on the Premises; and

(iii) A provision stating that if for any reason whatsoever this Lease is terminated, such termination will operate to terminate all the existing Subleases entered into by Tenant; and

(iv) A provision directing Subtenant to pay the Sublease rent and other sums due under the Sublease directly to Port upon receiving written notice from Port that a Tenant Event of Default has occurred; and

(v) A provision whereby each Subtenant expressly waives entitlement to any and all relocation assistance and benefits in connection with this Lease; and

(vi) Provisions whereby each Subtenant agrees to comply with *Sections 4.2* (Prohibited Uses), *9* (Compliance with Laws), *21* (Indemnification; Waiver), *22* (Hazardous Materials), *29* (No Waiver), *31* (Limitation on Liability), *32.1* (Estoppel), *33.3* (Fees for Review), *35* (Surrender), *38* (Access to the Premises), *41* (Economic Access), and *43* (Special City and Port Provisions) as if the Subtenant was the Tenant referenced in such sections and in the event of any conflict between the aforementioned sections and the Sublease, the terms of the aforementioned sections will control;

(vii) A provision similar to *Article 38* to require each Subtenant to permit Port to enter its subleased premises for the purposes specified in *Article 38*.

(g) **Copy of Executed Sublease.** Tenant will provide Port a true and complete copy of each executed Sublease within thirty (30) days after the execution thereof. Each executed Sublease must contain substantially the same (or more favorable to the landlord) business terms as set forth in the applicable Notice of Request to Sublease.

**20.5. *Non-Disturbance of Subtenants, Attornment, Sublease Provisions.***

(a) **Conditions for Non-Disturbance Agreements.**

(i) Upon the request of Tenant, Port will enter into an agreement with the Venue Space Subtenant providing generally that in the event of any termination of this Lease, Port will not terminate or otherwise disturb the Venue Space Subtenant's rights, but will instead

honor such Sublease as if such agreement had been entered into directly between Port and such Venue Space Subtenant (“**Non-Disturbance Agreement**”). The Non-Disturbance Agreement must comply with the provisions of this **Section 20.5**.

(ii) Port will provide a Non-Disturbance Agreement to the Venue Space Subtenant if all of the following conditions are satisfied:

(1) the performance by Tenant of its obligations under the Venue Space Sublease will not cause a Tenant Event of Default to occur under this Lease;

(2) the term of the Venue Space Sublease, including options, does not extend beyond the scheduled Term;

(3) the Venue Space Sublease complies with all of the conditions set forth in **Section 20.4(f)**;

(4) The Venue Space Subtenant agrees that in the event this Lease expires, terminates or is canceled during the term of the Venue Space Sublease, the Venue Space Subtenant will attorn to Port (provided Port agrees not to disturb the occupancy or other rights of the Venue Space Subtenant and to be bound by the terms of the Venue Space Sublease, except as otherwise set forth in the Non-Disturbance Agreement), and the Venue Space Sublease will be deemed a direct lease between the Venue Space Subtenant and Port, except that any subleases entered into by Venue Space Subtenant (or its subtenants) for the Venue Space Sublease Space will be terminated and Port will not be:

(A) liable to the Venue Space Subtenant for any security deposit or prepaid rent or other charges previously paid by such Venue Space Subtenant to Tenant unless such deposits, rent or charges are transferred to Port;

(B) bound by any indemnification obligations or any waivers and releases made by the sublandlord in the Venue Space Sublease for the benefit of Venue Space Subtenant or any other party;

(C) bound by any requirement or obligation of the sublandlord under the Venue Space Sublease to pay any (A) unpaid or unreimbursed tenant improvement allowance (provided, however, if the Venue Space Subtenant incurs costs after termination of this Lease that are reimbursable from any remaining and unpaid tenant allowance (“**Reimbursable Venue Space Subtenant Costs**”), then so long as Venue Space Subtenant is not in default under the Venue Space Sublease, Venue Space Subtenant may receive a rent credit of up to fifty percent (50%) of the monthly base rent then payable until the Reimbursable Venue Space Subtenant Costs are fully reimbursed, as further refined and agreed to between the parties in the Non-Disturbance Agreement), or (B) liquidated damages;

(D) bound by any requirement or obligation to keep records or documents confidential that violates the Brown Act or the City’s Sunshine Ordinance; and

(E) bound by any amendments or modifications of the Venue Space Sublease that increase the Tenant’s obligations under the Venue Space Sublease or decrease the Venue Space Subtenant’s obligations under the Venue Space Sublease unless each such amendment or modification has previously been approved by Port in writing. if Tenant is then in default of any of its obligations under this Lease, Port may, in its sole discretion, withhold or condition its agreement to provide a Non-Disturbance Agreement on the cure of such defaults as Port may specify either in a notice of default given under **Section 27** or in a notice withholding or conditioning its agreement to provide a Non-Disturbance Agreement; and

(5) Concurrently with its request for a Non-Disturbance Agreement from Port, Tenant will submit an executed Tenant estoppel certificate substantially in the form attached hereto as **Exhibit S**, and Tenant will certify as of the effective date of the Non-

Disturbance Agreement that the certifications made by Tenant in the estoppel certificate remains unchanged; and

(6) Tenant deposits sufficient funds to reimburse Port for its Attorneys' Fees and Costs to review the proposed Non-Disturbance Agreement;

(7) The Venue Space Subtenant is not in default under the Sublease as of the date this Lease terminates; and

(8) The Venue Space Subtenant will deliver to Port an executed estoppel certificate, substantially in the form attached hereto as **Exhibit T** certifying as of the Lease termination date, among other things: (A) that the Venue Space Sublease, including all amendments, is attached thereto and is unmodified, except for such attached amendments, and is in full force and effect, as so amended, or if such Venue Space Sublease is not in full force and effect, so stating, (B) which amendments, if any, to the Venue Space Sublease have been previously approved by Port in writing, including the dates of approval; (C) the dates, if any, to which any rent and other sums payable thereunder have been paid; (D) that the Venue Space Subtenant is not aware of any Tenant defaults which have not been cured, except as to defaults specified in said certificate; and (E) that the Subtenant is not aware of any Subtenant defaults which have not been cured.

(b) **Form of Non-Disturbance Agreement.** Each Non-Disturbance Agreement will be substantially in the form of **Exhibit U** and, if not in such form, will be in form and substance agreed upon by Tenant and Port. With each request for a Non-Disturbance Agreement, Tenant will submit a copy of the form, showing any requested interlineations or deletions, and Port will approve or disapprove of the requested changes within thirty (30) days after receipt of such changes (such approval not to be unreasonably withheld or conditioned). Any disapproval by Port will be in writing, and will set forth the specific reasons for Port's disapproval. With the execution of this Lease, Port, Tenant and Teatro have entered into a Non-Disturbance Agreement set forth in the attached hereto "**Exhibit V**".

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

**20.7. Fees for Review.** Tenant will reimburse Port for its Attorneys' Fees and Costs incurred by Port in connection with the review, investigation, processing, documentation, disapproval and/or approval of any proposed Transfer or Sublease.

**20.8. No Release of Tenant.** The acceptance by Port of Rent or other payment from any other person will not be deemed to be a waiver by Port of any provision of this Lease or to be a release of Tenant from any obligation under this Lease. Except as set forth in **Section 20.1(f)**, no Transfer or Sublease will in any way diminish, impair or release any of the liabilities and obligations of Tenant, any guarantor or any other person liable for all or any portion of Tenant's obligations under this Lease.

**20.9. Assignment of Sublease Rents.** Subject to **Section 39.5**, Tenant immediately and irrevocably assigns to Port, as security for Tenant's obligations under this Lease, all of Tenant's interest in any rent from any Sublease, except that, until the occurrence of a Tenant Event of Default, Tenant has the right to receive, collect and enjoy such rents. Subtenant will pay the rent and other sums due under any Sublease directly to Port upon receiving written notice from Port that Tenant is in default under this Lease with respect to the payment of Rent. In the event that, notwithstanding the giving of such notice, Tenant collects any rent or other sums from any Subtenant, then Tenant will hold such sums in trust for the benefit of Port and will immediately forward the same to Port. Port's collection of such rent and other sums will not constitute an acceptance by Port or attornment by such Subtenant.

**20.10. Acknowledgement.** Tenant acknowledges and agrees that each of the rights of Port set forth in this *Article 20* is a reasonable limitation on Tenant's right to assign or sublet for purposes of California Civil Code Section 1951.4.

## **21. INDEMNIFICATION OF PORT; WAIVER.**

**21.1. General Indemnification of the Indemnified Parties.** Subject to *Section 21.4*, Tenant agrees to and will Indemnify the Indemnified Parties from and against any and all Losses imposed upon or incurred by or asserted against any such Indemnified Parties in connection with the occurrence or existence of any of the following: (i) any accident, injury to or death of Persons or loss or destruction of or damage to property occurring in, on, under, around, or about the Premises or any part thereof and which may be directly or indirectly caused by any acts done in, on, under, or about the Premises, or any acts or omissions of Tenant, its Agents, Subtenants, or Invitees, or their respective Agents and Invitees; (ii) any use, non-use, possession, occupation, operation, maintenance, management, or condition of the Premises or any part thereof by Tenant, its Agents, Subtenants, or Invitees, or their respective Agents and Invitees; (iii) any latent, design, construction or structural defect relating to the Improvements, any other Subsequent Construction, or any other matters relating to the condition of the Premises caused directly or indirectly by Tenant or any of its Agents, Invitees, or Subtenants; (iv) any failure on the part of Tenant or its Agents, Invitees, or Subtenants, as applicable, to perform or comply with any of the terms, covenants, or conditions of this Lease or with applicable Laws; (v) performance of any labor or services or the furnishing of any materials or other property in respect of the Premises or any part thereof by Tenant or any of its Agents or Subtenants; (vi) any acts, omissions, or negligence of Tenant, its Agents, Invitees, or Subtenants; and (vii) any civil rights actions or other legal actions or suits initiated by any user or occupant of the Premises to the extent it relates to such use or occupancy.

### **21.2. Hazardous Materials Indemnification.**

**(a)** In addition to its obligations under *Section 21.1* and subject to *Section 21.4*, Tenant, for itself and on behalf of its Agents and Invitees, agrees to Indemnify the Indemnified Parties from any and all Losses and Hazardous Materials Claims that arise as a result of: (i) any Hazardous Material Condition; (ii) any Handling or Release of Hazardous Materials in, on, under, around or about the Premises; or (iii) Tenant's Exacerbation of any Hazardous Material Condition.

**(b)** Tenant's obligations under *Section 21.2(a)* includes: (i) costs incurred in connection with any Investigation or Remediation requested by Port or required by any Environmental Regulatory Agency and to restore the affected area to its condition before the Release; (ii) damages for diminution in the value of the Premises; (iii) damages for the loss or restriction on use of rentable or usable space or of any amenity of the Premises; (iv) damages arising from any adverse impact on marketing the space; (v) sums paid in settlement of Claims, Hazardous Materials Claims, Environmental Regulatory Actions, including fines and penalties; (vi) natural resource damages; and (vi) Attorneys' Fees and Costs, consultant fees, expert fees, court costs, and all other litigation, administrative or other judicial or quasi-judicial proceeding expenses. If Port pays any costs within the scope of this section, Tenant must reimburse Port for Port's costs, plus interest at the Interest Rate from the date Port incurs each cost until paid, within three (3) business days after Port's payment demand.

Tenant understands and agrees that its liability to the Indemnified Parties under this *Section 21.2* arises upon the earlier to occur of (a) discovery of any such Hazardous Materials in, on, under, around, or about the Premises, (b) the Handling or Release of Hazardous Materials in, on, under, around or about the Premises, (c) the Exacerbation of any Hazardous Material Condition, or (d) the institution of any Hazardous Materials Claim with respect to such Hazardous Materials, and not upon the realization of loss or damage.



**21.3. Scope of Indemnities; Obligation to Defend.** Except as otherwise provided in *Section 21.4*, Tenant's Indemnification obligations under this Lease is enforceable regardless of the active or passive negligence of the Indemnified Parties, and regardless of whether liability without fault is imposed or sought to be imposed on the Indemnified Parties. Tenant specifically acknowledges that it has an immediate and independent obligation to defend the Indemnified Parties from any Loss that actually or potentially falls within the Indemnification obligations of Tenant, even if such allegations are or may be groundless, false, or fraudulent, which arises at the time such claim is tendered to Tenant and continues at all times thereafter until finally resolved. Tenant's Indemnification obligations under this Lease are in addition to, and in no way will be construed to limit or replace, any other obligations or liabilities which Tenant may have to Port in this Lease, at common law or otherwise. All Losses incurred by the Indemnified Parties subject to Indemnification by Tenant constitute Additional Rent owing from Tenant to Port hereunder and is due and payable from time to time immediately upon Port's request, as incurred.

**21.4. Exclusions from Indemnifications, Waivers and Releases .** Nothing in this *Article 21* relieves the Indemnified Parties from liability, nor will the Indemnities set forth in *Sections 21.1* and *21.2*, the defense obligations set forth in *Sections 21.3* and *21.6*, or the waivers or releases of claims set forth in *Section 21.7* extend to Losses to the extent caused by the sole negligence or willful misconduct of the Indemnified Parties or arising from Pre-Existing Hazardous Materials so long as such Pre-Existing Hazardous Materials are not Released or Exacerbated during the Term. The Indemnified Parties will not be liable under any circumstances for any consequential, incidental, or punitive damages.

**21.5. Survival.** Tenant's Indemnification obligations and waivers and releases made under this Lease and the provisions of this *Article 21* will survive the expiration or earlier termination of this Lease.

**21.6. Defense.** Tenant, at its option but subject to the reasonable consent and approval of Port, will be entitled to control the defense, compromise, or settlement of any such matter through counsel of Tenant's own choice; provided, however, in all cases Port will be entitled to participate in such defense, compromise, or settlement at its own expense. If Tenant fails, however, in Port's reasonable judgment, within a reasonable time following notice from Port alleging such failure, to take reasonable and appropriate action to defend, compromise, or settle such suit or claim, Port has the right promptly to use the City Attorney or hire outside counsel, at Tenant's sole expense, to carry out such defense, compromise, or settlement, which expense will be due and payable to Port ten (10) days after receipt by Tenant of an invoice therefor.

**21.7. Waiver.** Subject to *Section 21.4*, as a material part of the consideration of this Lease, Tenant hereby assumes the risk of, and waives, discharges, and releases any and all claims against the Indemnified Parties from any Losses, including (i) damages by death of or injury to any Person, or to property of any kind whatsoever and to whomever belonging, (ii) goodwill, (iii) business opportunities, (iv) any act or omission of persons occupying adjoining premises, (v) theft, (vi) explosion, fire, steam, oil, electricity, water, gas or rain, pollution or contamination, (vii) stopped, leaking or defective Material Systems, (viii) Building defects, (ix) inability to use all or any portion of the Premises due to sea level rise or flooding, and (x) any other acts, omissions or causes arising at any time and from any cause, in, on, under, or about the Premises including all claims for Losses arising from the joint, concurrent, active or passive negligence of any of Indemnified Parties.

Tenant expressly acknowledges and agrees that the amount payable by Tenant hereunder does not take into account any potential liability of the Indemnified Parties for any consequential, incidental or punitive damages. Port would not be willing to enter into this Lease in the absence of a complete waiver of liability for consequential, incidental or punitive damages due to the acts or omissions of the Indemnified Parties, and Tenant expressly assumes the risk with respect thereto. Accordingly, without limiting any Indemnification obligations of Tenant or

other waivers or releases contained in this Lease and as a material part of the consideration of this Lease, Tenant fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against the Indemnified Parties for consequential, incidental and punitive damages (including, without limitation, lost profits) and covenants not to sue or to pay the Attorneys' Fees and Costs of any party to sue for such damages, the Indemnified Parties arising out of this Lease or the uses authorized hereunder, including, any interference with uses conducted by Tenant pursuant to this Lease regardless of the cause, and whether or not due to the negligence of the Indemnified Parties.

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

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

BY PLACING ITS INITIALS BELOW, TENANT SPECIFICALLY ACKNOWLEDGES AND CONFIRMS THE VALIDITY OF THE WAIVERS AND RELEASES MADE ABOVE AND THE FACT THAT TENANT WAS REPRESENTED BY COUNSEL WHO EXPLAINED THE CONSEQUENCES OF THE WAIVERS AND RELEASES AT THE TIME THIS LEASE WAS MADE, OR THAT TENANT HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL, BUT DECLINED TO DO SO.

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

Tenant acknowledges that the waivers and releases contained herein include all known and unknown, disclosed and undisclosed, and anticipated and unanticipated claims for consequential, incidental or punitive damages. Tenant realizes and acknowledges that it has agreed upon this Lease in light of this realization and, being fully aware of this situation, it nevertheless intends to waive the benefit of Civil Code Section 1542, or any statute or other similar law now or later in effect.

## **22. HAZARDOUS MATERIALS.**

**22.1. *Requirements for Handling.*** Neither Tenant nor its Agents or Invitees may Handle or permit any other person to Handle any Hazardous Material in, on, under or about the Premises, subject only to the following exceptions, provided that Handling is at all times in full compliance with all Environmental Laws and Operations Plan(s), if any: (i) standard building materials and equipment that do not contain asbestos or asbestos-containing materials, lead or polychlorinated biphenyl (PCBs), (ii) any Hazardous Materials which do not require a permit or license from, or that need not be reported to, a governmental agency, which Hazardous Materials are used in the construction of the Initial Improvements or Subsequent Construction, and which are reported to, and approved by Port prior to any such Handling, (iii) subject to **Section 22.8**, supplies or materials in such limited amounts as are customarily used for general landscaping purposes, and (iv) any janitorial, office, or restaurant supplies, or similar materials in such limited amounts as are customarily used in connection with the Permitted Uses.

**22.2. *Tenant Responsibility.*** Tenant agrees to protect its Agents and Invitees in its operations on the Premises from hazards associated with Hazardous Materials in accordance with all Environmental Laws and also agrees, for itself and on behalf of its Agents and Invitees, that during its use and occupancy of the Premises:

- (a) Will not cause or permit any Hazardous Material Condition; and
- (b) Will comply with all Environmental Laws relating to the Premises and any Hazardous Material Condition and any investigation, construction, operations, use or any other activities conducted in, on, or under the Premises, and will not engage in or permit any activity at the Premises, or in the operation of any vehicles used in connection with the Premises in violation of any Environmental Laws;
- (c) Tenant will, as necessary or if required by Regulatory Agencies, Remediate Hazardous Materials; and
- (d) Tenant will be the “Generator” of any waste, including hazardous waste, resulting from investigation, construction, operations, use or any other activities conducted in, on, or under the Premises.

**22.3. Tenant’s Environmental Condition Notification Requirements.**

The following requirements are in addition to the notification requirements specified in the Operations Plan(s), if any:

(a) Tenant must notify Port immediately, orally or by other means that will transmit the earliest possible notice to Port staff, followed within twenty-four (24) hours by written notice, of and when Tenant learns or has reason to believe Hazardous Materials were Released or, except as allowed under *Section 22.1*, Handled, in, on, under, or about the Premises or the environment, or from any vehicles Tenant, or its Agents and Invitees use during Tenant’s occupancy of the Premises, whether or not the Release or Handling is in quantities that would be required under Environmental Laws to be reported to an Environmental Regulatory Agency.

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

(i) Any notice of the Release or Handling of Hazardous Materials, in, on, under, or about the Premises or the environment, or from any vehicles Tenant, or its Agents and Invitees use during Tenant’s occupancy of the Premises that Tenant or its Agents or Invitees provide to an Environmental Regulatory Agency;

(ii) Any notice of a violation, or a potential or alleged violation, of any Environmental Law that Tenant or its Agents or Invitees receive from any Environmental Regulatory Agency;

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

(iv) Any Hazardous Materials Claim that is instituted or threatened by any third party against Tenant or its Agents or Invitees and that relates to the Release or Handling of Hazardous Materials, in, on, under, or about the Premises or the environment, or from any vehicles Tenant, or its Agents and Invitees use during Tenant’s occupancy of the Premises; and

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

(c) Tenant must notify Port of any meeting, whether conducted face-to-face or telephonically, between Tenant and any Environmental Regulatory Agency regarding an

Environmental Regulatory Action. Port will be entitled to participate in any such meetings at its sole election.

(d) Tenant must notify Port of any Environmental Regulatory Agency's issuance of an Environmental Regulatory Approval. Tenant's notice to Port must state the name of the issuing entity, the Environmental Regulatory Approval identification number, and the dates of issuance and expiration of the Environmental Regulatory Approval. In addition, Tenant must provide Port with a list of any plan or procedure required to be prepared and/or filed with any Environmental Regulatory Agency for operations on the Premises. Tenant must provide Port with copies of any of the documents within the scope of this *Section 22.3(d)* upon Port's request.

(e) Tenant must provide Port with copies of all communications with Environmental Regulatory Agencies, copies of investigation reports conducted by Environmental Regulatory Agencies, and all non-privileged communications with other persons regarding potential or actual Hazardous Materials Claims arising from Tenant's or its Agents' or Invitees' operations at the Premises. Upon Port's request, Tenant must provide Port with a log of all communications withheld under a claim of privilege that specifies the parties to and subject of each withheld communication.

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

#### **22.4. *Tenant Requirement to Remediate.***

(a) After notifying Port in accordance with *Section 22.3*, Tenant must Remediate, at its sole cost and in compliance with all Environmental Laws and this Lease, any Hazardous Material Condition occurring during the Term or while Tenant or its Agents or Invitees otherwise occupy any part of the Premises. Tenant must obtain Port's approval of a Remediation work plan whether or not such plan is required under Environmental Laws, then begin Remediation actions immediately following Port's approval of the work plan and continue diligently until Remediation is complete.

(b) In addition to its obligations under *Section 22.4(a)*, before this Lease terminates for any reason, Tenant must Remediate, at its sole cost and in compliance with all Environmental Laws and this Lease: (i) any Hazardous Material Condition caused by Tenant's or its Agents' or Invitees' Handling of Hazardous Materials during the Term; and (ii) any Hazardous Material Condition discovered during Tenant's occupancy that is required to be Remediated by any Regulatory Agency if Remediation would not have been required but for Tenant's use of the Premises, or due to Subsequent Construction or construction of the Initial Improvements.

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

**22.5. *Port's Right to Audit.*** Port has the right, but not the obligation, to inspect and audit the Premises for any Hazardous Materials, including the right to Investigate at reasonable times under *Article 38*. Port's failure to inspect or obtain samples or to detect conditions attributable to Tenant's operations if an inspection is conducted will not be deemed to be a release of Tenant's obligations under this Lease.

**22.6. *Notification of Asbestos and Lead.*** Port hereby notifies Tenant of the potential presence of lead-containing and presumed lead-containing materials in the Premises, and, in

accordance with the United States Occupational Safety and Health Administration (“OSHA”) Asbestos Rule (1995), 59 Fed. Reg. 40964, 29 CFR §§ 1910.1001, 1926.1101 (as amended, clarified and corrected) (OSHA Asbestos Rule); California Health and Safety Code §§ 25915-259.7 and the Division of Occupational Safety and Health of the California Department of Industrial Relations (“Cal-OSHA”) General Industry Safety Order for Asbestos, 8 CCR § 5208, of the presence of asbestos-containing materials (“ACMs”) and/or presumed asbestos-containing materials (“PACMs”) (as such terms are defined in the Cal-OSHA General Industry Safety Order for Asbestos), in the locations identified in the summary/table, if any, set forth in *Exhibit W*. Disturbance or removal of lead is regulated by among other Laws, 29 CFR §§ 1910.1025, 1926.62; California Health & Safety Code §§ 105185-105197 and 105250-105257; Cal-OSHA Construction Safety Order for Lead, Title 8 CCR § 1532.1; Title 17 CCR Chapter 8; and San Francisco Building Code § 3423.

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

Tenant hereby acknowledges receipt of the notification specified in the first paragraph of this *Section 22.6* and the notice and reports identified on *Exhibit W* and understands, after having consulted its legal counsel, that it must make its Agents aware of the presence of ACMs and/or PACMs in or about the Premises in order to avoid or minimize any damage to or disturbance of such ACMs and/or PACMs. Tenant further acknowledges its obligations under the Cal-OSHA General Industry Safety Order for Asbestos to provide information to its employees and contractors regarding the presence of ACMs and PACMs at the Premises and to provide a training program for its employees that conforms with 8 CCR § 5208(j)(7)(C).

Tenant agrees that its waiver of claims set forth in *Section 21.7* is given with full knowledge of the presence, or possible presence, of lead and/or asbestos in or about the Premises and the potential consequences of such fact. Tenant is aware that the presence, or possible presence, of lead and/or asbestos in or about the Premises may limit Tenant’s ability to construct the Improvements without Tenant first performing abatement of such lead and/or asbestos, as applicable. The presence of lead and/or asbestos in the Premises and the removal or non-removal by Port of all or a portion of such lead and/or asbestos will not, however, (i) entitle Tenant to any claim for Losses, (ii) relieve Tenant of any of its obligations hereunder, including the obligation to pay Rent, (iii) constitute or be construed as a constructive or other eviction of Tenant, or (iv) constitute or be construed as a breach of Port’s covenant assuring Tenant’s quiet enjoyment of the Premises.

Notwithstanding any other provisions of this Lease, Tenant agrees to defend and Indemnify the Indemnified Parties for Tenant’s acts or omissions that result in (1) asbestos-related enforcement actions, including both administrative or judicial proceedings; (2) any Losses arising from an alleged violation of Cal-OSHA General Industry Safety Order for asbestos and/or exposures to asbestos; (3) lead-related enforcement actions, including both administrative or judicial proceedings; and (4) any Losses arising from an alleged violation of Cal-OSHA Construction Safety Order for lead and/or exposures to lead.

**22.7. Presence of Hazardous Materials.** California Law requires landlords to disclose to tenants the presence or potential presence of certain Hazardous Materials. Accordingly, Tenant is hereby advised that Hazardous Materials may be present on or near the Premises, including naturally occurring asbestos, metals and other contamination commonly found in fill, petroleum, vehicle fluids, janitorial products, tobacco smoke, and building materials containing chemicals, such as lead and formaldehyde. Further, the following known Hazardous Materials are present on the property: asbestos in buildings, if any, as described in *Exhibit X*, naturally occurring asbestos, metals and other contamination commonly found in fill, petroleum, and lead-

based paint. By execution of this Lease, Tenant acknowledges that the notice set forth in this **Section 22.7** satisfies the requirements of California Health and Safety Code Section 25359.7 and related Laws. Tenant must disclose the information contained in this **Section 22.7** to any Subtenant, transferee, or assignee of Tenant's interest in this Lease. Tenant also acknowledges its own obligations pursuant to California Health and Safety Code Section 25359.7 as well as the penalties that apply for failure to meet such obligations.

**22.8. Pesticide Prohibition.** Tenant will comply with the provisions of **Section 43.8** relating to use of pesticides on the Premises.

**22.9. Survival.** Tenant's obligations under this **Article 22** will survive the expiration or earlier termination of this Lease.

**22.10. Stormwater Pollution Prevention.**

(a) Tenant must comply with the applicable provisions of the Statewide General Permit for Discharge of Industrial Storm Water issued by the State Water Resources Control Board, including filing a Notice of Intent to be covered, developing and implementing a site-specific Storm Water Pollution Prevention Plan ("SWPPP"), and conducting storm water monitoring and reporting. Tenant's SWPPP and a copy of a Notice of Intent for Tenant's Premises must be submitted to Port's Real Estate Division before beginning operations on the Premises.

(b) In addition to requiring compliance with the permit requirements under **Section 22.10(a)**, Tenant will comply with the post-construction stormwater control provisions of the Statewide General Permit for Discharge of Stormwater from Small Municipalities and the San Francisco Stormwater Design Guidelines, subject to review and permitting by the Port's Engineering Division.

**23. INSURANCE.[SUBJECT TO REVIEW BY RISK MANAGER]**

**23.1. Property and Liability Coverage.**

(a) **Required Types and Amounts of Insurance.** Except as more specifically provided in this **Section 23.1**, Tenant shall, at no cost to Port, obtain and maintain, and cause to be in effect at all times from the Commencement Date to the later of (i) the last day of the Term, or (ii) the last day Tenant (A) is in possession of the Premises or (B) has the right of possession of the Premises (except as otherwise specified in this **Section 23.1(a)**), the following types and amounts of insurance:

(i) **Builders Risk Insurance.** At all times during construction prior to completion of the Initial Improvements, and during any period of Subsequent Construction costing more than Five Hundred Thousand Dollars (\$500,000), which amount will be increased by Two Hundred Fifty Thousand Dollars (\$250,000) on each Periodic 10-Year Adjustment Date, Tenant will maintain, or require to be maintained, on a form reasonably approved by Port, builders risk insurance (or its equivalent for any Subsequent Construction, which may include coverage under a property insurance program as referenced under **Section 23.1(a)(ii)**) in the amount equal to the 100% replacement cost value of any existing structures being Rehabilitated or Restored, and 100% of all new construction, including all materials and equipment to be used/incorporated on or about the Premises, and in transit or storage off-site, against all risk or "special form" hazards, and earthquake and flood insurance (subject to **Section 23.1(a)(ii)**) including risks from any and all testing of any equipment, including as named insureds, Port and Tenant, with any deductible not to exceed Two Hundred Fifty Thousand (\$250,000) (except as to earthquake and flood insurance for which the deductible will be in accordance with the requirements of **Section 23.1(a)(ii)**). Tenant is solely responsible for payment of any deductibles required under this policy. Such builders risk insurance also will extend to cover soft costs and loss of business income for any delayed completion period as caused by any of the perils or hazards set forth in and required to be insured pursuant to

**Section 23.1(a)(i)**, for a delay period of not less than two (2) years with a limit of not less than One Million Dollars (\$1,000,000). If available at commercially reasonable rates, such builders risk insurance also will extend to cover the peril of terrorism.

(ii) *Property Insurance; Earthquake and Flood Insurance.*

(1) **Property Insurance.** Upon completion of the Initial Improvements, and upon completion of Subsequent Construction of any additional Improvements, Tenant will maintain, or require to be maintained, property insurance policies with coverage at least as broad as Insurance Services Office form CP 10 30 06 95 (“**Causes of Loss Special Form**” (or its replacement)), in an amount not less than 100% of the then-current full replacement cost of the Improvements including any foundations, pilings, excavations and footings, including increased cost of construction and demolition of damaged and undamaged structures due to the enforcement of Laws, (with any deductible not to exceed Two Hundred Fifty Thousand Dollars (\$250,000) (except as to earthquake and flood insurance)). If available at commercially reasonable rates, such insurance will extend to cover the peril of terrorism. In addition to the foregoing, Tenant may insure its Personal Property in such amounts as Tenant deems appropriate; and Port will have no interest in the proceeds of such Personal Property insurance, and the proceeds of such insurance will not be subject to **Section 16.7**.

(2) **Earthquake Insurance.**

(A) During construction of the Initial Improvements, earthquake insurance will be in an amount equal to at least the lesser of (i) the Probable Maximum Loss to the Initial Improvements or, (ii) the maximum amount that is available at commercially reasonable rates from recognized insurance carriers (with a deductible of up to but not to exceed ten percent (10%)) of the then-current, full replacement cost of the Initial Improvements without sublimits for excavations and footings; provided that earthquake coverage is available at commercially reasonable rates), except that a greater deductible will be permitted to the extent that such coverage is not available from recognized insurance carriers or at commercially reasonable rates). “Probable Maximum Loss” means the scenario upper loss (SUL) estimate of damage that may occur to the structures with a ninety percent (90%) confidence of non-exceedance as a result of an earthquake with a return period of 224 years as determined prior to completion of the Initial Improvements and thereafter not less frequently than every ten (10) years by a consultant chosen and paid for by Tenant who is reasonably satisfactory to Port; and

(B) From and after the issuance of a Final Certificate of Occupancy for the Hotel, earthquake insurance will be in an amount equal to at least the lesser of (i) the Probable Maximum Loss to the Improvements, or (ii) the amount that is available at commercially reasonable rates from recognized insurance carriers, in each case, with a deductible of up to but not to exceed an amount that is necessary to make such earthquake insurance available at a commercially reasonable rate.

(3) **Flood Insurance.**

(A) During construction of the Initial Improvements, flood insurance will be in an amount, to the extent available at commercially reasonable rates from recognized insurance carriers (or through the NFIP) equal to the maximum amount of the then-current, full replacement cost of the Initial Improvements (including building code upgrade coverage and without any deduction being made for depreciation), with a deductible of up to but not to exceed ten percent (10%), except that a greater deductible will be permitted to the extent that flood coverage is not available from recognized insurance carriers (or through the NFIP) at commercially reasonable rates; and

(B) From and after the issuance of a Final Certificate of Occupancy for the Hotel, flood insurance will be in an amount equal to at least the amount available at commercially reasonable rates from recognized insurance carriers or through the

NFIP, with a deductible of up to but not to exceed an amount that is necessary to make flood insurance available at commercially reasonable rates.

(4) Exceptions for Earthquake and Flood Insurance. If Tenant determines that earthquake or flood insurance should not be carried on the Improvements because it is not (or no longer) available at commercially reasonable rates (or through the NFIP for flood insurance) or, in Tenant's reasonable business judgment, is imprudent, then Tenant will request in writing Port's consent to the absence or deletion thereof. Any request for Port's consent required hereunder will include with such request evidence supporting Tenant's determination of commercial unreasonableness or imprudence as to the applicable coverage. Such evidence may include quotes, declinations, and notices of cancellation or non-renewal from leading insurance companies for the required coverage, percentage of overall operating expenses attributable thereto, and then current industry practice for comparable Hotels in San Francisco. Port will approve or disapprove the absence or deletion of earthquake or flood insurance within forty-five (45) days after Tenant's request. If Port disapproves such request, Port will state the basis for its disapproval. If Tenant disputes Port's disapproval, then Tenant may submit the matter to arbitration in accordance with the dispute resolution procedure set forth in *Section 24*. If Tenant elects not to carry or to discontinue such coverage with Port's approval (or pursuant to an arbitrator's decision), and Port later determines that due to changes in the industry or other changed circumstances, earthquake insurance or flood insurance, as applicable, has become commercially available at reasonable rates, then Port may notify Tenant thereof, and Tenant will add such coverage to its policy as soon as reasonably practicable thereafter; provided, however, that if Tenant disputes Port's determination, such dispute will be submitted to the dispute resolution procedure set forth in *Section 24*.

(iii) *Commercial General Liability Insurance.* Tenant will maintain, or require to be maintained "Commercial General Liability" insurance with coverage at least as broad as Insurance Services Office form CG 00 01 10 93 (or its replacement) insuring against claims for bodily injury (including death), property damage, personal injury and advertising injury, including coverage for premises operations, blanket contractual liability (to the extent possible under the above-referenced policy form or under a separate policy form) which includes coverage extending to the Indemnity in *Article 21*, broad form property damage, explosion, collapse and underground hazards, independent contractors, products and completed operations, with such insurance to afford protection in an amount not less than [Fifteen] Million Dollars (\$15,000,000) per occurrence and annual aggregate, and [Fifteen] Million Dollars (\$15,000,000) products and completed operations aggregate, and deleting any exclusions for care, custody and control of real property. In addition, if Tenant has (or is required under Laws to have) a liquor license and is selling or distributing alcoholic beverages on the Premises, then Tenant will maintain or require to be maintained liquor liability coverage with limits not less than [Three Million Dollars (\$3,000,000)] and Tenant will require any Subtenant or operator who has (or is required under Laws to have) a liquor license and who is selling or distributing alcoholic beverages on the Premises, to maintain such coverage. All such insurance may be provided under a combination of primary and umbrella excess policies and may be provided under policies with a "claims made" trigger as provided in *Section 23.1(b)(viii)*.

(iv) *Workers' Compensation Insurance.* During any period in which Tenant has employees, as defined in the California Labor Code, Tenant will maintain or require to be maintained policies of workers' compensation insurance providing statutory limits, including employer's liability coverage with limits not less than One Million Dollars (\$1,000,000) each accident, injury, or illness (except that such insurance in excess of One Hundred Thousand (\$100,000) each accident may be covered by a so-called "umbrella" or "excess coverage" policy) covering liability for all persons directly employed by Tenant in connection with the use, operation and maintenance of the Premises and the Improvements.

(v) *Boiler and Machinery Insurance.* If any of the following exposures are not covered by the insurance required by *Section 23.1(a)(ii)(1)*, Tenant will



maintain, or require to be maintained, boiler and machinery insurance covering damage to or loss or destruction of machinery and equipment located in, on, under, around, or about the Premises that is used by Tenant for heating, ventilating, air-conditioning, power generation and similar purposes, in an amount not less than one hundred percent (100%) of the actual replacement value of such machinery and equipment.

(vi) *Business Automobile Insurance.* Tenant will maintain, or require to be maintained, policies of business automobile liability insurance covering all owned, non-owned or hired motor vehicles (including electric carts) to be used by Tenant and its Agents in connection with Tenant's use and occupancy of the Premises, affording protection for bodily injury (including death) and property damage in the form of Combined Single Limit Bodily Injury and Property Damage policy with limits of not less than Five Million Dollars (\$5,000,000) per accident and annual aggregate.

(vii) *Business Income Insurance.* From and after the issuance of a Final Certificate of Occupancy for the Hotel, Tenant will maintain business income insurance, including loss of rents and extra expense caused by any of the perils or hazards set forth in and required to be insured pursuant to *Section 23.1(a)(ii)* covering an interruption period of not less than two (2) years, with a limit of not less than twenty-four (24) months' of Gross Revenues; provided, however, so long as the Venue Space Subtenant maintains the business income insurance required in this *Section 23.1(a)(vii)* with a limit of not less than twenty-four (24) months' of Gross Venue Space Revenues, then the limit of business income insurance Tenant is required to maintain will be based off of Gross Hotel Revenues, not Gross Revenues.] **[Note: Inclusion of the highlighted language is subject to approval from Port's Risk Manager.]**

(viii) *Contractor's Pollution Legal Liability Insurance.* Tenant will cause to be maintained during the period of construction of the Initial Improvements and during any periods of Subsequent Construction, that could reasonably be anticipated to involve a Release of Hazardous Materials on or about the Premises, Contractor's Pollution Legal Liability Insurance for any and all Losses caused by pollution conditions, that are sudden, accidental or gradual, resulting from the contractor's operations, or for which contractor is legally liable, in connection with the construction of the Initial Improvements or Subsequent Construction, whether such operations be by Tenant or Tenant's contractors, subcontractors, consultants or suppliers of the contractor. The foregoing policy will contain minimum liability limits of Five Million Dollars (\$5,000,000) per occurrence and Five Million Dollars (\$5,000,000) in the aggregate with a deductible not to exceed Two Hundred Fifty Thousand Dollars (\$250,000). The foregoing policy will at a minimum contain coverage for or be specifically endorsed to include coverage for pollution conditions resulting in, arising from or in connection with: (i) bodily injury (including death), property damage and environmental cleanup costs (on-site and off-site) resulting from construction of the Initial Improvements or any Subsequent Construction; (ii) the use or operation of motor vehicles (whether owned, non-owned or leased) in connection with construction of the Initial Improvements or any Subsequent Construction, including transportation of any Hazardous Materials to or from the Premises, including any interim or temporary storage or transfer sites (such transportation coverage will also include loading/unloading of materials); (iii) claims by third parties (other than a disposal site owner) for bodily injury or property damage arising from any disposal location or facility, both final and temporary, to which any waste that is generated in connection with the construction of the Improvements under the LDDA (if in effect) or any Subsequent Construction under this Lease or in connection with any Remediation obligation of Tenant pursuant to *Article 22* is delivered; all such disposal locations/facilities, both final and temporary, will be scheduled to the foregoing policy as Non-Owned Disposal Sites for coverage under such policy. The foregoing policy will be written on an occurrence form and be in effect during the construction periods described above, or, if not available on an occurrence form, then on a claims-made form. If the foregoing policy is written on a claims made form, then the foregoing policy will be maintained for, or contain an extended reporting period of, at least five (5) years. The foregoing policy definition

of “**Covered Operations**” or any other such designation of services or operations performed by Tenant’s contractors must include all work or services performed by Tenant’s contractors and their respective subcontractors, consultants, or suppliers.

(ix) *Professional Liability.* Tenant will maintain or require to be maintained, project-specific professional liability (errors and omissions) insurance, with limits not less than Five Million Dollars (\$5,000,000) each claim and annual aggregate, with respect to all professional services, including architectural, engineering, geotechnical, and environmental, reasonably necessary or incidental to the construction of the Initial Improvements and any Subsequent Construction with any deductible not to exceed Fifty Thousand Dollars (\$50,000) each claim (the “**lead policy**”). Notwithstanding the foregoing, however, Tenant may elect, instead of obtaining the foregoing coverages in this *Section 23.1(a)(ix)*, to require that any architects, contractors and sub-contractors performing professional services in connection with the Initial Improvements or any Subsequent Construction carry professional liability insurance (errors and omissions) in an amount not less than Five Million Dollars (\$5,000,000) each claim and annual aggregate with any deductible not to exceed Fifty Thousand Dollars (\$50,000). Such insurance will provide coverage during the period when such professional services are performed and for a period of (1) three (3) years after issuance of a Final Certificate of Occupancy for the Initial Improvements and (2) five (5) years for any Subsequent Construction. With respect to Subsequent Construction, Tenant will require that any architect, contractor or subcontractor performing professional services in connection with such Subsequent Construction, carry professional liability insurance (errors and omissions) in an amount not less than One Million Dollars (\$1,000,000) each claim and annual aggregate with any deductible not to exceed Twenty Five Thousand Dollars (\$25,000). Notwithstanding the foregoing requirements set forth in this *Section 23.1(a)(ix)*, professional liability insurance is not required for Subsequent Construction costing less than Five Hundred Thousand Dollars (\$500,000), which amount will be increased by Two Hundred Fifty Thousand Dollars (\$250,000) on each Periodic 10-Year Adjustment Date.

(x) *Crime Policy.* Tenant will maintain throughout the Term, at no expense to City, a blanket fidelity bond or a Crime Policy (Employee Dishonesty Coverage) that includes coverage for employee dishonesty, forgery & alteration, theft of money & securities, and theft via electronic means, covering all officers and employees in an amount not less than One Million Dollars (\$1,000,000).

(xi) *Other Insurance.* Tenant will obtain such other insurance or increase the coverage limits set forth in this *Section 23.1(a)* as is reasonably requested by City’s Risk Manager.

(b) **General Requirements.**

(i) As to all insurance required hereunder, such insurance will be carried under a valid and enforceable policy or policies issued by insurers of recognized responsibility that are rated Best A—:VIII or better by the latest edition of Best’s Key Rating Guide (or a comparable successor rating) and legally authorized to sell such insurance within the State;

(ii) As to property insurance required hereunder, such insurance will name Tenant as the first named insured, and will name Port as an insured as its interest may appear. As to general liability, automobile liability, and umbrella or excess liability insurance, such insurance will name as additional insureds by written endorsement: **THE CITY AND COUNTY OF SAN FRANCISCO AND THE SAN FRANCISCO PORT COMMISSION AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS.”**

(iii) As to all insurance required hereunder, such insurance will be evaluated by Port and Tenant for adequacy not less frequently than every five (5) years from the date of the issuance of a Final Certificate of Occupancy for the Hotel. Following consultation with Tenant, Port may, upon not less than ninety (90) days prior written notice, require Tenant to

increase the insurance limits for all or any of its general liability policies if in the reasonable judgment of the City's Risk Manager it is the general commercial practice in San Francisco to carry insurance for facilities of comparable size and use to the Premises in amounts substantially greater than the amounts being carried by Tenant with respect to risks comparable to those associated with the uses of the Premises. If the City's Risk Manager determines that the insurance limits required under this **Section 23.1** may be decreased in light of such commercial practice and the risks associated with the uses of the Premises, Port will notify Tenant of such determination, and Tenant will have the right to decrease the insurance coverage required under this Lease accordingly. In such event, Tenant will promptly deliver to Port a certificate evidencing such new insurance amounts and additional insured endorsements in form satisfactory to Port;

(iv) As to all insurance required hereunder, such insurance will provide that no cancellation, material modification or termination of such insurance will be effective until at least thirty (30) days after mailing or otherwise sending written notice of such cancellation, modification or termination to Port;

(v) As to commercial general liability and automobile liability insurance, such insurance will provide that it constitutes primary insurance with respect to claims insured by such policy, and, except with respect to limits, that insurance applies separately to each insured against whom claim is made or suit is brought. An ISO endorsement CG20 10 11 85 or its equivalent must be added naming the **CITY AND COUNTY OF SAN FRANCISCO AND THE SAN FRANCISCO PORT COMMISSION AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS** as additional insureds;

(vi) As to liability, automobile, worker's compensation and property insurance required hereunder, such insurance will provide for waivers of any right of subrogation that the insurer of such party may acquire against each Party hereto with respect to any losses of the type covered under the policies required by **Section 23.1(a)**;

(vii) All insurance will be subject to the approval of Port, which approval will be limited to whether or not such insurance meets the terms of this Lease;

(viii) If any of the policies of liability required hereunder is provided under a claims-made form of policy, Tenant will maintain such coverage continuously throughout the Term, and following the expiration or earlier termination of the Term, Tenant will maintain, or require to be maintained, such coverage without lapse for a period of ten (10) years beyond the expiration or earlier termination of this Lease, or, in the case of construction, for ten (10) years after issuance of a Final Certificate of Occupancy for the Initial Improvements or Subsequent Construction, as applicable; and

(c) **Certificates of Insurance; Right of Port to Maintain Insurance.**

Tenant will furnish Port certificates with respect to the policies required under this **Article 23** and additional insured endorsements in form satisfactory to Port, (i) on or prior to the Commencement Date (to the extent such policy is required to be carried as of the Commencement Date), (ii) for such policies required to be carried after the Commencement Date, on or prior to the date such policies are required, and (iii) with respect to renewal policies, within thirty (30) days after the policy renewal date of each such policy. Within thirty (30) days after Port's request, Tenant also will provide Port with copies of each such policy, or will otherwise make such policy available to Port for its review. If Tenant has determined that obtaining earthquake or flood insurance prior to commencement of construction of the Initial Improvements pursuant to **Section 23.1(a)(ii)(4)** is not commercially reasonable, then Tenant will provide Port with such documents evidencing such determination. If at any time Tenant fails to maintain the insurance required pursuant to this **Section 23.1**, or fails to deliver certificates and/or endorsements as required pursuant to this **Section 23.1(c)** then, upon ten (10) days' written notice to Tenant, Port may obtain and cause to be maintained in effect such insurance by taking out policies with companies satisfactory to Port. Within ten (10) days

following demand, Tenant will reimburse Port for all amounts so paid by Port, together with all costs and expenses in connection therewith and interest thereon at the Default Rate.

**(d) Insurance of Others.** To the extent Tenant requires liability insurance policies to be maintained by Subtenants, contractors, subcontractors or others in connection with their use or occupancy of, or their activities in, on, under, around, or about the Premises, Tenant will require that such policies be endorsed to include the **CITY AND COUNTY OF SAN FRANCISCO AND THE SAN FRANCISCO PORT COMMISSION AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS** as additional insureds. Notwithstanding the foregoing, Tenant will require all contractors and sub-contractors performing work in, on, under, around, or about the Premises and all operators and Subtenants of any portion of the Premises to carry the following coverages: (i) commercial general liability with limits of no less than Two Million Dollars (\$2,000,000) per occurrence and Four Million Dollars (\$4,000,000) annual general aggregate, (ii) workers' compensation in amounts required by law, (iii) employer's liability coverage in an amount not less than One Million Dollars (\$1,000,000) per accident, per employee and policy limit for injury by disease, covering all employees employed at the Premises, (iv) automobile insurance in an amount not less than \$1,000,000 combined single limit covering use of owned, non-owned or hired vehicles utilized in the performance of work in, on, under, around, or about the Premises.

**23.2. Port Entitled to Participate.** Except to the extent inconsistent with the terms of *Article 39*, with respect to Real Property Insurance proceeds, Port is entitled to participate in and consent to any settlement, compromise or agreement with respect to any claim for any Loss in excess of Two Million Dollars (\$2,000,000), which amount will be increased by Five Hundred Thousand Dollars (\$500,000.00) on each Periodic 10-Year Adjustment Date, covered by the insurance required to be carried hereunder; provided, however, that (i) Port's consent will not be unreasonably withheld, and (ii) no consent of Port will be required in connection with any such settlement, compromise or agreement concerning damage to all or any portion of the Improvements if Tenant will have agreed in writing to commence and complete Restoration.

**23.3. Release and Waiver.** Each Party hereby waives all rights of recovery and causes of action, and releases the other Party from any liability, losses occasioned to the property of each such Party, which losses are of the type covered under the property policies required by *Sections 23.1(a)(i), (ii), or (vi)* to the extent that such loss is reimbursed by an insurer.

**23.4. No Limitation.** The Indemnification requirements under this Lease, the LDDA, or any other Transaction Documents will not be limited by any insurance requirements set forth in any such documents.

## **24. DISPUTE RESOLUTION FOR CERTAIN MATTERS.**

**(a)** If Tenant disputes Port's (i) disapproval of Tenant's election not to obtain or to delete earthquake or flood insurance pursuant to *Section 23.1(a)(ii)(4)* or (ii) request to reinstitute earthquake or flood coverage pursuant to *Section 23.1(a)(ii)(4)*, then either Party may invoke the provisions of this Section at any time after such Party has made a good faith effort to resolve the disputed matter with the other Party, by delivering written notice to the other Party.

**(b)** Within twenty (20) days after delivery of notice invoking the provisions of this Section, each Party will provide, by written notice to the other Party, a list of its three (3) preferred arbitrators in order of descending preference along with a description of the qualifications of each such arbitrator and any past or current relationships between the arbitrator and the Party. Each proposed arbitrator must have at least ten (10) years' experience in insuring property comparable in size and use to the Premises in California if the dispute is related to earthquake insurance. Such person must be competent, qualified by training and experience, disinterested and independent. Either Party has the right to directly contact any of the arbitrators nominated by the other Party to obtain further information about such arbitrator's qualifications or relationship to the other Party. Within thirty (30) days after delivery of the notice invoking

the provisions of this Section, the two (2) Parties will meet and mutually agree upon one (1) arbitrator from among the six (6) nominees, attempting to select the highest-ranking nominee from either list. If they cannot agree within such time then either Party, on behalf of both, may request that appointment of an arbitrator be designated by the American Arbitration Association or similar provider of professional commercial arbitration services, from the six (6) nominees. If either Party fails to provide its list of arbitrators within such twenty (20) day period, the other Party will select the highest ranking arbitrator stated on such Party's list of three (3) nominees.

(c) The scope of the arbitrator's decision under this Section will be limited to whether or not the continuation or reinstatement (as applicable) of earthquake and/or flood coverage would be considered commercially unreasonable or imprudent under a reasonable judgment standard. The appointed arbitrator will make a final, written determination within twenty (20) days of appointment. The fees of the arbitrator and any court or arbitration fees (but not Attorneys' Fees and Costs or other consulting fees incurred by either Party) will be borne equally by both Parties. The determination of the arbitrator will be conclusive and binding on both Parties.

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

For all purposes of this Lease, a Party whose performance of its obligations hereunder is hindered or affected by events of Force Majeure will not be considered in breach of or in default of its obligations hereunder to the extent of any delay resulting from Force Majeure, and the time fixed for performance of any such obligation will be extended by a period of time equal to the duration of the Force Majeure event; provided, however, that the provisions of this *Article 25* will not apply to Tenant's obligation to pay Rent, Port Share of Transfer Proceeds, or Port Share of Refinancing Proceeds. A Party seeking an extension of time pursuant to the provisions of this *Article 25* must give notice to the other Party describing with reasonable particularity the facts and circumstances constituting Force Majeure within the earlier to occur of: (a) a reasonable time (but not more than fifteen (15) days) after knowledge of the beginning of such Force Majeure event, or (b) within ten (10) days after the other Party's demand for performance.

"Force Majeure" is defined in the LDDA for the period prior to issuance of the Certificate of Completion. From and after issuance of the Certificate of Completion, "Force Majeure" means events which result in delays in a Party's performance of its obligations hereunder due to causes beyond such Party's control and not caused by the acts or omissions of such Party, including acts of nature or of the public enemy, war, invasion, insurrection, riots, any general moratorium in the issuance of governmental or regulatory permits applicable to the Premises or the Improvements, fires, floods, earthquakes, tidal waves, epidemics, quarantine, restrictions, freight embargoes, unusually severe weather (but only if such unusually severe weather causes actual delays); delays of contractors or subcontractors due to any of the foregoing causes; strikes and substantial interruption of work because of labor disputes (excluding strikes and labor disputes directly related to any contracts between a Party and its contractors or work performed on behalf of such Party); inability to obtain materials or reasonably acceptable substitute materials (provided that such Party has ordered such materials on a timely basis and such Party is not otherwise at fault for such inability to obtain materials). The following are excluded from the definition of Force Majeure (i) failure to obtain financing or failure to have adequate funds, (ii) sea level rise; and (iii) any event that does not cause an actual delay.

## **26. PORT'S RIGHT TO PAY SUMS OWED BY TENANT.**

### **26.1. Port May Pay Sums Owed by Tenant Following Tenant's Failure to Pay.**

Without limiting any other provision of this Lease, and in addition to any other rights or remedies available to Port for any Tenant Event of Default, if at any time Tenant fails to pay any sum required to be paid by Tenant pursuant to this Lease to any Person other than Port (other than any Imposition with respect to which the provisions of *Section 7.4* apply), Port may, at its

sole option, but will not be obligated to, upon five (5) days prior notice to Tenant, pay such sum for and on behalf of Tenant.

**26.2. Tenant's Obligation to Reimburse Port.** If pursuant to *Section 26.1* Port pays any sum required to be paid by Tenant hereunder, Tenant will reimburse Port as Additional Rent, the sum so paid. All such sums paid by Port is due from Tenant to Port at the time the sum is paid, and if paid by Tenant at a later date, will bear interest at the lesser of the Default Rate or the maximum non-usurious rate Port is permitted by Law to charge from the date such sum is paid by Port until Port is reimbursed by Tenant. Port's rights under this *Article 26* are in addition to its rights under any other provision of this Lease or under applicable Laws. The provisions of this *Section 26.2* will survive the expiration or earlier termination of this Lease.

## **27. TENANT EVENTS OF DEFAULT.**

The occurrence of any one or more of the following events constitutes a "Tenant Event of Default":

(a) Tenant fails to pay any Rent to Port when due, which failure continues for five (5) business days following written notice from Port; provided, however, Port will not be required to give such notice on more than two (2) occasions during any calendar year, and failure to pay any Rent thereafter when due will be deemed a Tenant Event of Default without need for further notice;

(b) So long as the LDDA is in effect, a Developer Event of Default or Unmatured Developer Event of Default (as such terms are defined in the LDDA) occurs under the LDDA and remains uncured but such Tenant Event of Default under this Lease will be deemed cured if the Developer Event of Default or Unmatured Developer Event of Default is cured pursuant thereto;

(c) Tenant abandons the Premises, within the meaning of California Civil Code Section 1951.2, which abandonment is not cured within fifteen (15) days after notice from Port of Port's belief of abandonment;

(d) The Premises are used for Prohibited Uses, as determined by Port in its reasonable discretion, and such Prohibited Use(s) continues for a period of twenty-four (24) hours following written notice from Port;

(e) Tenant fails to comply with the provisions of *Articles 10* and *11* and *Sections 22.1—22.4* and such failure continues for a period of twenty-four (24) hours following written notice from Port. If such default cannot reasonably be cured within such twenty-four (24) hour period, Tenant will not be in default of this Lease if Tenant commences to cure the default within such twenty-four (24) hour period and diligently and in good faith continues to cure the default;

(f) Tenant files a petition for relief, or an order for relief is entered against Tenant, in any case under applicable bankruptcy or insolvency Law, or any comparable Law that is now or hereafter may be in effect, whether for liquidation or reorganization, which proceedings if filed against Tenant are not dismissed or stayed within one hundred twenty (120) days;

(g) A writ of execution is levied on the Leasehold Estate which is not released within one hundred twenty (120) days, or a receiver, trustee or custodian is appointed to take custody of all or any material part of the property of Tenant, which appointment is not dismissed within one hundred twenty (120) days; provided, however, that the exercise by the most senior Mortgagee of any of its remedies under its Permitted Mortgage will not, in and of itself, constitute a default under this *Section 27(g)*;

(h) Tenant makes a general assignment for the benefit of its creditors;

(i) Tenant fails to execute and deliver to Port the estoppel certificate within the time period and in the manner required by *Section 32.1*, and Tenant's failure to cure the foregoing default within five (5) days following written notice from Port; or

(j) Tenant Transfers or Subleases, or attempts to Transfer or Sublease, this Lease or the Premises, as applicable, contrary to the provision of *Section 20*; or

(k) Without limiting the provisions of *Section 9* or lengthening the cure periods under such section, Tenant's failure to comply with Laws and Tenant's failure to cure the foregoing default within forty-eight (48) hours following written notice from Port;

(l) Without limiting the provisions of *Section 4* or lengthening the cure periods under such section, Tenant's use of the Premises or a portion of the Premises as a time-share, condominium, or residential apartment and Tenant's failure to cure the foregoing default within forty-eight (48) hours following written notice from Port;

(m) Tenant fails to maintain any insurance required to be maintained by Tenant under this Lease, which failure continues without cure for five (5) business days after written notice from Port; or

(n) Tenant violates any other covenant, or fails to perform any other obligation to be performed by Tenant under this Lease at the time such performance is due, and such violation or failure continues without cure for more than thirty (30) days after written notice from Port specifying the nature of such violation or failure, or, if such cure cannot reasonably be completed within such thirty (30) day period, if Tenant does not within such thirty (30) day period commence such cure, or having so commenced, does not prosecute such cure with diligence and dispatch to completion within a reasonable time thereafter.

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

**28.1. *Port's Remedies Generally.*** Upon the occurrence and during the continuance of a Tenant Event of Default (but without obligation on the part of Port following the occurrence of a Tenant Event of Default to accept a cure of such Tenant Event of Default other than as required by Law or by this Lease), Port has all rights and remedies provided in this Lease or available at Law or in equity (including the right to seek injunctive relief or an order for specific performance, where appropriate). All of Port's rights and remedies are cumulative, and except as may be otherwise provided by applicable Law, the exercise of any one or more rights will not preclude the exercise of any other.

### **28.2. *Right to Keep Lease in Effect.***

(a) **Continuation of Lease.** Port has the remedy described in California Civil Code Section 1951.4 (lessor may continue lease in effect after lessee's breach and abandonment and recover rent as it becomes due, if lessee has right to sublet or assign, subject only to reasonable limitations) under which Port may continue this Lease in full force and effect. In the event Port elects this remedy, Port has the right to enforce by suit or otherwise, all covenants and conditions hereof to be performed or complied with by Tenant and exercise all of Port's rights, including the right to collect Rent when due. Upon the occurrence of a Tenant Event of Default, Port may enter the Premises without terminating this Lease and relet them, or any part of them, to third parties for Tenant's account. Tenant will be liable immediately to Port for all reasonable costs Port incurs in reletting the Premises, including Attorneys' Fees and Costs, brokers' fees or commissions, expenses of remodeling the Premises required by the reletting and similar costs. Reletting can be for a period shorter or longer than the remaining Term, at such rents and on such other terms and conditions as Port determines in its sole discretion.

(b) **No Termination Without Notice.** No act by Port allowed by this *Section 28.2*, nor any appointment of a receiver upon Port's initiative to protect its interest under this Lease, nor any withholding of consent to a Transfer or termination of a Transfer in

accordance herewith, will terminate this Lease, unless and until Port notifies Tenant in writing that Port elects to terminate this Lease.

(c) **Application of Proceeds of Reletting.** If Port elects to relet the Premises as provided in *Section 28.2(a)*, the rent that Port receives from reletting will be applied to the payment of:

(i) First, all costs incurred by Port in enforcing this Lease, whether or not any action or proceeding is commenced, including Attorneys' Fees and Costs, brokers' fees or commissions, the costs of removing and storing Personal Property, costs in connection with reletting the Premises, or any portion thereof, altering, installing, modifying and constructing tenant improvements required for a new tenant, and costs of repairing, securing and maintaining the Premises or any portion thereof;

(ii) Second, the payments of any indebtedness other than Rent due hereunder from Tenant to Port;

(iii) Third, Rent due and unpaid under this Lease;

(iv) After deducting the payments referred to in this *Section 28.2(c)*, any sum remaining from the rent Port receives from reletting will be held by Port and applied to monthly installments of future Rent as such amounts become due under this Lease. In no event will Tenant be entitled to any excess rent received by Port. If on a date Rent or other amount is due under the Lease, the rent received by Port as of such date from any reletting is less than the Rent or other amount due on that date, or if any costs incurred by Port in reletting, remain after applying the rent received from such reletting, Tenant will pay to Port such deficiency. Such deficiency will be calculated and paid monthly.

(d) **Payment of Rent.** Tenant will pay to Port Rent on the dates the Rent is due, less the rent Port has received from any reletting which exceeds all costs and expenses of Port incurred in connection with a Tenant Event of Default and the reletting of all or any portion of the Premises.

**28.3. Right to Terminate Lease.** Subject to the rights under any Permitted Mortgage and the rights of Mortgagee pursuant to *Section 39.11*, Port may terminate this Lease at any time after the occurrence of (and during the continuation of) a Tenant Event of a Default by giving written notice of such termination. Termination of this Lease will thereafter occur on the date set forth in such notice. Acts of maintenance or preservation, and any appointment of a receiver upon Port's initiative to protect its interest hereunder will not in any such instance constitute a termination of Tenant's right to possession. No act by Port other than giving notice of termination to Tenant in writing will terminate this Lease. Upon termination of this Lease, Port has the right to recover from Tenant all sums allowed under California Civil Code Section 1951.2, including the following:

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

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

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

(d) Any other amount necessary to compensate Port for all detriment proximately caused by the Tenant Event of Default, or which in the ordinary course of things would be likely to result therefrom; and



“The worth at the time of award” as used in *Sections 28.3(a)* and *28.3(b)* will be computed by allowing interest at a rate per annum equal to the Default Rate. “The worth at the time of award” as used in *Section 28.3(c)* will be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award, plus one percent (1%).

**28.4. Interest.** Rent not paid when due will bear interest at the Default Rate from the date due until paid.

**28.5. No Rights to Assign or Sublet.** Upon the occurrence of a Tenant Event of Default, notwithstanding anything in *Section 20*, to the contrary, Tenant will have no right to sublet or assign its interest in the Premises or this Lease without City’s written consent, which may be given or withheld in City’s sole and absolute discretion, subject to the rights of Mortgagees as set forth in *Section 39*.

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

**28.7. Appointment of Receiver.** From and after a Tenant Event of Default, Port has the right to have a receiver appointed to collect Rent and conduct Tenant’s business. Neither the filing of a petition for the appointment of a receiver nor the appointment itself will constitute an election by Port to terminate this Lease.

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

**28.9. Remedies Not Exclusive.** The remedies set forth in this *Article 28* are not exclusive; they are cumulative and in addition to any and all other rights or remedies of Port now or later allowed by Law or in equity. Tenant’s obligations hereunder will survive any termination of this Lease.

## **29. NO WAIVER.**

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

**29.2. No Accord or Satisfaction.** No submission by Tenant or acceptance by Port of full or partial Rent or other sums during the continuance of any failure by Tenant to perform its obligations hereunder will waive any of Port’s rights or remedies hereunder or constitute an accord or satisfaction, whether or not Port had knowledge of any such failure except with respect to the Rent so paid. No endorsement or statement on any check or remittance by or for Tenant or in any communication accompanying or relating to such payment will operate as a compromise

or accord or satisfaction unless Port approves the same as such in writing. Port may accept such check, remittance or payment and retain the proceeds thereof, without prejudice to its rights to recover the balance of any Rent, including any and all Additional Rent, due from Tenant and to pursue any right or remedy provided for or permitted under this Lease at Law or in equity. No payment by Tenant of any amount claimed by Port to be due as Rent hereunder will be deemed to waive any claim which Tenant may be entitled to assert with regard to the making of such payment or the amount thereof, and all such payments will be without prejudice to any rights Tenant may have with respect thereto, whether or not such payment is identified as having been made “under protest” or “on account,” or words of similar import.

### **30. PORT EVENT OF DEFAULT; TENANT REMEDIES.**

**30.1. *Port Event of Default.*** Port will be deemed to be in default hereunder (“**Port Event of Default**”) only if Port fails to perform or comply with any obligation on its part hereunder and (i) such failure continues for more than the time of any cure period provided herein after written notice thereof from Tenant, or (ii) if no cure period is provided herein, for more than sixty (60) days after written notice thereof from Tenant (provided that, Port will use reasonable efforts to cure such default within a thirty (30) day period) after receipt of such written notice from Tenant, or (iii) if such default cannot reasonably be cured within such sixty (60) day period, Port does not within such period commence with due diligence and dispatch the curing of such default, or, having so commenced, thereafter fails or neglects to prosecute or complete with diligence and dispatch the curing of such default.

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

### **31. LIMITATION ON LIABILITY.**

**31.1. *No Recourse Beyond Value of Property.*** Notwithstanding any other term or provision of this Lease, (a) the liability of Port for its obligations under this Lease or for any claim based upon this Lease, is limited solely to the fair market value of Port’s fee interest in the Premises (as encumbered by this Lease) and (b) neither Port nor the Indemnified Parties will be liable under any circumstances for injury or damage to, or interference with Tenant’s business, including loss or profits, loss of rents or other revenues, loss of business opportunity, loss of goodwill or loss of use, in each case, however occurring.

**31.2. *Nonliability of City Officials, Employees and Agents.*** No commissioner, officer or employee of the Indemnified Parties will be personally liable to Tenant, or any successor in interest, for any Port Event of Default, and Tenant agrees that it will have no recourse with respect to any obligation of Port under this Lease, or for any amount which may become due Tenant or any successor or for any obligation or claim based upon this Lease, against any such Person.

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

**31.4. *No Liability for Consequential, Incidental or Punitive Damages.*** The Indemnified Parties will not be liable under any circumstances for any consequential, incidental, or punitive damages.

## **32. ESTOPPEL CERTIFICATES.**

**32.1. *Estoppel Certificate by Tenant.*** Tenant will execute, acknowledge and deliver to Port (or at Port's request, to a prospective purchaser, lessee, or mortgagee of Port's interest in the Premises), within thirty (30) days after request, a certificate in substantially the same form as *Exhibit S*. In addition, if requested by Port, Tenant will attach to such certificate a copy of this Lease, and any amendments thereto, and include in such certificate a statement by Tenant that such attachment is a true, correct and complete copy of this Lease, as applicable, including all modifications thereto. Port, any successor agency, and any prospective purchaser, lessee or mortgagee of the Premises or any part of Port's interest in the Premises, may rely upon any such certificate therein. Tenant also will use commercially reasonable efforts (including inserting a provision similar to this *Section 32.1* into each Sublease) to cause Subtenants under Subleases to execute, acknowledge and deliver to Port, within thirty (30) days after request, an estoppel certificate in substantially the same form as *Exhibit T* with respect to each such applicable Sublease, but Tenant will not be in default hereunder for failure of any particular Subtenant to deliver such estoppel certificate to Port.

**32.2. *Estoppel Certificate by Port.*** Subject to Port's receipt of its review costs as set forth in *Section 33.3*, Port will execute, acknowledge and deliver to Tenant (or at Tenant's request, to a prospective Mortgagee, or other prospective transferee of Tenant's interest under this Lease), within thirty (30) days after request, a certificate in substantially the same form as *Exhibit Y*. In addition, if requested, Port will attach to such certificate a copy of this Lease and any amendments thereto, and include in such certificate a statement by Port that such attachment is a true, correct and complete copy of this Lease, including all modifications thereto and if further requested, include such additional information reasonably and customarily requested by a prospective Mortgagee in such certificate. Tenant, any prospective Mortgagee, or other prospective transferee of Tenant's interest under this Lease may rely upon any such certificate.

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

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

**33.2. *Standard Otherwise Applicable.*** Except as expressly provided otherwise or when the Port is acting in its regulatory capacity, the following standards will apply to the Parties' conduct under this Lease.

(a) **Advance Writings Required.** Whenever a Party's approval or waiver is required: (i) the approval or waiver must be obtained in advance and in writing; and (ii) the Party whose approval or waiver is sought may not unreasonably withhold, condition, or delay its approval or waiver, as applicable.

(b) **Commercial Reasonableness.** Whenever a Party is permitted to make a judgment, form an opinion, judge the sufficiency of the other Party's performance, or exercise discretion in taking (or refraining from taking) any action or making any determination, that Party must employ commercially reasonable standards in doing so. In general, the Parties' conduct in implementing this Lease, including construction of Improvements, disapprovals, demands for performance, requests for additional information, and any exercise of an election or option, must be commercially reasonable.

**33.3. Fees for Review.** Unless an earlier time is set forth in this Lease for payment to Port, within ten (10) days after Port's written request, Tenant will pay Port, as Additional Rent, Port's reasonable costs, including Attorneys' Fees and Costs and costs for Port staff time, incurred in connection with the review, investigation, processing, documentation and/or approval of any proposed Transfer, Non-Disturbance Agreement, Mortgage or Refinancing, certificate, or Subsequent Construction. Tenant will pay such costs regardless of whether or not Port consents to such requested action, proposal or document.

#### **34. NO MERGER OF TITLE.**

There will be no merger of the Leasehold Estate with the fee estate in the Premises by reason of the fact that the same Person may own or hold (a) the Leasehold Estate or any interest in such Leasehold Estate, and (b) any interest in such fee estate. No such merger will occur unless and until all Persons having any interest in the Leasehold Estate and the fee estate in the Premises will join in and record a written instrument effecting such merger.

#### **35. SURRENDER OF PREMISES UPON EXPIRATION OR EARLIER TERMINATION.**

**35.1. Condition of Premises.** Upon the expiration or earlier termination of this Lease, Tenant will quit and surrender to Port the Premises (a) in good order and in clean and operable condition, reasonable wear and tear excepted to the extent the same is consistent with maintenance of the Premises in the condition required hereunder or by Tenant otherwise performing all of its obligations under this Lease; (b) clean, free of debris, waste, and Hazardous Materials (other than any Pre-Existing Hazardous Materials that have not been Handled, Released, or Exacerbated by Tenant, its Agents, or Invitees), (c) free and clear of all liens and encumbrances other than the Permitted Title Exceptions or those which are being contested in accordance with *Article 8*, (d) exclusive of any Personal Property except as provided in elsewhere in this Lease, including, without limitation in *Section 35.3*, and (e) with all Improvements, repairs, alterations, additions, substitutions and replacements thereto subject to *Sections 35.3* and *35.4*. If it is determined by Port that the condition of all or any portion of the Premises is not in compliance with the provisions of this Lease with respect to Hazardous Materials at the expiration or earlier termination of this Lease, then at Port's sole option, Port may require Tenant to hold over possession of the Premises until Tenant can surrender the Premises to Port in the condition required herein.

**35.2. Subleases and Agreements.** Upon any termination of this Lease, Port will have the right to terminate all Subleases hereunder and any and all agreements for the maintenance or operation of the Premises, including without limitation, the Management Agreement, except for those Subleases with respect to which Port has entered into Non-Disturbance Agreements as provided in *Section 20.5*, and any and all agreements for the maintenance or operation of the Premises with respect to which Port has agreed to assume pursuant to *Section 28.6*.

**35.3. Personal Property.** If a Tenant Event of Default exists at the expiration or termination of this Lease, title to the Personal Property will vest in Port without any further action by any Party, subject to the rights of a Mortgagee in such Personal Property which are

superior to the rights of Port pursuant to the terms of this Lease. If no Tenant Event of Default exists at the expiration or termination of this Lease, Tenant and all Subtenants will have the right to remove their respective trade fixtures and other Personal Property. At Port's request, Tenant will remove, at no cost to Port, any Personal Property belonging to Tenant which then remains on the Premises, including any Signs (both on and off the Premises relating to the Improvements). If the removal of such Personal Property causes damage to the Premises, Tenant will promptly repair such damage, at no cost to Port. Any Personal Property and other items not removed by Tenant as of the expiration or earlier termination of this Lease will be deemed abandoned and may be stored, removed, and disposed of by Port at Tenant's sole cost and expense, and Tenant waives all claims against Port for any Losses resulting from Port's retention, removal or disposition of such Personal Property and any other items; provided, however, that Tenant will be liable to Port for all costs incurred in storing, removing and disposing of such abandoned property or repairing any damage to the Premises resulting from such removal.

**35.4. Demolition.** Upon the expiration or termination of this Lease, upon written instructions from Port in its sole discretion, Tenant will, at Tenant's sole cost and expense, demolish the Improvements, or such portion thereof as Port will instruct, and return the Premises to Port in a clean and reasonably flat graded condition. Such demolition must be conducted in accordance with the provisions of this Lease relating to Subsequent Construction on the Premises.

**35.5. Quitclaim.** Upon the expiration or earlier termination of this Lease, the Premises will automatically, and without further act or conveyance on the part of Tenant or Port, become the property of Port, free and clear of all liens and without payment therefore by Port and will be surrendered to Port upon such date. Upon or at any time after the expiration or earlier termination of this Lease, if requested by Port, Tenant will promptly deliver to Port, without charge, a quitclaim deed to the Premises and any other instrument reasonably requested by Port to evidence or otherwise effectuate the termination of Tenant's Leasehold Estate hereunder and to effectuate such transfer or vesting of title to the Premises, the Improvements and Personal Property that Port agrees are to remain within the Premises.

**35.6. Survival.** Tenant's obligations under this *Article 35* will survive the expiration or earlier termination of this Lease.

### **36. HOLD OVER.**

Any holding over after the expiration of the Term will not constitute a renewal hereof but will be deemed a month-to-month tenancy and will be upon each and every one of the other terms, conditions and covenants of this Lease, except that Minimum Rent payable for the applicable month will be equal to one hundred fifty percent (150%) of the higher of: (i) the monthly Minimum Rent payable immediately prior to the expiration of the Term increased as if it were a Periodic 10-Year Adjustment Date in accordance with *Section 3.3*, or (ii) sixty-five percent (65%) of the average of the Percentage Rent due and payable to Port during the five (5) year period immediately prior to the expiration of the Term. Either Party may cancel said month-to-month tenancy upon thirty (30) days written notice to the other party.

### **37. NOTICES.**

#### **37.1. Notices.**

All notices, demands, consents, approvals, and requests that may or are to be given by any Party to the other will be in writing, except as otherwise provided herein. All notices, demands, consents, approvals, and requests to be provided hereunder will be deemed to have been properly given on the date of receipt if served personally on a day that is a business day (or on the next business day if served personally on a day that is not a business day) or if mailed, the next business day after being deposited with an overnight courier or two business days after

being deposited with the U.S. Postal Service (as evidenced by a postmark date), postage prepaid, in each case, addressed as follows:

To Port: Port of San Francisco  
(Reference: Teatro/Hotel)  
Pier 1  
San Francisco, CA 94111  
Attention: Director of Real Estate  
Telephone: (415) 274-0400

with a copy to: Port General Counsel  
(Reference: Teatro/Hotel)  
Pier 1  
San Francisco, CA 94111  
Telephone: (415) 274-0400

To Tenant:  
  
TZK Broadway, LLC  
1215 K Street, Suite 1150  
Sacramento, CA 95814  
Attn: Darius Anderson, Manager  
Telephone: (916) 443-8891

PresidioCo Bay Area LLC  
631 Folsom Street, 11F  
San Francisco, CA 94107  
Attn: Rikesh Patel, Manager  
Telephone: (415) 264-7298

TZZ San Francisco, LLC  
14200 NE 145<sup>th</sup> Street  
Woodinville, WA 98072  
Attn: Norm Langill, Manager  
Telephone: (206) 802-0015

or at such other place or places in the United States as each such Party may from time to time designate by written notice to the other in accordance with the provisions hereof. For convenience of the Parties, copies of notices also may be given by telefacsimile to the telefacsimile (fax) number set forth above or such other number as may be provided from time to time by notice given in the manner required hereunder; however, neither Party may give official or binding notice by telefacsimile.

**37.2. Form and Effect of Notice.**

Every notice given to a Party or other Person must state (or will be accompanied by a cover letter that states):

(a) The section of this Lease pursuant to which the notice is given and the action or response required, if any;

(b) If applicable, the period of time within which the recipient of the notice must respond thereto; and

(c) If applicable, that the failure to object to the notice within a stated time period will be deemed to be the equivalent of the recipient's approval of or consent to the subject matter of the notice.

In no event will recipient's approval of or consent to the subject matter of a notice be deemed to have been given by its failure to object thereto if such notice (or the accompanying cover letter) does not comply with the requirements of this *Section 37.2*.

### **38. ACCESS TO THE PREMISES.**

**38.1. *Entry by Port.*** Tenant must permit Port and its Agents to enter the Premises during regular business hours upon reasonable prior notice (and at any time and without notice in the event of an emergency) for the purpose of (i) inspecting the same for compliance with any of the provisions of this Lease, (ii) inspecting the construction of the Improvements for compliance with the provisions of the LDDA (if in effect), (iii) performing any work on the Premises that Port has right to perform, or (iv) inspecting, sampling, testing, surveying, or monitoring the Premises or any portion thereof, including the Improvements, grounds, and subsurface areas, as Port reasonably deems necessary or appropriate for evaluation of Hazardous Materials, or other physical, geotechnical, or environmental conditions. Nothing herein implies any duty on the part of Port to conduct inspections, but such right of inspection does not relieve Tenant of its independent responsibility to operate, manage, maintain, and repair the Premises and Improvements in accordance with this Lease. Additionally, Port's failure to inspect or obtain samples or to detect conditions attributable to Tenant's operations if an inspection is conducted may not be deemed to be a release of any liability for any Hazardous Materials subsequently determined to be Tenant's responsibility under this Lease.

Nothing herein implies any duty on the part of Port to perform any work that Tenant is required to perform, nor to place upon Port any obligation or liability for the care, supervision or repair of the Premises; provided, however, Port will use commercially reasonable efforts to minimize interference with the activities of Tenant, its Subtenants and their respective Invitees during any inspection. If Port elects to perform work on the Premises pursuant to this *Article 38*, Port will not be liable for inconvenience, loss of business or other damage to Tenant or its Subtenants and their respective Invitees by reason of the performance of such work on the Premises, or on account of bringing necessary materials, supplies and equipment into or through the Premises during the course thereof, provided that Port uses commercially reasonable diligence to minimize the interference that any such work may cause to the activities of Tenant, its Subtenants, or their respective Invitees.

Tenant will permit Port and its Agents to enter the Premises during regular business hours upon reasonable prior notice (i) to exhibit the same in a reasonable manner in connection with any sale, transfer or other conveyance of Port's interest in the Premises, and (ii) during the last eighteen (18) months of the Term for the purpose of leasing the Premises and showing the same to prospective tenants.

**38.2. *Notice, Right to Accompany.*** Port agrees to give Tenant at least twenty-four (24) hours prior notice of Port's entering on the Premises, except in an emergency, for the purposes set forth in *Section 38.1*. Tenant has the right to have a representative of Tenant accompany Port or its Agents on any entry into the Premises. Notwithstanding the foregoing, no notice is required for Port's entry onto Public Access Areas or other public areas of the Premises during hours such areas are open.

### **39. LEASEHOLD MORTGAGE.**

**[Note: Additional changes may be required if there is PACE financing for construction of the Project]**

#### **39.1. *No Mortgage Except as Set Forth Herein.***

(a) **Restrictions on Financing.** Except as expressly permitted in this *Article 39*, Tenant cannot:

(i) Engage in any financing or other transaction creating any mortgage, deed of trust or similar security interest upon Tenant's Leasehold Estate or Tenant's interest in the Improvements; or

(ii) Place or suffer to be placed upon Tenant's Leasehold Estate or interest in the Improvements hereunder, any lien or other encumbrance other than as permitted by *Section 18.1*; or

(iii) Assign, mortgage, or encumber Tenant's Leasehold Estate by way of any Mortgage without Port's prior consent, which consent may be withheld in its sole and absolute discretion, if (i) the loan secured by the Mortgage is cross-collateralized with any other debt of Tenant or Tenant Affiliate, or (ii) the loan secured by the Mortgage is cross-defaulted against any other debt of Tenant or Tenant Affiliate.

(b) **No Subordination of Fee Interest or Rent.** Under no circumstance whatsoever will Tenant place or suffer to be placed any lien or encumbrance on Port's fee interest in the Premises in connection with any financing permitted hereunder, or otherwise. Port will not subordinate its interest in the Premises nor its right to receive Rent to any Mortgagee.

(c) **Violation of Covenant.** Any mortgage, deed of trust, encumbrance or lien not permitted by this *Article 39* will be deemed to be a violation of this covenant on the date of its execution or filing of record regardless of whether or when it is foreclosed or otherwise enforced.

### ***39.2. Leasehold Liens; Tenant's Obligation to Obtain Additional Financing.***

(a) **Tenant's Right to Mortgage Leasehold.** Subject to *Section 39.1(a)* and receipt by Port of the Port Share of Refinancing Proceeds in accordance with *Sections 3.7* and *39.7*, Tenant has the right to assign, mortgage, or encumber Tenant's Leasehold Estate by way of Mortgage(s) to the extent permitted in accordance with this *Article 39*.

(b) **Leasehold Mortgages Subject to this Lease.** With the exception of the rights expressly granted to Mortgagees in this Lease or pursuant to any direct agreement between Port and any Mortgagee, the execution and delivery of a Mortgage will not give or be deemed to give a Mortgagee any greater rights than those granted to Tenant hereunder.

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

***39.3. Notice of Liens.*** Tenant will notify Port promptly of any lien or encumbrance, other than the Permitted Title Exceptions, of which Tenant has knowledge and which has been recorded against or attached to the Improvements or Tenant's Leasehold Estate hereunder whether by act of Tenant or otherwise.

### ***39.4. Purpose of Mortgage.***

(a) **Purpose.** A Mortgage may be granted only for the purposes of financing construction of the Initial Improvements (including Hard Costs and Soft Costs), any permanent take-out financing, Refinancing, Capital Improvements, acquisition, repair or replacement of Personal Property throughout the Hotel in connection with a significant upgrade or renovation of the Hotel, or any Subsequent Construction, funding any Mortgagee required Reserve Accounts, and reducing any outstanding Tenant equity used to fund any of the foregoing. With respect to any issuance of corporate debt or other securitized financings, Tenant is not permitted to create any structure that would create an obligation or security of Port.

(b) **Certain Assurances.** Subject to Port's receipt of its (i) review costs as set forth in *Section 33.3* and (ii) Port Share of Refinancing Proceeds in accordance with *Sections 3.7*



and **39.7**, Port agrees to give to any holder or proposed holder of a Mortgage a statement as to whether such Mortgage is permitted hereunder to secure all of the advances and indebtedness stated by the terms of the applicable financing documents (“**Mortgage Confirmation Statement**”). Except as set forth in the Mortgage Confirmation Statement, the Mortgage Confirmation Statement will estop Port from asserting, against either Tenant or such prospective Mortgagee, that such Mortgage (if done in the way described in the Mortgage Confirmation Statement) is not permitted hereunder, but will not create any liability on Port, and will conclusively establish that such Mortgage is permitted hereunder and does not constitute by itself, a default by Tenant. Port will deliver to Tenant the Mortgage Confirmation Statement or notify Tenant of Port’s disapproval of the proposed Mortgage (and its reasons for such disapproval) within thirty (30) days following receipt by Port of (i) true, accurate, and complete copies of the financing documents as reasonably requested by Port to permit Port to make the determination whether such Mortgage is permitted hereby and (ii) Port’s Attorneys’ Fees and Costs incurred, including Port staff time spent, in connection with reviewing the financing documents and preparing the Mortgage Confirmation Statement. In no event, however, will any failure by Tenant or other party to comply with the terms of any Mortgage, including without limitation the use of any proceeds of any debt, the repayment of which secured by a Mortgage, be deemed to invalidate the lien of a Mortgage.

**39.5. Interest Covered by Mortgage.** A Permitted Mortgage may attach to any or all of the following interests: (i) Tenant’s Leasehold Estate in the Premises and Tenant’s interest in the Improvements (or some portion thereof), (ii) Tenant’s interest in any permitted Subleases, (iii) any Personal Property, (iv) products and proceeds of the foregoing, and (v) any other rights and interests of Tenant arising under this Lease. As provided in **Section 39.1(b)** no Mortgage may encumber Port’s interest in or under this Lease or Port’s fee simple interest in the Premises or Port’s personal and other property in, on or around the Premises.

**39.6. Bona Fide Institutional Lender; Other Permitted Mortgagees.** A Mortgage may be given only to a Bona Fide Institutional Lender or any other lender approved by Port in its sole and absolute discretion.

**39.7. Port Participation in Refinance Proceeds.** In accordance with **Section 3.7**, but subject to **Section 39.11**, Tenant and all subsequent assignees will pay to Port, Port Share of Refinancing Proceeds, if any, from the close of escrow for each Refinancing that occurs during the Term.

**39.8. Rights Subject to Lease.**

(a) **Subject to Lease.** Except as otherwise expressly provided herein, all rights acquired by a Mortgagee under any Mortgage is subject to each and all of the covenants, conditions and restrictions set forth in this Lease, the LDDA (if in effect), and to all rights of Port hereunder. None of such covenants, conditions and restrictions is or will be waived by Port by reason of the giving of such Mortgage, except as expressly provided in this Lease or otherwise specifically waived by Port in writing.

(b) **Construction and Restoration Obligations.** Notwithstanding anything to the contrary contained in this Lease, no Mortgagee, including any such Mortgagee who obtains title to the Leasehold Estate or any part thereof as a result of foreclosure proceedings or action in lieu thereof but excluding (i) any other Person who thereafter obtains title to the Leasehold Estate or any part thereof from or through such Mortgagee, or (ii) any other purchaser at a foreclosure sale (other than such Mortgagee), is obligated by the provisions of the LDDA (if still in effect) or this Lease to complete or Restore any damage or destruction to the Improvements, as applicable; provided, however, (A) nothing in this Section or any other provision of this Lease will be deemed or construed to permit or authorize any such Mortgagee to devote the Premises or any part thereof to any uses other than the Permitted Uses or to construct any improvements thereon other than the Improvements provided or authorized in the LDDA or in this Lease, as hereafter amended or extended from time to time, and (B) in the event

that Mortgagee obtains title to the Leasehold Estate and chooses not to complete or to Restore any Improvements, it will so notify Port in writing of its election within ninety (90) days following its acquisition of the Leasehold Estate and will sell its Leasehold Estate with reasonable diligence to a purchaser that will be obligated to complete or Restore the Improvements, but in any event Mortgagee will use good faith efforts to cause such sale to occur within one (1) year following Mortgagee's written notice to Port of its election not to complete or Restore the Improvements (the "Sale Period"). If Mortgagee fails to sell its tenancy interest within the Sale Period, such failure will not constitute a default hereunder but Mortgagee will be obligated to complete the Initial Improvements or Restore the Improvements, as applicable. In the event Mortgagee agrees to complete or Restore the Improvements, all such work will be performed in accordance with all the of requirements set forth in the LDDA with respect to the construction of the Initial Improvements or this Lease with respect to Restoration of the Improvements, and Mortgagee must submit evidence reasonably satisfactory to Port that it has the qualifications and financial responsibility necessary to perform such obligations.

**39.9. Required Provisions in Every Mortgage.** Tenant agrees to have each Mortgage provide: (a) that the Mortgagee will by registered or certified mail give written notice to Port of the occurrence of any event of default under the Mortgage; (b) that Port will be given notice at the time such Mortgagee initiates any foreclosure action; and (c) that the disposition and application of insurance and condemnation awards will be consistent with the provisions of this Lease. Notices to Port must be delivered to the address set forth in *Article 37*.

**39.10. Notices to Mortgagee.**

(a) **Copies of Notices.** Whenever Port delivers any notice or demand to Tenant for any Tenant Event of Default, Port will at the same time forward a copy of such notice or demand to each Mortgagee having a Mortgage on the Premises who has previously made a written request to Port for a copy of any such notices in accordance with *Section 39.10(b)*. Port's notice will be sent to the address specified by such Mortgagee in its most recent notice to Port. A delay or failure by Port to provide such notice required by this *Section 39.10(a)* will extend, for the number of days until notice is given, the time allowed to Mortgagee for cure.

(b) **Notice From Mortgagee to Port.** Each Mortgagee is entitled to receive notices from time to time given to Tenant by Port under this Lease in accordance with *Section 39.10(a)* provided such Mortgagee has delivered a notice to Port in substantially the following form:

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

If Mortgagee desires to have Port acknowledge receipt of Mortgagee's name and address delivered to Port pursuant to this *Section 39.10(b)*, then such request must be made in bold, underlined and in capitalized letters.

**39.11. Mortgagee's Right to Cure.** If Tenant mortgages this Lease in compliance with the provisions hereof, then, so long as any such Mortgage remains unsatisfied of record, the following provisions will apply:

(a) **Cure Periods.** Each Mortgagee has the right, but not the obligation, at any time prior to termination of this Lease, to pay the Rents due hereunder, to effect any insurance, to pay taxes or assessments, to make any repairs or improvements, to do any other act or thing required of Tenant hereunder, and to do any act or thing which may be necessary and

proper to be done in the performance and observance of the agreements, covenants and conditions hereof to prevent termination of this Lease; provided that all such acts must be performed in compliance with the terms of this Lease. Except after Mortgagee acquires Tenant's interest under this Lease, no such action will constitute an assumption by such Mortgagee of the obligations of Tenant under this Lease. Subject to compliance with the applicable terms of this Lease, each Mortgagee and its agents and contractors will have full access to the Premises for purposes of accomplishing any of the foregoing. Any of the foregoing done by any Mortgagee will be as effective to comply with Tenant's obligations under this Lease, to cure a default by Tenant under this Lease or a Tenant Event of Default, or to prevent a termination of this Lease, each as the same would have been if done by Tenant. In the case of any notice of default given by Port to Tenant and/or Mortgagee in accordance with **Section 39.10**, Mortgagee has the same concurrent cure periods as are given to Tenant under this Lease for remedying a default or causing it to be remedied, plus, in each case, an additional period of fifteen (15) days for monetary defaults and forty-five (45) days for non-monetary defaults after the later to occur of (i) the expiration of Tenant's cure period, or (ii) the date that Port has served such notice of default upon Mortgagee. Port will accept such performance by or at the instance of Mortgagee as if the same had been done by Tenant. If such non-monetary default cannot reasonably be cured or remedied within such additional forty-five (45) day period, such cure period will be extended at Mortgagee's request so long as Mortgagee commences the cure or remedy within such period, and prosecutes the completion thereof with diligence and dispatch, subject to Force Majeure, or if such default cannot be reasonably be cured or remedied by Mortgagee within such forty-five (45) day period without obtaining possession of the Premises (if possession is required to cure or remedy) the cure period will be extended so long as Mortgagee is diligently seeking to obtain possession and thereafter commences the cure or remedy within such period as is reasonable.

**(b) Foreclosure.** Notwithstanding anything contained in this Lease to the contrary, upon the occurrence of a Tenant Event of Default, other than a Tenant Event of Default due to a default in the payment of money or other default reasonably susceptible of being cured prior to a Mortgagee obtaining possession, Port will take no action to effect a termination of this Lease if, within forty-five (45) days after notice of such Tenant Event of Default is given to each Mortgagee, a Mortgagee has (i) obtained possession of the Premises (including possession by a receiver), or (ii) notified Port of its intention to institute foreclosure proceedings (or to commence actions to obtain possession of the Premises through appointment of a receiver or otherwise) or otherwise acquire Tenant's interest under this Lease, and thereafter promptly commences and prosecutes such proceedings with diligence and dispatch subject to normal and customary postponements and compliance with any judicial orders relating to the timing of or the right to conduct such proceedings. The period from the date Mortgagee so notifies Port until a Mortgagee acquires and succeeds to the interest of Tenant under this Lease or some other party acquires such interest through Foreclosure is herein called the "**Foreclosure Period.**" A Mortgagee, upon acquiring Tenant's interest in this Lease, will be required promptly to cure all monetary defaults and all other defaults then reasonably susceptible of being cured by such Mortgagee to the extent not cured prior to the completion of foreclosure proceedings. The foregoing provisions of this **Section 39.11(b)** are subject to the following: (A) no Mortgagee will be obligated to continue possession or to continue foreclosure proceedings after a Tenant Event of Default is cured (and Port will accept such cure or performance of such obligation by any party, including Tenant); (B) nothing herein contained will preclude Port, subject to the provisions of this **Section 39.11(b)**, from exercising any rights or remedies under this Lease (other than a termination of this Lease to the extent otherwise permitted hereunder) with respect to any other Tenant Events of Default during the pendency of such foreclosure proceedings; and (C) such Mortgagee will agree with Port in writing to comply during the Foreclosure Period with the terms, conditions and covenants of this Lease as are reasonably susceptible of being complied with by Mortgagee, including the payment of all sums due and owing hereunder and the use restrictions set forth in **Section 4.2**. Notwithstanding anything to the contrary, including

an agreement by Mortgagee given under clause (C) of the preceding sentence, Mortgagee will have the right at any time to notify Port that it has relinquished possession of the Premises to Tenant or that it will not institute foreclosure proceedings or, if such foreclosure proceedings have commenced, that it has discontinued them, and, in such event, Mortgagee will have no further liability under such agreement from and after the date it delivers such notice to Port, and, thereupon, Port will be entitled to seek the termination of this Lease (unless such Tenant Event of Default has been cured) and/or any other available remedy as provided in this Lease. Upon any such termination, the provisions of **Section 39.11(d)** will apply. If Mortgagee is prohibited by any process or injunction issued by any court having jurisdiction of any bankruptcy or insolvency proceedings involving Tenant from commencing or prosecuting foreclosure or other appropriate proceedings in the nature thereof, the times specified above for commencing or prosecuting such foreclosure or other proceedings will be extended for the period of such prohibition, provided that Mortgagee will (x) have fully cured any Tenant Event of Default due to a default in the payment of money, (y) continue to pay currently such Rent as and when the same become due, and (z) perform all other obligations of Tenant under this Lease to the extent that such obligations are reasonably susceptible of being performed by Mortgagee, including at any time Mortgagee is in possession of the Premises (which Mortgagee will be obligated to use reasonable efforts to obtain), the use restrictions set forth in **Section 4.2**, the operating covenants set forth in **Section 10.1**, and the maintenance and repair obligations set forth in **Section 11.1**.

(c) **Construction.**

(i) Subject to **Section 39.8(b)**, if a Tenant Event of Default occurs following any damage or destruction but prior to completion of the Initial Improvements or Restoration of the Improvements, as applicable, each Mortgagee, either before or after foreclosure or action in lieu thereof, will not be obligated to complete the Initial Improvements or Restore the Improvements, as applicable, beyond the extent necessary to preserve or protect the Improvements already made, to remove any debris and to perform other reasonable measures to protect the public, unless such Mortgagee expressly assumes Tenant's obligations to complete the Initial Improvements or Restore the Improvements, as applicable, in accordance with this Lease, by written agreement reasonably satisfactory to Port and submits evidence satisfactory to Port that it has the qualifications and financial responsibility necessary to perform such obligation.

(ii) Upon assuming Tenant's obligation to complete the Initial Improvements or Restore the Improvements, as applicable, in accordance with **Section 39.11(c)(i)**, Mortgagee or any transferee of Mortgagee will not be required to adhere to the existing construction schedule, but instead all dates set forth in the LDDA for the Initial Improvements, if applicable, or this Lease for such Restoration will be extended for the period of delay from the date Tenant stopped work on the Restoration, to the date of such assumption plus an additional one hundred twenty (120) days or otherwise agreed to period.

(d) **New Lease.** In the event this Lease is terminated prior to the Expiration Date, except by Major Casualty during the last ten (10) years of the Term, an event of Uninsured Casualty, or Total Condemnation, Port will deliver to each Mortgagee who has previously made a written request to Port for a copy of any such notices in accordance with **Section 39.10(b)** written notice that this Lease has been terminated, together with a statement of any and all sums which would at that time be due under this Lease but for such termination, and of all other defaults, if any, under this Lease then known to Port. Each Mortgagee will thereupon have the option to obtain a new lease of the Premises ("**New Lease**"), which option must be exercised by written notice to Port within thirty (30) days after service of such notice that this Lease has been terminated, in accordance with and upon the following terms and conditions:

(i) Port will enter into a New Lease with the most senior Mortgagee giving notice within such thirty (30)-day period, subject to the provisions set forth in this

**Section 39.11(d)** and provided that such Mortgagee assumes Tenant's obligations as sublandlord under any Subleases then in effect; and

(ii) The New Lease will be effective as of the date of termination of this Lease, will be for the remainder of the Term, and at the Rent and upon all the agreements, terms, covenants and conditions hereof, in substantially the same form as this Lease, except for:

(1) Any requirements or conditions which Tenant has satisfied prior to the termination of this Lease;

(2) Any new or amended ordinances or policies adopted by Port or the City applicable to real property leases; and

(3) The concept of Second-Tier IRR Threshold and Actual Equity Capital Invested will be deleted in the New Lease. The concept of First-Tier IRR Threshold will be revised so that Mortgagee, as the new tenant, will earn a return in accordance with this **Section 39.11(d)(ii)(3)** on the Eligible Amount at an annual rate equal to the Loan Rate. "Eligible Amount" means the outstanding amount of principal and unpaid interest owed to Mortgagee pursuant to the loan documents that was secured by the Permitted Mortgage on the immediately prior leasehold estate less any amounts received by Mortgagee from any guarantor of such loan; provided, however, "Eligible Amount" does not include any late charges, penalties or other fees, charges or costs owed Mortgagee, including foreclosure costs and Attorneys' Fees and Costs. "Loan Rate" means the lesser of the annual interest rate due under the loan documents secured by the Permitted Mortgage on the immediately prior leasehold estate or the 20% IRR or 16% IRR applicable for the First Tier IRR Threshold under such immediately prior lease.

(iii) Mortgagee will also pay for Port's reasonable Attorneys' Fees and Costs for negotiating and documenting the New Lease with Mortgagee. The New Lease will have the same priority as this Lease. Such New Lease will require the Mortgagee to perform any unfulfilled monetary obligation of Tenant under this Lease that would, at the time of the execution of the New Lease, be due under this Lease if this Lease had not been terminated and to perform as soon as reasonably practicable any unfulfilled non-monetary obligation which is reasonably susceptible of being performed by such Mortgagee. Construction of the Initial Improvements and Restoration of the Improvements will be deemed to be an obligation susceptible of being performed by Mortgagee. Upon the execution of the New Lease, Mortgagee will pay to Port any and all sums which would at the time of the execution thereof be due under this Lease but for such termination, and will pay all expenses, including Attorneys' Fees and Costs incurred by Port in connection with such defaults and termination, the recovery of possession of the Premises, and the preparation, execution and delivery of the New Lease. The provisions of this **Section 39.11(d)** will survive any termination of this Lease (except as otherwise expressly set out in the first sentence of this **Section 39.11(d)**), and will constitute a separate agreement by Port for the benefit of and enforceable by Mortgagee.

(e) **Nominee.** The rights of Mortgagee under this **Section 39.11** may be exercised by or through its nominee or designee (other than Tenant) which is an Affiliate of Mortgagee; provided, however, no Mortgagee will acquire title to the Lease through a nominee or designee which is not a Person otherwise permitted to become Tenant hereunder; provided, further that a Mortgagee may acquire title to the Lease through a wholly owned (directly or indirectly) subsidiary of Mortgagee.

(f) **Subleases.** Effective upon the commencement of the term of any New Lease executed pursuant to **Section 39.11(d)**, any Sublease then in effect will be assigned and transferred without recourse by Port to Mortgagee. Between the date of termination of this Lease and commencement of the term of the New Lease, so long as Mortgagee enters into a New Lease, Port will not (1) enter into any new subleases, management agreements or agreements for the maintenance of the Premises or the supplies therefor which would be binding upon Mortgagee, (2) cancel or materially modify any of the existing subleases, management

agreements or agreements for the maintenance of the Premises or the supplies therefor or any other agreements affecting the Premises, or (3) accept any cancellation, termination or surrender of any of the above without the written consent of Mortgagee, which consent will not be unreasonably withheld or delayed. Effective upon the commencement of the term of the New Lease, if permitted by Law or Port holds title to the Personal Property within the Premises, Port will also transfer to Mortgagee, its designee or nominee (other than Tenant), without recourse, such Personal Property within the Premises.

(g) **Limited to Permitted Mortgagees.** Anything herein contained to the contrary notwithstanding, the provisions of this *Article 39* will inure only to the benefit of the holders of Permitted Mortgagees.

(h) **Consent of Mortgagee.** No material modification, termination or cancellation of this Lease will be effective against the most senior Mortgagee unless a copy of the proposed material modification, termination or cancellation has been delivered to such Mortgagee and such Mortgagee has approved the material modification, termination or cancellation in writing, which approval will not be unreasonably withheld, conditioned, or delayed. Any Mortgagee having such approval rights will either approve or disapprove the proposed modification, termination, or cancellation, as applicable, with specified reasons for any disapproval together with reasonable requirements that if satisfied would obtain such Mortgagee's approval, in writing, within thirty (30) days after delivery of a copy thereof. The most senior Mortgagee's failure to deliver an approval or disapproval notice within ten (10) days after it receives a second written notice after the applicable time period will be deemed such Mortgagee's approval of the proposed modification, termination, or cancellation. No merger of this Lease and the fee estate in the Premises will occur on account of the acquisition by the same or related parties of the Leasehold Estate created by this Lease and the fee estate in the Premises without the prior written consent of Mortgagee.

(i) **Limitation on Liability of Mortgagee.** Anything contained in this Lease to the contrary notwithstanding, no Mortgagee, or its designee or nominee, will become liable under the provisions of this Lease, unless and until such time as it becomes the owner of the Leasehold Estate created hereby, and then only for so long as it remains the owner of the Leasehold Estate and only with respect to the obligations arising during such period of ownership. If a Mortgagee becomes the owner of the Leasehold Estate under this Lease or under a New Lease, (i) except to the extent further limited by other provisions hereof or as otherwise set forth in *Section 39.8(b)* and *39.11(c)*, such Mortgagee will be liable to Port for the obligations of Tenant hereunder only to the extent such obligations arise during the period that such Mortgagee remains the owner of the Leasehold Estate under this Lease or under a New Lease, as applicable, and (ii) in no event will Mortgagee have personal liability under this Lease or New Lease, as applicable, greater than Mortgagee's interest in this Lease or such New Lease, and Port will have no recourse against Mortgagee's assets other than its interest herein or therein.

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

(k) **Further Assurances.** Port, through its Executive Director, and Tenant will cooperate in including in this Lease by suitable written amendment from time to time any provision which may be reasonably requested by the most senior Mortgagee to implement the provisions and intent of this *Article 39*, provided, however, that any such amendment will not adversely affect any of Port's rights and remedies under this Lease and Tenant will reimburse Port for all of Port's costs related to reviewing, negotiating and executing any such amendment.

(l) **Default under Permitted Mortgage.** In no event will the occurrence of a default under a Permitted Mortgage, in and of itself, (i) constitute a default under this Lease or the LDDA, or (ii) entitle the Port to exercise any of its rights or remedies under the Lease or the LDDA.

(m) **Disposition of Insurance Proceeds.** Notwithstanding anything contained herein, the terms and conditions of the most senior Permitted Mortgage loan documents will control and govern the disposition of any insurance proceeds.

**39.12. Assignment by Mortgagee.** Foreclosure of any Mortgage, or any sale thereunder, whether by judicial proceedings or by virtue of any power contained in the Mortgage, or any conveyance of the Leasehold Estate hereunder from Tenant to any Mortgagee or its nominee or designee through, or in lieu of, foreclosure or other appropriate proceedings, will not require the consent of Port or constitute a breach of any provision of or a default under this Lease, and upon such foreclosure, sale or conveyance Port will recognize Mortgagee or other transferee in connection therewith as tenant hereunder. The right of Mortgagee's transferee (but not the right of Mortgagee) to assign or transfer this Lease or such New Lease will be subject to the restrictions of *Article 20*. In addition, the provisions of *Sections 3.6 and 20.2*, will apply only if there are Additional Foreclosure Proceeds. "Additional Foreclosure Proceeds" means the amount of proceeds received by Mortgagee in a foreclosure proceeding that exceed all amounts owed to Mortgagee under the applicable loan documents. If there are Additional Foreclosure Proceeds, Port will be paid at the time closing of such foreclosure proceeding twenty percent (20%) of the Additional Foreclosure Proceeds. In the event Mortgagee subsequently Transfers its interest under this Lease after acquiring the same by foreclosure or deed in lieu of foreclosure or subsequently Transfers its interest under any New Lease and in connection with any such Transfer, Mortgagee takes back a mortgage or deed of trust encumbering such Leasehold Estate to secure a portion of the purchase price given to Mortgagee for such Transfer, then such mortgage or deed of trust will be considered a Permitted Mortgage, and Mortgagee will be entitled to receive the benefit and enforce the provisions of this *Article 39* and any other provisions of this Lease intended for the benefit of Mortgagees who holds a Permitted Mortgage.

**39.13. Transfer of Mortgage.** Port hereby consents to a Transfer by Mortgagee, absolutely or as collateral security for performance of its obligations, of its Mortgage or any interest therein, provided such transfer is to a Bona Fide Institutional Lender (including any securitization of the Mortgage) and otherwise satisfies the requirements of this Lease, and in the event of any such Transfer the new holder or pledgee of the Mortgage will have all the rights of its predecessor Mortgagee hereunder until such time as the Mortgage is further transferred or released from the Leasehold Estate.

**39.14. Appointment of Receiver.** In the event of any default under a Mortgage, the holder of the Mortgage is entitled to have a receiver appointed, irrespective of whether such Mortgagee accelerates the maturity of all indebtedness secured by its Mortgage.

#### **40. NO JOINT VENTURE.**

Nothing contained in this Lease will be deemed or construed as creating a partnership or joint venture between Port and Tenant or between Port and any other Person, or cause Port to be responsible in any way for the debts or obligations of Tenant or any other Person. The subject of this Lease is a lease with neither Party acting as the Agent of the other Party in any respect except as may be expressly provided for in this Lease.

#### **41. ECONOMIC ACCESS.**

It is the policy of the City and County of San Francisco to act to give effect to the rights of every inhabitant of the City and County to equal economic, political and educational opportunity. Pursuant to the policy, Tenant will comply with the Equal Opportunity Program and the [First Source Hiring Agreement dated XXXXX attached hereto as *Exhibit Z* ("Equal Opportunity Program").] The Equal Opportunity Program is designed to afford opportunities for

San Francisco residents to participate in the construction and operation of the Project. Tenant will comply with such Equal Opportunity Program, with respect to the operation and leasing of the Premises, and will include such applicable provisions in its Subleases in accordance with the Equal Opportunity Program. **[Note: This section may be revised based on agreed format related to First Source Hiring, Local Hire, LBE, etc.]**

#### **42. REPRESENTATIONS AND WARRANTIES.**

Tenant represents, warrants and covenants to Port as follows, as of the date hereof and as of the Commencement Date:

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

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

(c) **No Limitation on Ability to Perform.** Neither Tenant's articles of organization or operating agreement, nor any applicable Law, prohibit Tenant's entry into this Lease 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 Lease by Tenant and Tenant'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 Tenant, and Tenant has not received notice of the filing of any pending suit or proceedings against Tenant before any court, Regulatory Agency, or arbitrator, which might materially adversely affect the enforceability of this Lease or the business, operations, assets or condition of Tenant.

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

(e) **Defaults.** The execution, delivery and performance of this Lease (i) do not and will not violate or result in a violation of, contravene or conflict with, or constitute a default by Tenant under (1) any agreement, document or instrument to which Tenant is a party or by which Tenant is bound, (2) any Law applicable to Tenant or its business, or (3) the articles of organization or the operating agreement of Tenant, and (ii) do not result in the creation or imposition of any lien or other encumbrance upon the assets of Tenant, except as contemplated hereby.

(f) **Financial Matters.** Tenant is not in default under, and has not received notice asserting that it is in default under, any agreement for borrowed money, Tenant 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 Tenant's ability to meet its Lease obligations hereunder, and to the best of Tenant's knowledge, no involuntary petition naming Tenant 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 Lease.

#### **43. SPECIAL CITY AND PORT PROVISIONS.**

Tenant has reviewed, understands, and is ready, willing, and able to comply with the terms of this *Article 43*, which summarizes additional City and Port requirements as of the Effective Date, each of which is incorporated by reference as if fully stated in this Lease. Tenant



acknowledges that City and Port requirements in effect when Transaction Documents are executed will be incorporated into the Transaction Documents as applicable, and will apply to all contractors, subcontractors, subtenants, and any other Tenant parties, as applicable. The following summary is for Tenant's convenience only; Tenant 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](http://www.sfgov.org). References to specific laws in this **Article 43** refer to San Francisco municipal codes unless specified otherwise. Capitalized or other terms used in this **Article 43** and not defined in this Lease will have the meanings ascribed to them in the cited ordinance.

**43.1. Non-Discrimination in City Contracts and Benefits Ordinance.**

(a) **Covenant Not to Discriminate.** In the performance of this Lease, Tenant covenants and agrees not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), weight, height, association with members of classes protected under Chapter 12B or 12C of the Administrative Code or in retaliation for opposition to any practices forbidden under Chapter 12B or 12C of the Administrative Code against any employee of Tenant or any City and County employee working with Tenant, any applicant for employment with Tenant, or any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by Tenant in the City and County of San Francisco.

(b) **Subleases and Other Contracts.** Tenant will include in all Subleases and other contracts relating to the Premises a non-discrimination clause applicable to such Subtenant or other contractor in substantially the form of **Section 43.1(a)**. In addition, Tenant will incorporate by reference in all Subleases and other contracts the provisions of Sections 12B.2 (a), 12B.2 (c)-(k) and 12C.3 of the Administrative Code and will require all subtenants and other contractors to comply with such provisions.

(c) **Non-Discrimination in Benefits.** Tenant represents that it does not as of the date of this Lease and will not during the Term, in any of its operations in San Francisco or where the work is being performed for the City, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits (collectively "**Core Benefits**") as well as any benefits other than the Core Benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local Law authorizing such registration, subject to the conditions set forth in Section 12B.2 of the Administrative Code.

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

(e) **Penalties.** Tenant understands that pursuant to Section 12B.2(h) of the Administrative Code, a penalty of \$50.00 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Lease may be assessed against Tenant and/or deducted from any payments due Tenant.

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

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

(b) Notwithstanding the above, if Tenant meets the requirements of a “**small business**” by the City pursuant to Section 12Q.3(d) of the HCAO, it will have no obligation to comply with *Section 43.2(a)*.

(c) If, within 30 days after receiving written notice of a breach of this Lease for violating the HCAO, Tenant fails to cure such breach or, if such breach cannot reasonably be cured within such 30-day period, Tenant fails to commence efforts to cure within such period, or thereafter fails to diligently pursue such cure to completion, the City will have the remedies set forth in Section 12Q.5(f). Each of these remedies will be exercisable individually or in combination with any other rights or remedies available to the City.

(d) Any Sublease or any Contract or Subcontract regarding services to be performed on the Premises entered into by Tenant will require the Subtenant, Contractor and Subcontractors, as applicable, to comply with the requirements of the HCAO and will contain contractual obligations substantially the same as those set forth in Chapter 12Q of the Administrative Code. Tenant will notify the Office of Labor Standards Enforcement (“**OLSE**”) when it enters into such a Sublease or Contract and will certify to OLSE that it has notified the Subtenant or Contractor of the obligations under the HCAO and has imposed the requirements of the HCAO on the Subtenant or Contractor through written agreement with such Subtenant or Contractor. Tenant is responsible for ensuring compliance with the HCAO for each Subtenant and each Contractor and Subcontractor performing services on the Premises. If any Subtenant, Contractor or Subcontractor fails to comply, the City may pursue the remedies set forth in Section 12Q.5 of the Administrative Code against Tenant based on the Subtenant’s, Contractor’s, or Subcontractor’s failure to comply, provided that OLSE has first provided Tenant with notice and an opportunity to cure the violation.

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

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

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

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

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

(j) If a Contractor or Subcontractor is exempt from 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 will 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.

**43.3. First Source Hiring.** The City has adopted a First Source Hiring Program (Administrative Code Sections 83.1 et seq.) which establishes specific requirements, procedures and monitoring for first source hiring of qualified economically disadvantaged individuals for entry-level positions as those terms are defined by the ordinance. Tenant acknowledges receiving and reviewing the First Source Hiring Program materials and requirements and agrees to comply with requirements of the ordinance as implemented by the Port and/or City, including without limitation, notification of vacancies throughout the Term and entering into a First Source Hiring Agreement, if applicable. Tenant acknowledges and agrees that it may be subject to monetary penalties for failure to comply with the ordinance or a First Source Hiring Agreement and that such non-compliance will be a default of this Lease. **[Note: This Section subject to revision based on agreed format between Developer and City. Requirements will include compliance with Chapter 83, First Source Hiring Program for end use jobs – good faith effort working with OEWD for the operations of the hotel and any entry-level position.]**

**43.4. Local Business Enterprises.** The Port Commission encourages the participation of local business enterprises (“LBEs”) in Tenant’s operations. Tenant is committed to affording opportunities to LBEs to participate in the architecture, design, engineering, and construction of the Improvements, and in the operation of the Project and agrees to consult with the Contract Monitoring Division of the City’s General Services Agency to determine appropriate methods for promoting participation by LBEs. Architecture, Engineering, Laboratory Services (Materials Testing), Trucking and Hauling, and Security Guard Services are categories of services that may provide opportunities for certified LBE participation. City maintains a list of certified LBEs at: <http://sfgov.org/cmd/lbe-certification-0>. **[Note: This Section subject to revision based on agreed format between Developer and City. LBE goals 17% SF Small and Micro LBE sub goal across the board for non-construction and construction; 17% SF Small and Micro LBE participation for operations; Standard Good Faith Outreach Efforts including advance notice, outreach, and record keeping provisions; Port and TZK will seek to, whenever practicable, engage contracting teams to reflect the diversity of the City and include participation of both businesses and residents from the City’s most disadvantaged communities including, but not limited to the Bayview/Hunters Point, Chinatown, Mission, South of Market, Tenderloin, Visitacion Valley and Western Addition neighborhoods.]**

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

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

**43.7. Prohibition of Alcoholic Beverages Advertising.** Tenant acknowledges and agrees that no advertising of alcoholic beverages is allowed on the Premises. For purposes of this section, “alcoholic beverage” will be defined as set forth in California Business and Professions Code Section 23004, and will not include cleaning solutions, medical supplies and other products and substances not intended for drinking. This advertising prohibition includes the placement of the name of a company producing, selling or distributing alcoholic beverages or the name of any alcoholic beverage in any promotion of any event or product. This advertising

prohibition does not apply to any advertisement sponsored by a state, local, nonprofit or other entity designed to (i) communicate the health hazards of alcoholic beverages, (ii) encourage people not to drink alcohol or to stop drinking alcohol, or (iii) provide or publicize drug or alcohol treatment or rehabilitation services. This advertising prohibition does not apply to any restaurant within the Premises or to Tenant or any Subtenant operating a business where the sale, production or consumption of alcoholic beverages is legally permitted and that complies with applicable City sign ordinances.

**43.8. *Restrictions on the Use of Pesticides.*** Chapter 3 of the San Francisco Environment Code (the Integrated Pest Management Program Ordinance or “**IPM Ordinance**”) describes an integrated pest management (“**IPM**”) policy to be implemented by all City departments. Tenant will not use or apply or allow the use or application of any pesticides on the Premises, and will not contract with any party to provide pest abatement or control services to the Premises, without first receiving City’s written approval of an integrated pest management plan that (i) lists, to the extent reasonably possible, the types and estimated quantities of pesticides that Tenant may need to apply to the Premises during the term of this Lease, (ii) describes the steps Tenant will take to meet the City’s IPM Policy described in Section 300 of the IPM Ordinance, and (iii) identifies, by name, title, address and telephone number, an individual to act as the Tenant’s primary IPM contact person with the City. Tenant will comply, and will require all of Tenant’s contractors to comply, with the IPM plan approved by the City and will comply with the requirements of Sections 300(d), 302, 304, 305(f), 305(g), and 306 of the IPM Ordinance, as if Tenant were a City department. Among other matters, such provisions of the IPM Ordinance: (a) provide for the use of pesticides only as a last resort, (b) prohibit the use or application of pesticides on property owned by the City, except for pesticides granted an exemption under Section 303 of the IPM Ordinance (including pesticides included on the most current Reduced Risk Pesticide List compiled by City’s Department of the Environment), (c) impose certain notice requirements, and (d) require Tenant to keep certain records and to report to City all pesticide use by Tenant’s staff or contractors. If Tenant or Tenant’s contractor will apply pesticides to outdoor areas, Tenant must first obtain a written recommendation from a person holding a valid Agricultural Pest Control Advisor license issued by the California Department of Pesticide Regulation and any such pesticide application will 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>.

**43.9. *MacBride Principles - Northern Ireland.*** The City and Port urge companies doing business in Northern Ireland to move towards resolving employment inequities and encourages them to abide by the MacBride Principles as expressed in Administrative Code Section 12F.1, et seq. The City and Port also urge San Francisco companies to do business with corporations that abide by the MacBride Principles.

**43.10. *Tropical Hardwood and Virgin Redwood Ban.*** The City and Port urge companies not to import, purchase, obtain or use for any purpose, any tropical hardwood or tropical hardwood wood product, or any virgin redwood or virgin redwood wood product. Tenant agrees that, except as permitted by the application of Sections 802(b) and 803(b) of the San Francisco Environment Code, Tenant will not use or incorporate any tropical hardwood or virgin redwood in the construction of the Improvements. Tenant will not provide any items to the construction of the Improvements, or otherwise in the performance of this Lease which are tropical hardwoods, tropical hardwood wood products, virgin redwood, or virgin redwood wood products. In the event Tenant fails to comply in good faith with any of the provisions of Chapter 8 of the San Francisco Environment Code, Tenant will be liable for liquidated damages for each violation in any amount equal to the contractor’s net profit on the contract, or five percent (5%) of the total amount of the contract dollars, whichever is greater.

**43.11. Preservative Treated Wood Containing Arsenic.** Tenant may not purchase preservative-treated wood products containing arsenic in the performance of this Lease unless an exemption from the requirements of Chapter 13 of the Environment Code is obtained from the Department of the Environment under Section 1304 of the Environment Code. 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, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Tenant may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude Tenant 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.

**43.12. Notification of Limitations on Contributions.** Through its execution of this Lease, Tenant acknowledges its obligations under Section 1.126 of the San Francisco Campaign and Governmental Conduct Code which prohibits any person who contracts with the City for the selling or leasing of any land or building to or from the City whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making a contribution to such an officer, or candidate for such an office, or committee controlled by such officer or candidate at any time from the submission of a proposal for such contract until the termination of negotiations for such contract or twelve (12) months has elapsed from the date the contract is approved.

Tenant acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of one hundred thousand dollars (\$100,000) or more. Tenant further acknowledges that, if applicable, (i) the prohibition on contributions applies to each Tenant; each member of Tenant’s board of directors, and Tenant’s principal officers, including its chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than ten percent (10%) in Tenant; and any subcontractor listed in the Tenant’s bid or contract; and (ii) within thirty (30) days of the submission of a proposal for the contract, the Port is obligated to submit to the Ethics Commission the parties to the lease and any subtenant. Additionally, Tenant certifies that Tenant has informed each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126 by the time it submitted a proposal for the contract, and has provided to City the names of the persons required to be informed.

San Francisco Ethics Commission Regulation 1.126-1 provides that negotiations are commenced when a prospective contractor first communicates with a City officer or employee about the possibility of obtaining a specific contract. This communication may occur in person, by telephone or in writing, and may be initiated by the prospective contractor or a City officer or employee. Negotiations are completed when a contract is finalized and signed by the City and the contractor. Negotiations are terminated when the City and/or the prospective contractor end the negotiation process before a final decision is made to award the contract.

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

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

**43.15. *Drug-Free Workplace.*** Tenant acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1988 (41 U.S.C. Ch. 81), the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City property (including the Premises). Tenant and its Agents or assigns will comply with all terms and provisions of such Act and the rules and regulations promulgated thereunder. Tenant agrees that any violation of this prohibition by Tenant, its Agents or assigns will be deemed a material breach of this Lease.

**43.16. *Prevailing Wages and Working Conditions.***

(a) **Prevailing Wage Rate Requirement For Construction.** Tenant agrees that any person performing (i) labor in the construction of the Improvements, including any “public work” as defined under California Labor Code Section 1720 et seq. (which includes certain construction, alteration, maintenance, demolition, installation, repair, carpet laying, or refuse hauling work if paid for in whole or part out of public funds) or (ii) Covered Construction to: (A) pay workers performing such work not less than the highest prevailing rate of wages (B) provide the same hours, working conditions, and benefits as in each case are provided for similar work performed in San Francisco County, and (C) employ apprentices in accordance with Administrative Code Section 23.61 (collectively, “**Prevailing Wage Requirements**”). Tenant agrees to cooperate with the City in any action or proceeding against a contractor or subcontractor that fails to comply with the Prevailing Wage Requirements.

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

Tenant will also pay, and will require its subtenants, Agents, and contractors and subcontractors (regardless of tier) to pay, the Prevailing Rate of Wage for the following activities on the Premises as set forth in and to the extent required by Administrative Code Chapter 21C: a Public Off-Street Parking Lot, Garage or Automobile Storage Facility (as defined in Section 21C.3), a Show (as defined in Section 21C.4), a Special Event (as defined in Section 21C.8), and Broadcast Services (as defined in Section 21C.9).

(b) **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 Premises, 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 will have the meanings provided in Section 21.C4. Accordingly, Tenant, as a condition of this Lease, agrees that:

(i) Tenant will comply with the obligations in Administrative Code Section 21C.4, and will require Tenant's subtenants, Agents, 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 Tenant or its subtenant, Agent, contractor (or any subcontractor) fails to comply with these obligations, the City will have all available remedies against Tenant 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 Lease.

(ii) The City may inspect and/or audit any workplace, job site, books and records pertaining to the presentation of a Show at the Premises, and may interview any individual who provides, or has provided, work involving theatrical or technical services for the Show at the Premises; 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 Premises.

(iii) Tenant will provide to the City (and to require any subtenant, contractor or subcontractor who maintains such records to provide to the City), upon request, immediate access to all workers' time sheets, payroll records, and paychecks for inspection in so far as they relate the presentation of a Show at the Premises.

For current Prevailing Wage rates, see [www.sfgov.org/olse/prevailingwages](http://www.sfgov.org/olse/prevailingwages) or call the Office of Labor Standard Enforcement at 415-554-6235.

(c) **Prevailing Wage Rate Requirement For Special Event or Trade Show Work.** 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 (including 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 Administrative Code Section 21C.8(b). Capitalized terms in this Section will have the meanings provided in Sections 21.C8. Accordingly, Tenant, as a condition of this Lease, agrees that:

(i) Tenant will comply with the obligations in Administrative Code Section 21C.8, and will require Tenant's subtenants, Agents, 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 Tenant or its subtenant, Agent, contractor (or any subcontractor) fails to comply with these obligations, the City will have all available remedies against Tenant 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 Lease.

(ii) The City may inspect and/or audit any workplace, job site, books and records pertaining to On-site work on Trade Shows or Special Events at the Premises, and may interview any individual who provides, or has provided, On-site work on Trade Shows or Special Events at the Premises.

(iii) Tenant will provide to the City (and to require any subtenant, Agent, contractor or subcontractor who maintains such records to provide to the City), upon request, immediate access to all workers' time sheets, payroll records, and paychecks for inspection in so far as they relate a Trade Show or Special Event at the Premises.

For current Prevailing Wage rates, see [www.sfgov.org/olse/prevailingwages](http://www.sfgov.org/olse/prevailingwages) or call the Office of Labor Standard Enforcement at 415-554-6235.

**43.17. Prohibition of Political Activity with City Funds.** In accordance with Administrative Code Chapter 12.G, no funds appropriated by Port for this Lease may be expended for organizing, creating, funding, participating in, supporting, or attempting to influence any political campaign for a candidate or for a ballot measure.

**43.18. Compliance with Disabled Access Laws.** Tenant acknowledges that, pursuant to the Disabled Access Laws, programs, services and other activities provided by a public entity to the public, whether directly or through Tenant or contractor, must be accessible to the disabled public. Tenant will not discriminate against any person protected under the Disabled Access Laws in connection with the use of all or any portion of the Real Property and will comply at all times with the provisions of the Disabled Access Laws.

**43.19. Protection of Private Information.** Tenant agrees to comply fully with and be bound by all of the provisions of Chapter 12M of the Administrative Code (the “**Protection of Information Ordinance**”), including the remedies provided therein. Consistent with the requirements of the Protection of Information Ordinance, Tenant agrees to all of the following:

(a) Neither Tenant nor any of its Contractors or Subcontractors who receive Private Information from the City in the performance of a Contract may disclose that information to a Subcontractor or any other person or entity, unless one of the following is true:

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

(b) Any disclosure or use of Private Information authorized by this Lease will be in accordance with any conditions or restrictions stated in this Lease or the Contracting Department’s approval and will not be used except as necessary in the performance of the obligations under the Contract. Any disclosure or use of Private Information authorized by a Contracting Department will be in accordance with any conditions or restrictions stated in the approval.

(c) “**Private Information**” means any information that (1) could be used to identify an individual, including name, address, social security number, medical information, financial information, date and location of birth, and names of relative; or (2) the law forbids any person from disclosing.

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

**43.20. Diesel Fuel Measures.** Tenant must minimize exhaust emissions from operating equipment and trucks during construction. At a minimum, Tenant 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. Tenant 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 Premises, 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.” In addition, Tenant will encourage independent truckers contracting with Tenant to move materials to and from the Premises 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.

**43.21. Charter Provisions.** This Lease is governed by and subject to the provisions of the Charter of the City and County of San Francisco.

**43.22. Card Check Agreement.** Article 6 of Chapter 23 of the Administrative Code presently requires employers of employees in projects that include hotels or restaurants on public property with more than fifty (50) employees to enter into a “card check” agreement with a labor organization regarding the preference of employees to be represented by a labor organization to act as their exclusive bargaining representative. Tenant and its Subtenants must comply with these requirements to the extent applicable to restaurant and hotel operations within the Premises.

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

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

(a) Tenant agrees to, and will cause its contractors, subcontractors, and Agents to comply with and be bound by all of the provisions of Administrative Code Chapter 12T (Criminal History in Hiring and Employment Decisions; “Chapter 12T”), which are hereby incorporated, including the remedies and implementing regulations as may be amended from time to time, with respect to applicants and employees of Tenant, its contractors, subcontractors, and Agents, who would be or are performing work at the Premises.

(b) Tenant must incorporate by reference the provisions of Chapter 12T in the Construction Contract, all contracts, subcontracts, and subleases of some or all of the Premises, and must require all its contractors, subcontractors, Agents and subtenants to comply with such provisions. Tenant’s failure to comply with the obligations in this subsection will constitute a material breach of this Lease.

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

(d) Tenant, its contractors, subcontractors, Agents and subtenants will not inquire about or require applicants, potential applicants for employment, or employees to disclose on any employment application the facts or details of any conviction history, unresolved arrest, or any matter identified in subsection (c) above. Tenant, its contractors, subcontractors,

Agents and subtenants will not require such disclosure or make such inquiry until either after the first live interview with the person, or after a conditional offer of employment.

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

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

(g) Tenant, its contractors, subcontractors, Agents and subtenants understand and agree that upon any failure to comply with the requirements of Chapter 12T, the City has the right to pursue any rights or remedies available under Chapter 12T or this Lease, including but not limited to a penalty of \$50 for a second violation and \$100 for a subsequent violation for each employee, applicant or other person as to whom a violation occurred or continued, termination or suspension in whole or in part of this Lease.

(h) If Tenant has any questions about the applicability of Chapter 12T, it may contact 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.

**43.25. Local Hire.** Any undefined, initially-capitalized term used in this Section will have the meaning given to such term in Administrative Code Section 23.62 (the "**Local Hiring Requirements**"). The Construction of the Project is subject to the Local Hiring Requirements unless the cost for such work is (i) estimated to be less than \$750,000 per building permit; (ii) is in connection with the set-up, execution and strike of special events of three (3) or fewer days costing in excess of the Threshold Amount; or (iii) meets any of the other exemptions in the Local Hiring Requirements. Tenant agrees that it will comply with the Local Hiring Requirements to the extent applicable. Before starting any Tenant Improvements or Alterations, Tenant will contact City's Office of Economic Workforce and Development ("**OEWD**") to determine whether the work is a Covered Project subject to the Local Hiring Requirements.

Tenant will include, and will require its contractors, subcontractors, Agents and subtenants to include, a requirement to comply with the Local Hiring Requirements in any contract for a Covered Project with specific reference to Administrative Code Section 23.62. Each such contract will name the City and County of San Francisco as a third party beneficiary for the limited purpose of enforcing the Local Hiring Requirements, including the right to file charges and seek penalties. Tenant will cooperate, and require its contractors, subcontractors, Agents and subtenants to cooperate, with the City in any action or proceeding against a contractor or subcontractor that fails to comply with the Local Hiring Requirements when required. Tenant's failure to comply with its obligations under this Section will constitute a material breach of this Lease. A contractor's, subcontractor's, Agent's, or subtenants failure to comply with this Section will enable the City to seek the remedies specified in Administrative Code Section 23.62 against the breaching party. **[Note: This Section subject to revision based on agreed format between Developer and City. Requirements will include compliance with Chapter 82, Mandatory Local Hire policy for construction – 30% by trade; and Chapter 83, First Source Hiring Program for end use jobs – good faith effort working with OEWD for the operations of the hotel and any entry-level position.]**

**43.26. San Francisco Bottled Water Ordinance.** Tenant is subject to all applicable provisions of Environment Code Chapter 24 (which are hereby incorporated) prohibiting the sale

or distribution of drinking water specified containers at City-permitted events held on the Premises with attendance of more than 100 people, except as otherwise set forth in Environmental Code Chapter 24.

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

**43.28. All-Gender Toilet Facilities.** Tenant must comply with Administrative Code Section 4.1-3 which requires at least one all-gender toilet facility on each floor of any new building on City-owned land and within existing buildings leased by the City, including the Premises, where extensive renovations are made. An “**all-gender toilet facility**” means a toilet that is not restricted to use by persons of a specific sex or gender identity by means of signage, design, or the installation of fixtures. “**Extensive renovations**” means any renovation where the construction cost exceeds 50% of the cost of providing the toilet facilities required by this section.

**43.29. Waiver of Relocation Assistance Rights.** To the extent allowed by applicable Law, Tenant hereby waives any and all rights, benefits or privileges of the California Relocation Assistance Law, California Government Code §§ 7260 et seq., or under any similar law, statute or ordinance now or hereafter in effect.

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

#### **44. NO LIGHT, AIR OR VIEW EASEMENT.**

Any diminution or shutting off of light, air or view by any structure, vehicle, or vessel which may be erected or berthed at or near the Premises will in no way affect this Lease or impose any liability on Port, nor entitle Tenant to any reduction of Rent, nor affect this Lease in any way or Tenant’s obligations hereunder.

**45. GENERAL PROVISIONS.**

**45.1. *Time of Performance.***

- (a) **Expiration.** All performance dates (including cure dates) expire at 5:00 p.m., San Francisco, California time, on the performance or cure date.
- (b) **Weekend or Holiday.** A performance date that falls on a Saturday, Sunday or City holiday is deemed extended to 5:00 p.m. the next business day.
- (c) **Days for Performance.** All periods for performance or notices specified herein in terms of days will be calendar days, and not business days, unless otherwise provided herein.
- (d) **Time of the Essence.** Time is of the essence with respect to each provision of this Lease, including the provisions for the exercise of any option on the part of Tenant hereunder and the provisions for the payment of Rent and any other sums due hereunder.

**45.2. *Interpretation of Agreement.***

- (a) **Exhibits and Schedule.** Whenever an “Exhibit” or “Schedule” is referenced, it means an attachment to this Lease unless otherwise specifically identified. All such exhibits and schedules are incorporated herein by reference.
- (b) **Captions.** Whenever a section, article or paragraph is referenced, it refers to this Lease unless otherwise specifically identified. The captions preceding the articles and sections of this Lease and in the table of contents have been inserted for convenience of reference only. Such captions will not define or limit the scope or intent of any provision of this Lease.
- (c) **Words of Inclusion.** The use of the term “include”, “including”, “such as”, or words of similar import, when following any general term, statement or matter will not be construed to limit such term, statement or matter to the specific items or matters, whether or not language of non-limitation is used with reference thereto. Rather, such terms will be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such statement, term or matter.
- (d) **No Presumption Against Drafter.** This Lease has been negotiated at arm’s length and between Persons sophisticated and knowledgeable in the matters dealt with herein. In addition, experienced and knowledgeable legal counsel has represented each Party. Accordingly, this Lease will be interpreted to achieve the intents and purposes of the Parties, without any presumption against the Party responsible for drafting any part of this Lease (including California Civil Code Section 1654).
- (e) **Fees and Costs.** The Party on which any obligation is imposed in this Lease will be solely responsible for paying all costs and expenses incurred in the performance thereof, unless the provision imposing such obligation specifically provides to the contrary.
- (f) **Lease References.** Wherever reference is made to any provision, term or matter “in this Lease,” “herein” or “hereof,” or words of similar import, the reference will be deemed to refer to any and all provisions of this Lease reasonably related thereto in the context of such reference, unless such reference refers solely to a specific numbered or lettered article, section or paragraph of this Lease or any specific subdivision thereof.
- (g) **Approvals.** Unless otherwise specifically stated in this Lease, wherever a Party hereto has a right of approval or consent, such approval or consent will not be unreasonably withheld, conditioned or delayed and such approval or consent will be given in writing.

(h) **Legal References.** Wherever reference is made to a specific code or section of a specific Law, the reference will be deemed to include any amendment, restatement or replacement.

**45.3. Successors and Assigns.** This Lease is binding upon and will inure to the benefit of the successors and assigns of Port, Tenant and any Mortgagee. Where the term “**Tenant**,” “**Port**” or “**Mortgagee**” is used in this Lease, it means and includes their respective successors and assigns. Whenever this Lease specifies or implies Port as a Party or the holder of the right or obligation to give approvals or consents, if Port (or a comparable public body which has succeeded to Port’s rights and obligations) no longer exists, then City will be deemed to be the successor and assign of Port for purposes of this Lease.

**45.4. No Third Party Beneficiaries.** This Lease is for the exclusive benefit of the Parties hereto and not for the benefit of any other Person and will not be deemed to have conferred any rights, express or implied, upon any other Person, except as provided in **Article 39** with regard to Mortgagees.

**45.5. Real Estate Commissions.** Port is not liable for any real estate commissions, brokerage fees or finder’s fees that may arise from this Lease. Tenant and Port each represents that it engaged no broker, agent or finder in connection with this transaction. In the event any broker, agent or finder makes a claim, Tenant will indemnify Port from any Losses arising out of such claim.

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

**45.7. Entire Agreement.** This Lease, the LDDA, , and the other Transaction Documents (for so long as the LDDA, , and the other Transaction Documents are in effect, as applicable) constitute the entire agreement between the Parties with respect to the subject matter set forth therein, and supersede all negotiations or previous agreements between the Parties with respect to all or any part of the terms and conditions mentioned herein or incidental hereto. No parol evidence of any prior drafts or of other agreement will be permitted to contradict or vary the terms of this Lease.

**45.8. Amendment.** Neither this Lease nor any of the terms hereof may be terminated, amended or modified except by a written instrument executed by the Parties.

**45.9. Governing Law; Selection of Forum.** This Lease will be governed by, and interpreted in accordance with, the laws of the State of California. As part of the consideration for Port’s entering into this Lease, Tenant agrees that all actions or proceedings arising directly or indirectly under this Lease may, at the sole option of Port, be litigated in courts having situs within the State of California, and Tenant consents to the jurisdiction of any such local, state or federal court, and consents that any service of process in such action or proceeding may be made by personal service upon Tenant wherever Tenant may then be located, or by certified or registered mail directed to Tenant at the address set forth herein for the delivery of notices.

**45.10. Recordation.** This Lease will not be recorded by either Party. The Parties agree to execute and record in the Official Records a Memorandum of Lease in the form attached hereto as **Exhibit AA**. Promptly upon Port’s request following the expiration or earlier termination of this Lease, Tenant will deliver to Port a duly executed and acknowledged quitclaim deed suitable for recordation in the Official Records and in form and content satisfactory to Port and the City Attorney, for the purpose of evidencing in the Official Records the termination of Tenant’s interest under this Lease. Port may record such quitclaim deed at any time on or after the termination of this Lease, without the need for any approval or further act of Tenant.

**45.11. Extensions by Port.** Upon the request of Tenant, Port may, by written instrument, extend the time for Tenant’s performance of any term, covenant or condition of this Lease or

permit the curing of any default upon such terms and conditions as it determines appropriate, including the time within which Tenant must agree to such terms and/or conditions, provided, however, that any such extension or permissive curing of any particular default will not operate to release any of Tenant's obligations nor constitute a waiver of Port's rights with respect to any other term, covenant or condition of this Lease or any other default in, or breach of, this Lease or otherwise effect the time of the essence provisions with respect to the extended date or other dates for performance hereunder.

**45.12. Further Assurances.** The Parties hereto agree to execute and acknowledge such other and further documents as may be necessary or reasonably required to express the intent of the Parties or otherwise to effectuate the terms of this Lease. The Executive Director of Port is authorized to execute on behalf of Port any closing or similar documents and any contracts, agreements, licenses, permits, memoranda or similar documents with Tenant, State, regional and local entities or enter into any tolling agreement with any Person that are necessary or proper to achieve the purposes and objectives of this Lease, if the Executive Director determines that the document or agreement is necessary or proper and is in Port's best interests.

**45.13. Severability.** If any provision of this Lease, or its application to any Person or circumstance, is held invalid by any court, the invalidity or inapplicability of such provision will not affect any other provision of this Lease or the application of such provision to any other Person or circumstance, and the remaining portions of this Lease will continue in full force and effect, unless enforcement of this Lease as so modified by and in response to such invalidation would be grossly inequitable under all of the circumstances, or would frustrate the fundamental purposes of this Lease.

#### **46. FEMA DISCLOSURE NOTICE.**

The Federal Emergency Management Agency ("FEMA") is revising Flood Insurance Rate Maps ("FIRMs") for 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 buildings and reconstructing or repairing existing buildings on certain parts of the San Francisco waterfront.

FEMA prepares the FIRMs to support the National Flood Insurance Program ("NFIP"), a federal program that enables property owners, businesses, and residents in participating communities to purchase flood insurance backed by the federal government. The San Francisco Board of Supervisors has adopted a floodplain management ordinance governing new construction and substantial improvements in flood prone areas of San Francisco and authorizing the City's participation in NFIP (as amended, the "Floodplain Ordinance"). The Floodplain Ordinance imposes requirements on any new construction or substantial improvement of structures in city-designated flood zones that are intended to minimize or eliminate flood hazard risks. NFIP regulations allow a local jurisdiction to issue variances to its floodplain management ordinance under certain narrow circumstances, without jeopardizing the local jurisdiction's eligibility in the NFIP. However, the particular projects that are granted variances by the local jurisdiction may be deemed ineligible for federally-backed flood insurance by FEMA.

FIRMs identify areas that are subject to inundation during a flood having a 1% chance of occurrence in a given year (also known as a "base flood" or "100-year flood"). FEMA refers to an area that is at risk from a flood of this magnitude as a special flood hazard area ("SFHA"). To prepare the FIRM for San Francisco, FEMA has performed detailed coastal engineering analyses and mapping of the San Francisco Bay shoreline. The San Francisco Bay Area Coastal Study includes both regional hydrodynamic and wave modeling of the San Francisco Bay, as well as detailed onshore coastal analysis used to estimate wave runup and overtopping, as well as overland wave propagation. These onshore analyses form the basis for the Base Flood Elevations (BFEs) and SFHAs shown on the FIRM.

FEMA initiated preparation of a FIRM for the City in the mid-2000s, and issued a preliminary version of the FIRM in 2007, but did not finalize that map. Subsequently, FEMA completed region-wide analyses of flooding on San Francisco Bay and the Pacific Ocean coastline. FEMA used these studies to prepare another preliminary FIRM for San Francisco, which it issued in November 2015. The preliminary FIRM identified SFHAs along the City's shoreline in and along the San Francisco Bay consisting of "A zones" (coastal areas subject to inundation by tidal surge and waves less than three feet in height) and "V zones" (areas subject to the additional hazards that accompany waves more than three feet in height). These zones generally affect City property under the jurisdiction of the Port of San Francisco and other areas of the San Francisco waterfront, including parts of Mission Bay, Hunters Point Shipyard, Candlestick Point, Treasure and Yerba Buena Islands, and an area adjacent to Islais Creek.

Due to comments and an appeal submitted by the City, FEMA has not yet finalized the FIRM. Sometime during 2019, FEMA intends to issue a revised preliminary FIRM showing changes due to the appeal resolution, and give the City a period (most likely 30 days) in which to comment. Following resolution of any comments, FEMA would finalize the FIRM.

To finalize the FIRM, FEMA will issue a Letter of Final Determination (LFD) stating that the map will be published in final form six months from the date of the LFD (referred to as the "effective date" of the FIRM). During that six-month period, the City must amend the floodplain management ordinance to adopt the new FIRM. After the effective date, the FIRM will be used for all flood insurance and floodplain management purposes.

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.shtm>; [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.shtm>; and <http://www.sfgov.org>.

This disclosure is provided for information purposes only, and without representation or warranty of any kind by the City, including, without limitation, Port, with regard to any of the matters discussed in this notice. Tenant is entirely responsible for investigating on its own the consequences of the potential inclusion of the Premises in any future FEMA designated SFHA and the consequences of the City's decision to participate or to not participate in the NFIP.

Tenant acknowledges and agrees that the City's participation or failure to participate in the NFIP will not give rise to any rights, causes of action, or remedies under this Lease, including, but not limited to any termination or rent abatement right.

#### **47. DEFINITIONS.**

For purposes of this Lease, initially capitalized terms will have the meanings ascribed to them in this Section:

"100-year flood" is defined in *Section 46*.

"AAA's" means the American Automobile Association

"Accounting" is defined in *Section 3.8(c)*.

"ACMs" is defined in *Section 22.6*.

"Actual Equity Capital Invested" is defined in *Section 3.5(a)*.

"Additional Foreclosure Proceeds" is defined in *Section 39.12*.

"Additional Rent" means any and all sums (other than Minimum Rent, Percentage Rent, and Port's share of Transfer Proceeds or Net Refinancing Proceeds) that may become due or be payable by Tenant under this Lease, including any Late Charge and interest at the Default Rate.

“**Adjustment Date**” is defined in *Section 3.3*.

“**Affiliate**” means any Person directly or indirectly Controlling, Controlled by or under Common Control with the other Person in question.

“**Agents**” means, when used with reference to either Party to this Lease, the members, officers, directors, commissioners, employees, agents and contractors of such Party, and their respective heirs, legal representatives, successors and assigns.

“**all-gender toilet facility**” is defined in *Section 43.28*.

“**Anniversary Date**” means each anniversary of the Commencement Date during the Term, unless the actual Commencement Date is not the first day of a month, in which case, each Anniversary Date will be determined as if the Commencement Date were the first day of the first full month after the actual Commencement Date.

“**Annual Revenue Statement**” is defined in *Section 3.8(b)*.

“**Approve**” or “**Approval**” means a Party’s consent to or approval of a request, action, or other matter, and, when appropriate in the context, may mean a Regulatory Approval. “**Approved**” and “**Approving**” have correlative meanings.

“**Approved Hotel Operating Standards**” is defined in *Section 10.1(b)*.

“**Approved Operating Standards**” is defined in *Section 10.1(b)*.

“**Approved Public Access Operating Standards**” is defined in *Section 10.1(b)*.

“**Approved Restaurant Operating Standards**” is defined in *Section 10.1(b)*.

“**As Is With All Faults**” is defined in *Section 1.3*.

“**Assignment and Assumption Agreement**” is defined in *Section 20.1(d)*.

“**AT&T Use Area**” is defined in *Section 1.11* and depicted on *Exhibit C*.

“**AT&T Lines**” is defined in *Section 1.11* and depicted on *Exhibit C*.

“**Attorneys’ Fees and Costs**” means reasonable attorneys’ fees (including, if applicable, fees and reasonable costs of the City Attorney), costs, expenses and disbursements, including expert witness fees and costs, travel time and associated costs, transcript preparation fees and costs, document copying, exhibit preparation, courier, postage, facsimile, long-distance and communications expenses, court costs and other reasonable costs and fees associated with any other legal, administrative or alternative dispute resolution proceeding, including such fees and costs associated with execution upon any judgment or order, and costs on appeal.

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

“**base flood**” is defined in *Section 46*.

“**Base Year**” is defined in *Section 10.8(b)*.

“**Board**” means the Board of Supervisors of the City and County of San Francisco.

“**Bona Fide Institutional Lender**” means any one or more of the following, whether acting in its own interest and capacity or in a fiduciary capacity for one or more Persons none of which need be Bona Fide Institutional Lenders: (i) a savings bank, a savings and loan association, a commercial bank or trust company or branch thereof, an insurance company, an investment banking or merchant banking firm, or other lender, all of which, at the time a Mortgage is recorded in favor of such entity, has assets of at least Five Hundred Million Dollars (\$500,000,000) in the aggregate (or the equivalent in foreign currency), or (ii) upon prior approval of Port, which approval will take into account market interest rates for loans from institutional lenders that are secured by mortgages on commercial or hotel property in San



Francisco, debt or private equity fund or company, a PACE lender, or any other reputable, regionally recognized real estate lending firm or company.

“**Books and Records**” is defined in *Section 3.9*.

“**Brokerage Commissions**” is defined in.

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

“**business day**” means Monday through Friday that is not a City holiday.

“**Cal-OSHA**” is defined in *Section 22.6*.

“**Capital Expenditure Statement**” is defined in *Section 10.7(d)*.

“**Capital Expenditures**” is defined in *Section 3.5(a)*.

“**Capital Improvement Equity**” is defined in *Section 3.5(a)*.

“**Capital Improvements**” is defined in *Section 3.5(a)*.

“**Capital Reserves Account**” is defined in *Section 10.6(a)*.

“**Capital Reserve Deposit**” is defined in *Section 10.6(a)*.

“**card check**” is defined in *Section 43.22*.

“**Cash Consideration**” is defined in *Section 3.6(a)*.

“**CASp**” is defined in *Section 1.13*.

“**Casualty**” is defined in *Section 16.1(a)*.

“**Casualty Notice**” is defined in *Section 16.1(b)*.

“**Causes of Loss Special Form**” is defined in *Section 23.1(a)(ii)(1)*.

“**CEQA**” means the California Environmental Quality Act.

“**Certificate of Completion**” is a document issued by Port after Developer has completed the construction of the Initial Improvements and the Project in accordance with all the LDDA and the Parties have agreed on the Total Project Cost and the Actual Equity Capital Invested in accordance with the LDDA. The form of Certificate of Completion is attached to the LDDA.

“**Certified Capital Expenditure**” is defined in *Section 10.7(d)*.

“**City**” means the City and County of San Francisco, a municipal corporation. City will refer to the City operating by and through its Port Commission, where appropriate. All references to City will include Port unless inappropriate in context.

“**City Attorney**” means the City Attorney of the City and County of San Francisco.

“**City Projects**” is defined in *Article 6*.

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

“**Commencement Date**” is defined in *Article 2*.

“**Condemnation**” means the taking of all or any part of any property, or the right of possession thereof, for any public or quasi-public purpose by any lawful governmental power or authority, by exercise of the right of eminent domain, condemnation, inverse condemnation, or appropriation. Condemnation may occur pursuant to the recording of a final order of condemnation, or by a voluntary sale of all or any part of any property to any Person having the power of eminent domain (or to a designee of any such Person), provided that the property or

such part thereof is then under the threat of condemnation or such sale occurs by way of settlement of a condemnation action.

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

“**Condemned Land Value**” is defined in *Section 17.4(b)*.

“**Construction Documents**” is defined in *Section 13.3(a)*.

“**Construction Impacts**” is defined in *Section 6*.

“**Construction Rent Expiration Date**” is defined in *Section 3.2(a)*.

“**Control**” means the ownership (direct or indirect) by one Person of more than fifty percent (50%) of the profits or capital of another Person, and Controlled and Controlling have correlative meanings.

“**Common Control**” means that two Persons are both Controlled by the same other Person.

“**Core Benefits**” is defined in *Section 43.1(c)*.

“**Costs of Transfer**” is defined in *Section 3.6(a)*.

“**County Assessor**” means the Assessor-Recorder of the City and County of San Francisco.

“**Current Index**” is defined in *Section 3.3(a)*.

“**DBI**” means the City and County of San Francisco Department of Building Inspections.

“**Default Rate**” is defined in *Section 3.13*.

“**Deferred Items**” means (i) uncompleted customary punch list items, (ii) landscaping, or (iii) exterior finishes (to the extent Tenant can demonstrate to Port’s reasonable satisfaction that such finishes would be damaged during the course of later construction of interior improvements) that remain after Port’s issuance of a Certificate of Completion.

“**Developer**” means the developer under the LDDA, also the Tenant under this Lease, commonly known as TZK Broadway, LLC, or any successors permitted under the LDDA.

“**Dinner Theater Restaurant**” is defined in *Section 10.1(b)*.

“**Disability Laws**” means the Americans with Disabilities Act, a federal law codified at 42 U.S.C. §§ 12101 et seq., including, but not limited to, Title III thereof, and all regulations and guidelines related thereto, together with any and all laws, rules, regulations, ordinances, codes and statutes now or hereafter enacted by local or state agencies having jurisdiction thereof, including all requirements of Title 24 of the State of California, as the same may be in effect on the date of this Lease and may be hereafter modified, amended or supplemented.

“**Downturn Approval Request**” is defined in *Section 10.8(c)*.

“**Eligible Amount**” is defined in *Section 39.11(d)(ii)(3)*.

“**ENA**” is defined in *Recital O*.

“**Environmental Financial Performance Deposit**” is defined in *Section 19.2*.

“**Environmental Laws**” means any present or future federal, state or local Laws or policies relating to Hazardous Material (including the Handling, Release, or Remediation) or to human health and safety, industrial hygiene or environmental conditions in the environment, including structures, soil, air, air quality, water, water quality and groundwater conditions, and any environmental mitigation measure adopted under Environmental Laws affecting any portion of the Premises. “**Environmental Laws**” include the City’s Pesticide Ordinance (Chapter 39 of the

San Francisco Administrative Code), Section 20 of the San Francisco Public Works Code (Analyzing Soils for Hazardous Waste) and the Fats, Oils and Grease Control Ordinance.

“**Environmental Notice**” is defined in *Section 19.3(b)*.

“**Environmental Oversight Deposit**” is defined in *Section 19.3(a)*.

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

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

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

“**Equal Opportunity Program**” is defined in *Article 41*.

“**EV Access Area**” is defined in *Section 1.10*.

“**Exacerbate**” or “**Exacerbating**” when used with respect to Hazardous Materials means any act or omission that increases the quantity or concentration of Hazardous Materials in the affected area, causes the increased migration of a plume of Hazardous Materials in soil, groundwater, or bay water, causes a Release of Hazardous Materials that had been contained until the act or omission, or otherwise requires Investigation or Remediation that would not have been required but for the act or omission. Exacerbate also includes the disturbance, removal or generation of Hazardous Materials in the course of Tenant's operations, Investigations, maintenance, repair, Improvements and Alterations under this Lease. “**Exacerbation**” has a correlative meaning.

“**Excess Cash Flow Participation Rent**” is defined in *Section 3.5(a)*.

“**Executive Director**” means the Executive Director of Port or his or her designee (except as used in the notice provisions with respect to Tenant).

“**Expiration Date**” is defined in *Article 2*.

“**Extended Term**” is defined in *Section 2.2*.

“**Extended Term Commencement Date**” is defined in *Section 3.2(g)*.

“**Extension Notice**” is defined in *Section 2.2(a)(i)*.

“**Exterior Improvements**” means any improvements, furnishings, fixtures, or equipment located on the exterior facades of buildings or in the exterior areas of the Premises, which may include mechanical equipment, Satellite Dishes, public art, statues, bollards, flower baskets, benches, tables, chairs, umbrellas, heaters, railings, gates, trash receptacles, cleats, Signs, kiosks, flagpoles, canopies, awnings, landscaping, planter boxes, light poles, lighting fixtures, fountains, ticket booths, bicycle racks, plaques, markers, tents, and paving or other surface treatments.

“**F&B**” is defined in *Section 3.4(b)*.

“**Facilities Condition Report**” is defined in *Section 11.2*.

“FEMA” is defined in *Article 46*.

“Fifth Operation Period” is defined in *Section 3.2(f)*.

“Final Certificate of Occupancy” means issuance by Port’s building department of a Certificate of Final Completion and Occupancy for the applicable Improvements that will permit occupancy of the Improvements or will allow the Hotel and Teatro, as applicable, to open to the public or commence operations.

“Final Construction Documents” means plans and specifications sufficient for the processing of an application for a building permit in accordance with applicable Laws.

“financial statements” is defined in *Section 20.4(d)*.

“FIRMS” is defined in *Article 46*.

“First Operation Period” is defined in *Section 3.2(b)*.

“First Tier IRR Participation Rent” is defined in *Section 3.5(a)*.

“First Tier IRR Threshold” is defined in *Section 3.5(a)*.

“Flagpoles” is defined in *Section 10.11*.

“Floodplain Ordinance” is defined in *Section 46*.

“FMND” is defined in *Recital R*.

“Force Majeure” is defined in *Section 25*.

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

“Foreclosure Period” is defined in *Section 39.11(b)*.

“Fourth Operation Period” is defined in *Section 3.2(e)*.

“GAAP” means generally accepted accounting principles consistently applied.

“Good Neighbor Policy” is defined in *Section 10.16*.

“Graffiti” is defined in *Section 10.13*.

“Gross F&B Rental Revenues” is defined in *Section 3.4(b)*.

“Gross F&B Revenues” is defined in *Section 3.4(b)*.

“Gross Hotel Revenues” is defined in *Section 3.4(b)*.

“Gross Venue Space Revenues” is defined in *Section 3.4(b)*.

“Gross Revenues” is defined in *Section 3.4(b)*.

“Guest Rooms” means each of the rooms in the Premises which are available for occupancy by guests for overnight accommodations which are separately keyed.

“Handle” when used with reference to Hazardous Materials means to use, generate, manufacture, process, produce, package, treat, transport, store, emit, discharge or dispose of any Hazardous Material. “Handled” and “Handling” have correlative meanings.

“Hard Cost” is defined in the LDDA.

“Hazardous Materials” means any material that, because of its quantity, concentration or physical or chemical characteristics, is deemed by any federal, state or local governmental authority to pose a present or potential hazard to human health or safety or to the environment. Hazardous Material includes any material or substance defined as a “hazardous substance,” or

“**pollutant**” or “**contaminant**” under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA,” also commonly known as the “Superfund” law), as amended (42 U.S.C. §§ 9601 et seq.), or under Section 25281 or Section 25316 of the California Health & Safety Code; any “hazardous waste” is defined in Section 25117 or listed under Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of the structure of any existing Improvements on the Premises, any Improvements to be constructed on the Premises by or on behalf of Tenant, or are naturally occurring substances on, in or about the Premises and petroleum, including crude oil or any fraction, and natural gas or natural gas liquids.

“**Hazardous Material Claim**” means any Environmental Regulatory Action or any claim made or threatened by any third party against the Indemnified Parties or the Premises relating to damage, contribution, cost recovery compensation, loss or injury resulting from the Release of any Hazardous Materials, including Losses based in common law. Hazardous Materials Claims include Investigation and Remediation costs, fines, natural resource damages, damages for decrease in value of the Premises or other Port property, the loss or restriction of the use or any amenity of the Premises or other Port property, Attorneys’ Fees and Costs and fees and costs of consultants and experts.

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

“**HCAO**” is defined in *Section 43.2*.

“**Hotel**” is defined in *Section 10.1(b)*.

“**Hotel Opening Date**” means the date the Hotel first opens to the public and members of the public are able to stay overnight after payment of the then overnight rate.

“**Hotel Space**” is defined in *Section 10.1(b)*.

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

“**Improvements**” means all physical construction on the Premises (and off the Premises where designated in the Scope of Development), the Initial Improvements, all buildings, structures, fixtures, building systems (such as plumbing, sewer, electrical, mechanical and other utility systems), any Subsequent Construction, and other improvements erected (such as the Spiegel tent), built, Rehabilitated, placed, installed, constructed, located upon or within the Premises on or after the Commencement Date.

“**Indemnified Parties**” means City, including all of its boards, commissions, departments, agencies and other subdivisions, including Port, all of the elected officials, Agents of the City, including Port, and all of their respective heirs, legal representatives, successors and assigns, and each of them.

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

“**Index**” is defined in *Section 3.3(a)*.

“**Indexed**” means the sum of the number to be adjusted plus the product of the number to be adjusted multiplied by the percentage increase, if any, in the Index from the first day of the month in which the Commencement Date occurred to the first day of the most recent month for which the Index is available at any given time; except that, for any number that is to be Indexed annually under this Lease, the number to be adjusted will be multiplied by the percentage

increase, if any, in the Index from the first day of the 13th month preceding the adjustment date to the first day of the month immediately preceding the adjustment date.

“**Initial Improvements**” means all Improvements to be built on the Premises (and off the Premises where designated in the Scope of Development) as described in the Scope of Development in the LDDA and attached hereto as **Exhibit BB**, and all in accordance with, and as further described in, the LDDA.

“**Initial Term**” is defined in **Section 2.1**.

“**Investigate**” or “**Investigation**” when used with reference to Hazardous Material means any activity undertaken to determine the nature and extent of Hazardous Material that may be located in, on, under or about the Premises, any Improvements or any portion of the site or the Improvements or which have been, are being, or threaten to be Released into the environment. Investigation will include preparation of site history reports and sampling and analysis of environmental conditions in, on, under or about the Premises or any Improvements.

“**Invitees**” when used with respect to Tenant means the customers, patrons, invitees, guests, licensees, assignees and Subtenants of Tenant and the customers, patrons, invitees, guests, members, licensees, assignees and sub-tenants of Subtenants; when used with respect to Port means the invitees, guests and licensees of Port.

“**IPM**” is defined in **Section 43.8**.

“**IRR**” is defined in **Section 3.5(a)**.

“**Kenwood**” is defined in **Recital I**.

“**Late Charge**” is defined in **Section 3.14**.

“**Law**” or “**Laws**” means any one or more present and future laws, ordinances, rules, regulations, permits, codes, authorizations, orders and requirements, to the extent applicable to the Parties or to the Premises or any portion thereof, whether or not foreseen, unforeseen or in the present contemplation of the Parties, including all consents or approvals (including Regulatory Approvals) required to be obtained from or issued by, and all rules and regulations of, and all building and zoning laws of, all federal, state, county and municipal governments, the departments, bureaus, agencies or commissions thereof, authorities, boards of officers, any national or local board of fire underwriters, or any other body or bodies exercising similar functions, having or acquiring jurisdiction of, or which may affect or be applicable to, the Premises or any part thereof, including any subsurface area, the use thereof and of the buildings and Improvements thereon.

“**LDDA**” is defined in **Recital X**.

“**lead policy**” is defined in **Section 23.1(a)(ix)**.

“**Lease**” means this lease, as it may be amended from time to time.

“**Leasehold Estate**” means Tenant’s leasehold estate created by this Lease.

“**Lease Year**” during the Initial Term means the twelve (12) month period commencing on the Operation Period Rent Commencement Date and each anniversary of such Operation Period Rent Commencement Date thereafter until the expiration of the Initial Term. “**Lease Year**” during the Extended Term means the twelve (12) month period commencing on the Extended Term Commencement Date and each anniversary of such Extended Term Commencement Date thereafter until the expiration of the Extended Term.

“**Limited Equity Interest**” is defined in **Section 3.5(a)**.

“**Limited Equity Interest Rate**” is defined in **Section 3.5(a)**.

“**Limited Operations Equity**” is defined in **Section 3.5(a)**.

“**Limited Operations Equity Cap**” is defined in *Section 10.8(e)*.

“**Loan Rate**” is defined in *Section 39.11(d)(ii)(3)*.

“**Local Hiring Requirements**” is defined in *Section 43.25*.

“**Loss**” or “**Losses**” when used with reference to any Indemnity means any and all claims, demands, losses, liabilities (including direct or vicarious liabilities), damages (including foreseeable and unforeseeable, incidental and consequential damages), liens, obligations, interest, injuries, penalties, fines, lawsuits and other proceedings, judgments and awards and costs and expenses, (including reasonable Attorneys’ Fees and Costs and consultants’ fees and costs) of whatever kind or nature, known or unknown, contingent or otherwise.

“**Maintenance Notice**” is defined in *Section 11.4*.

“**Major Casualty**” is defined in *Section 16.4(a)*.

“**Management Agreement**” is defined in *Section 10.4(a)*.

“**Manager**” is defined in *Section 10.4(a)*.

“**Market-Wide Downturn**” is defined in *Section 10.8(b)*.

“**Material Systems**” is defined in *Section 11.4*.

“**Memorandum of Lease**” means the Memorandum of this Lease, between Port and Tenant, recorded in the Official Records.

“**Minimum Rent**” is defined in *Section 3.2*.

“**Minimum Rent Deposit**” is defined in *Section 19.1*.

“**Minor Alterations**” is defined in *Section 13.2*.

“**Mitigation Monitoring and Reporting Program**” means all of the mitigation and improvement measures set forth in the Final Mitigated Negative Declaration for the Initial Improvements and described in *Exhibit R*.

“**Mortgage**” means a mortgage, deed of trust, or similar security instrument of Tenant’s leasehold interest under this Lease that is recorded in the Official Records.

“**Mortgage Confirmation Statement**” is defined in *Section 39.4(b)*.

“**Mortgagee**” means the holder or holders of a Permitted Mortgage and, if the Permitted Mortgage is held by or for the benefit of a trustee, agent or representative of one or more financial institutions, the financial institution on whose behalf the Permitted Mortgage is being held. Multiple financial institutions participating in a single financing secured by a single Permitted Mortgage will be deemed a single Mortgagee for purposes of this Lease.

“**Mutual Termination Agreement**” is defined in *Recital E*.

“**NFIP**” is defined in *Article 46*.

“**Net Awards and Payments**” is defined in *Section 17.4*.

“**Net Cash Flow**” is defined in *Section 3.5(a)*.

“**Net Refinancing Proceeds**” is defined in *Section 3.7(a)*.

“**Net Transfer Proceeds**” is defined in *Section 3.6(a)*.

“**New Lease**” is defined in *Section 39.11(d)*.

“**Non-Cash Consideration**” is defined in *Section 3.6(a)*.

“**Non-Disturbance Agreements**” is defined in *Section 20.5(a)*.

“**Noise Ordinance**” means *Article 29* of the San Francisco Code or its successor.

“**Notice of Request to Sublease**” is defined in *Section 20.4(d)*.

“**Notice to Cease Prohibited Use**” is defined in *Section 4.2*.

“**NPS**” means the National Park Service.

“**Nutritional Standards Requirements**” is defined in *Section 43.27*.

“**OEWD**” means Office of Economic Workforce and Development.

“**Official Records**” means, with respect to the recordation of Mortgages and other documents and instruments, the Official Records of the City and County of San Francisco.

“**Open Space Area**” means the Public Park Area and the Public Utility Area, each as depicted on *Exhibit C*.

“**Operating Expenses**” is defined in *Section 3.5(a)*.

“**Operation Period Rent Commencement Date**” is defined in *Section 3.2(b)*.

“**Operations Equity Report**” is defined in *Section 10.8(d)(ii)*.

“**Operations Plan**” means Tenant’s operations plan for the Handling of Hazardous Materials and approved by Port [and is attached hereto as *Exhibit CC*, as may be amended from time to time with the prior consent of Port. **[Note: Delete highlighted language if an Operations Plan isn’t required at lease execution.]**]

“**OSHA**” is defined in *Section 22.6*.

“**PACMs**” is defined in *Section 22.6*.

“**Partial Condemnation**” is defined in *Section 17.3*.

“**Party**” means Port or Tenant, as a party to this Lease; Parties means both Port and Tenant, as Parties to this Lease.

“**Percentage Rent**” is defined in *Section 3.4(c)*.

“**Periodic 10-Year Adjustment Date**” is defined in *Section 3.3(a)*.

“**Permitted Mortgage**” is a Mortgage in compliance with the provisions of *Article 39* and approved by Port.

“**Permitted Title Exceptions**” is defined in *Section 1.9*.

“**Permitted Uses**” is defined in *Section 4.1*.

“**Person**” means any individual, partnership, corporation (including any business trust), limited liability company, joint stock company, trust, unincorporated association, joint venture or any other entity or association, the United States, or a federal, state or political subdivision thereof.

“**Personal Property**” means all fixtures (other than fixtures that become a part of the realty, such as bathroom fixtures), furniture, furnishings, equipment, machinery, supplies, software and other tangible personal property that is incident to the ownership, development or operation of the Improvements and/or the Premises, whether now or hereafter located in, upon or about the Premises, belonging to Tenant or any Subtenant and/or in which Tenant or any Subtenant has or may hereafter acquire an ownership interest, together with all present and future attachments, replacements, substitutions and additions thereto or therefor. The Spiegel tent erected within the Venue Space is not Personal Property. From and after the installation of the Spiegel tent, the Spiegel tent forms a part of the realty and the Improvements.

“**Pesticide Ordinance**” is defined in *Section 22.8*.



“Port” means the City and County of San Francisco, acting by and through the San Francisco Port Commission.

“Port Event of Default” is defined in *Section 30.1*.

“Port IFD” is defined in *Section 7.2*.

“Port Representative” is defined in *Section 3.10*.

“Port’s Repair Notice” is defined in *Section 11.4*.

“Port Share of Refinancing Proceeds” is defined in *Section 3.7(b)*.

“Port Share of Transfer Proceeds” is defined in *Section 3.6(b)*.

“Port’s Sign Guidelines” are set forth in *Exhibit M*.

“Pre-Approved Sublease” is defined in *Section 20.4(b)*.

“Pre-Existing Hazardous Materials” means Hazardous Materials present on the Premises immediately prior to the Commencement Date.

“Pre-LDDA Costs” is defined in the LDDA and is equal to the [\$\_\_\_\_\_]  
[Note: Insert actual amount before lease execution.]

“Preliminary Construction Documents” means dimensioned, scaled preliminary drawings with floor plans, elevations, sections, perspective renderings, electrical, mechanical and plumbing plans, outline specifications for materials, finishes and methods of construction, and equipment plans, to the extent applicable to the proposed Subsequent Construction.

“preservative-treated wood containing arsenic” is defined in *Section 43.11*.

“Presidio” is defined in *Recital I*.

“Premises” is defined in *Section 1.1*.

“Prevailing Wage Requirements” is defined in *Section 43.16(a)*.

“Prime Rate” means the base rate on corporate loans posted by at least 75% of the nation’s 30 largest banks, as published by the Wall Street Journal, or if the Wall Street Journal has ceased to publish the Prime Rate, then such other equivalent recognized source.

“Prior Index” is defined in *Section 3.3*.

“Private Information” is defined in *Section 43.19(c)*.

“Prohibited Uses” is defined in *Section 4.2*.

“Project” is defined in *Recital J*.

“Project Cost” means the Total Project Cost incurred as of the applicable date.

“Public Park Area” is defined in *Section 4.4* and depicted on *Exhibit A-2*.

“Public Trust” means the tidelands public trust for commerce, navigation and fisheries, including the statutory trust imposed by the Burton Act set forth in the Burton Act.

“Public Trust Findings” is defined in *Recital V*.

“Public Utility Area” means the EV Access Area and the AT&T Use Area, as depicted on *Exhibit A-2*.

“PV System” is defined in *Section 14.2*.

“Qualification Determination” is defined in *Recital N*.

“Qualified Engineer” means a qualified, California registered structural engineer.

“**Qualified Operator**” is defined in *Section 10.4(b)(iii)*.

“**Quarter**” means a three-month period commencing on the first day of January, April, July, and October of each calendar year.

“**Quarterly Revenue Statement**” is defined in *Section 3.8(a)*.

“**Real Property**” is defined in *Section 1*.

“**Reassessment Event**” means a change in ownership of real property as described in Cal. Revenue and Taxation Code, Chapter 2 (Change in Ownership and Purchase), Section 64, as amended or replaced from time to time.

“**Revenue Statement**” is defined in *Section 3.8(a)*.

“**Record Drawings**” is defined in *Section 13.6(a)*.

“**Refinancing**” is defined in *Section 3.7(a)*. “**Refinance**” has a correlative meaning.

“**Refinancing Proceeds**” is defined in *Section 3.7(a)*.

“**Regulatory Agency**” and “**Regulatory Agencies**” means any local, regional, state or federal governmental agency or political subdivision having jurisdiction over the Premises, including City, any Environmental Regulatory Agency, State Lands, City’s Planning Commission and/or Zoning Administrator, DBI, SFPUC, WDAC, and Port’s Chief Harbor Engineer.

“**Regulatory Approval**” means any authorization, approval, endorsement, determination of trust consistency, amendment of any existing plans, or permit required or issued by any Regulatory Agency.

“**Rehabilitate**” and “**Rehabilitation**” means the repair or alteration of an historic building that does not damage or destroy the Historic Fabric.

“**Reimbursable Venue Space Subtenant Costs**” is defined in *Section 20.5(a)(ii)(4)*.

“**Release**” when used with respect to Hazardous Material means any actual or imminent spilling, introduction, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing in, on, under, or about any existing improvements or any Improvements constructed under this Lease or the LDDA by or on behalf of Tenant, or in, on, under or about the Premises or any portion thereof, or into the environment. “Released” has a correlative meaning.

“**Remediate**” or “**Remediation**” when used with reference to Hazardous Materials means any activities undertaken to clean up, abate, transport, dispose, contain, treat, stabilize, monitor, remediate, remove, or otherwise control Hazardous Materials located in, on, under or about the Premises or which have been, are being, or threaten to be Released into the environment, or to restore the affected area to the standard required by the applicable Environmental Regulatory Agency in accordance with application Environmental Laws and any additional Port requirements. Remediation includes those actions included within the definition of “**remedy**” or “**remedial action**” in California Health and Safety Code Section 25322 and “**remove**” or “**removal**” in California Health and Safety Code Section 25323.

“**Rent**” is defined in *Section 3.1*.

“**Replacement Notice**” is defined in *Section 10.11*.

“**Reserve Accounts**” is defined in *Section 10.6(a)*.

“**Restaurant**” is defined in *Section 10.1(b)*.

“**Restoration**” and “**Restore**” means the restoration, replacement, renovation, reconstruction, repair, or rebuilding of the Improvements (or the relevant portion thereof) in accordance with all Laws (including the Secretary’s Standards if applicable) then applicable. All

Restoration will be conducted in accordance with the provisions of *Article 13*. “**Restore**” and “**Restored**” have correlative meanings.

“**retail**” means restaurants, specialty retail uses (as distinguished from major department stores, “big box” retail, large non-maritime “destination” stores) or purely neighborhood-serving retail uses that sell goods or services that are consistent with the public trust doctrine.

“**Revenue Statement**” is defined in *Section 3.8(c)*.

“**Revenues**” is defined in *Section 3.4(b)*.

“**RevPAR**” is defined in *Section 10.8(b)*.

“**RWQCB**” means the San Francisco Bay Regional Water Quality Control Board of Cal/EPA, a state agency.

“**Sale Period**” is defined in *Section 39.8(b)*.

“**Satellite Dish**” means an antennae, telecommunication, or transmission device for transmitting and/or receiving signals.

“**Schematic Drawings**” means conceptual drawings in sufficient detail to describe a development proposal.

“**Scope of Development**” means the Scope of Development attached hereto as *Exhibit BB*, which describes the to-be-built Project.

“**Seawall**” is defined in *Section 6*.

“**Seawall Improvements**” is defined in *Section 6*.

“**Second Notice**” is defined in *Section 10.4(b)*.

“**Second Operation Period**” is defined in *Section 3.2(c)*.

“**Second Tier IRR Participation Rent**” is defined in *Section 3.5(a)*.

“**Second Tier IRR Threshold**” is defined in *Section 3.5(a)*.

“**Secretary’s Standards**” mean the Secretary of the Interior’s Standards for the Treatment of Historic Properties which are published by the National Park Service and posted on its website at <http://www.nps.gov/history/hps/tps/Standards/index.htm> and the Guidelines for Rehabilitating Historic Buildings.

“**Security Deposit**” is defined in *Section 19.1*.

“**SFHA**” means a special flood hazard area.

“**SFPUC**” means the San Francisco Public Utilities Commission.

“**SF RevPAR**” is defined in *Section 10.8(b)*.

“**SF STR Trend Report**” is defined in *Section 10.8(b)*.

“**SHPO**” means the California State Historic Preservation Officer.

“**Sign**” means any sign, whether free-standing or affixed to a structure, flag, advertisement, poster, or banner.

“**Significant Change**” means (i) any change in the direct or indirect ownership of Tenant or the Developer, that results in a change in Control of Tenant or the Developer, as applicable, (ii) any cumulative or aggregate sale, assignment, encumbrance, or other transfer of any percentage of TZZ’s legal or beneficial interests in Tenant or Developer, as applicable; (iii) 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 Tenant or Developer owning fifty percent (50%) or more of the interests in Tenant or Developer, as applicable, or rights to its

capital or profits; (iv) the occurrence of any of the events described in (i), (ii), or (iii) with respect to either Kenwood, Presidio, or TZZ, LLC, or such other entity related to any subsequent assignee or transferee Port requires in connection with the applicable assignment or transfer; or (vi) the occurrence of a Reassessment Event.

“**Soft Cost**” is defined in the LDDA.

“**Sole Source Resolution**” is defined in *Recital L*.

“**Special City and Port Provisions**” is defined in *Section 28.1*.

“**State**” means the State of California.

“**State Lands**” means the California State Lands Commission.

“**Sublease**” means any lease, sublease, license, concession or other agreement by which Tenant leases, subleases, demises, licenses or otherwise grants to any Person in conformity with the provisions of this Lease, the right to occupy or use any portion of the Premises (whether in common with or to the exclusion of other Persons).

“**Sublease Rent**” means rent or fee actually received by Tenant (excluding rents or fees for the reimbursement of any operating expenses, insurance or taxes) pursuant to all Subleases.

“**Subsequent Construction**” means all additions, expansions, Restoration, alterations or modifications of any Improvements or any construction of additional Improvements following completion of the Initial Improvements pursuant to the LDDA.

“**Substantial Condemnation**” is defined in *Section 17.3(a)*.

“**Subtenant**” means any Person leasing, using, occupying or having the right to occupy any portion of the Premises under and by virtue of a Sublease.

“**SWL**” means seawall lot.

“**SWPPP**” means Storm Water Pollution Prevention Plan.

“**Teatro**” means TZZ San Francisco, LLC.

“**Teatro Sublease**” is defined in *Section 20.4(b)(v)*.

“**Tenant**” is TZK Broadway, LLC, a California limited liability company, and its permitted successors and assigns, acting as the developer under the LDDA and related transaction documents.

“**Tenant Event of Default**” is defined in *Article 27*.

“**Term**” is defined in *Article 2*.

“**Term Sheet**” is defined in *Recital P*.

“**Theater Lease**” is defined in *Recital E*.

“**Third Operation Period**” is defined in *Section 3.2(d)*.

“**Total Condemnation**” is defined in *Section 17.2*.

“**Total Project Cost**” means (i) the sum of Pre-LDDA Costs and all Hard Costs and Soft Costs incurred by Tenant for the development and construction of the Project prior to the Hotel Opening Date plus the cost of any Deferred Items incurred after the Hotel Opening Date included in the Agreed Total Project Cost and Developer Equity Amount.

“**Transaction Costs**” is defined in the LDDA.

“**Transaction Documents**” is defined in the LDDA.

“**Transfer**” is defined in *Section 20.1(a)*.

“**Transfer Proceeds**” is defined in *Section 3.6(a)*.

“**TZ**” is defined in *Recital E*.

“**Uninsured Casualty**” is defined in *Section 16.4(a)*.

“**Unmatured Tenant Event of Default**” means any default that, with the giving of notice or the passage of time, or both, would constitute a Tenant Event of Default.

“**Venue Space**” is defined in *Section 10.1(b)*.

“**Venue Space Sublease**” means a Sublease for the Venue Space.

“**Vulnerability Study**” is defined in *Section 1.2*.

“**WLUP**” means the Port of San Francisco Waterfront Land Use Plan, including the Waterfront Design and Access Element, for the approximately 7-1/2 miles of waterfront property under Port jurisdiction.

“**WDAC**” means the Waterfront Design Advisory Committee authorized under Planning Code Section 240.

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, the Parties have executed this Lease as of the day and year first above written.

**Tenant**

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

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

**Port**

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

By: \_\_\_\_\_

APPROVED AS TO FORM:

DENNIS J. HERRERA, City Attorney

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

Lease authorized by:

-Port Commission Resolution No. 19-36 on September 10, 2019  
Board of Supervisors Resolution No. [\_\_\_\_\_] on [\_\_\_\_\_, 2019]