

**THIRD AMENDMENT  
TO EMERGENCY AGREEMENT  
KHP III SF SUTTER LLC  
KIMPTON BUCHANAN HOTEL**

THIS **THIRD AMENDMENT TO EMERGENCY AGREEMENT** (this “*Amendment*”), dated as of April 3, 2022, for reference purposes, is entered into by and between KHP III SF Sutter LLC, a Delaware limited liability company (“*Contractor*” or “*Hotel*”), and the City and County of San Francisco, a municipal corporation (“*City*”), acting by and through its Human Services Agency (the “*HSA*”), and with reference to the following facts and circumstances:

**RECITALS**

**A.** City and Contractor are parties to that certain Emergency Agreement, dated as of May, 23 2020 (the “*Original Agreement*”), pursuant to which Hotel granted City the right to use that certain real property and the improvements thereon consisting of a One Hundred Thirty-One (131) room hotel located at 1800 Sutter Street in the City and County of San Francisco, commonly known as the “**Kimpton Buchanan Hotel**”, to further the public health and safety in connection with City’s response to the Local Emergency declared by Mayor London Breed on Tuesday, February 25, 2020.

**B.** The Original Agreement was amended pursuant to that certain First Amendment to Emergency Agreement by and between City and Hotel, dated as of May 2021 (the “*First Amendment*”), and by that certain Second Amendment to Emergency Agreement by and between City and Hotel, dated as of March 1, 2022 (the “*Second Amendment*”). The Original Agreement, as modified by the First Amendment and the Second Amendment, is referred to in this Amendment as the “*Agreement*”. The Second Amendment was entered into pursuant to Section 2 of the Forty-Fifth Supplement to the February 25, 2020 Mayoral Proclamation declaring the existence of a local emergency (“*Section 2 of the Forty-Fifth Supplement*”), which authorized the Executive Director of the HSA to extend the term of the Agreement up to and including April 2, 2022.

**C.** The San Francisco Board of Supervisors adopted Ordinance No. [REDACTED] on May [REDACTED], 2022 (the “*Ordinance*”), to authorize the extension of the Booking Period from April 2, 2022, to December 31, 2022, and to increase the Compensation under the Agreement by Four Million Seventy-One Thousand, Six Hundred Seventeen Dollars (\$4,071,617), from Nine Million, Nine Hundred Ninety-Two Thousand, Six Hundred Fifteen Dollars (\$9,992,615) to Fourteen Million Sixty-Four Thousand, Two Hundred Thirty-Two Dollars (\$14,064,232).

**D.** City and Contractor now desire to enter into this Amendment to, among other things, (a) extend the Booking Period from April 2, 2022, to December 31, 2022, and (b) increase the Compensation in accordance with the Ordinance and on the terms and conditions set forth herein.

**AGREEMENT**

NOW, THEREFORE, for and in consideration of the foregoing Recitals, which are incorporated into this Amendment by this reference, the mutual covenants and obligations of the parties contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Hotel and the City hereby agree as follows:

**Section 1. Definitions.** Capitalized terms used and not defined in this Amendment shall have the meanings assigned to such terms in the Agreement.

**Section 2. Amendment of Agreement.** The Agreement is hereby amended as follows:

(a) **Amendment of Section 2.1.** *Section 2.1 of the Agreement is hereby amended and restated in its entirety and shall hereinafter read as follows:*

**“2.1 Term.** The term of this Agreement commenced on **June 1, 2020**, and will expire of its own accord on **December 31, 2022** (the “**Booking Period**”), unless earlier terminated as otherwise provided herein. Notwithstanding the foregoing, either City or Hotel may terminate this Agreement as of any date by providing at least thirty (30) days’ written notice to the other party of such termination.

**(b) Amendment of Section 3.3.1.** *The fifth sentence of Section 3.3.1 is hereby amended and restated in its entirety and shall hereinafter read as follows:*

“In no event shall the amount of this Agreement exceed Fourteen Million Sixty-Four Thousand, Two Hundred Thirty-Two Dollars (\$14,064,232).”

**(c) Amendment of Section 3.3.3.** *Section 3.3.3 is hereby amended and restated in its entirety, and shall hereinafter read as follows:*

**“3.3.3. Last Month’s Payment.** Upon execution of this Agreement, the City shall pay to the Hotel the amount of (\$402,039) (the “**Last Month’s Payment**”) by wire transfer or ACH to an account designated by the Hotel, which amount shall be applied to the Compensation payable for the last month of the Booking Period. If, at any time during or at the end of the Booking Period there is any damage (other than ordinary wear and tear) caused to the Property by the City or any of its Guests (“**Property Damage**”), Hotel shall repair such Property Damage following its submission of a written description and photographs of such Property Damage and invoices therefor, and the City shall promptly reimburse Hotel all undisputed amounts for the repair of such Property Damage, as such undisputed amounts are mutually agreed upon by the Parties, subject to the approval of the San Francisco Board of Supervisors acting in its sole discretion if required by the San Francisco Administrative Code. Any remaining disputed amounts may be reserved by the Hotel in a mutually agreed upon final agreement closeout and release in a form substantially similar to the Final Agreement Closeout and Release of Claims attached to this Agreement as **Appendix F**, and shall be subject to dispute resolution, as provided herein. The Hotel hereby reserves all other rights and remedies available to it at law or in equity for any Property Damage. The Last Month’s Payment will be held by the Hotel and may be commingled with other funds; any interest earned on the Last Month’s Payment, if any, shall be the property of the Hotel.”

**(d) Amendment of Section 3.9.** *Section 3.9 of the Agreement shall hereinafter read as follows:*

“To the extent applicable, Hotel shall, and shall cause its contractors and subcontractors to, comply with the prevailing wage requirements of the California Department of Industrial Relations under California Labor Code Section 1720 et. seq. and implementing rules and regulations.”

**(e) Addition of Section 8.1.4.** *Section 8.1.4 is hereby added to the Agreement.*

“Upon the expiration of the Booking Period or earlier termination of this Agreement, City and Hotel will enter into a mutually agreed upon Final Agreement Closeout and

Release of Claims, in a form substantially similar to that attached hereto as **Appendix F.**”

(f) **Amendment of Appendix B.** *The following amounts within Section 1 of Appendix B “Maximum Not-to-Exceed Compensation” are hereby amended and fully incorporated into the Agreement:*

**Maximum Not-to-Exceed Amount of Agreement:**

- |  |                     |
|--|---------------------|
| a. <b>Total Not-to-Exceed Compensation:</b>                                  | <b>\$14,064,232</b> |
| b. Not-to-Exceed Compensation without Reimbursable Amount:<br>(131x\$99x943) | \$12,229,767        |
| c. Not-to-Exceed Reimbursable Amount:  | \$1,834,465         |

**Section 3. Effective Date.** Each of the amendments set forth in Section 2 above shall be effective on and after April 3, 2022.

**Section 4. Reference.** No reference to this Amendment is necessary in any instrument or document at any time referring to the Agreement. Any future reference to the Agreement will be deemed a reference to the Agreement, as amended by this Amendment.

**Section 5. No Other Amendment; Entire Agreement.** Except as expressly modified by this Amendment, all of the terms and conditions of the Agreement shall remain unchanged and in full force and effect. The Agreement as amended by this Amendment constitutes the entire agreement between City and Hotel with respect to the subject matter of the Agreement and supersedes and cancels any and all previous negotiations, agreements, or understandings, if any, regarding the matters contained in the Agreement. In the event of any conflict between the terms of the Agreement and the terms of this Amendment, the terms of this Amendment will control.

**Section 6. Exhibits.** The Exhibits attached hereto are incorporated into this Amendment by this reference.

**Section 7. Applicable Law.** This Amendment will be governed by, construed, and enforced in accordance with the laws of the State of California and City’s Charter. Any legal suit, action, or proceeding arising out of or relating to this Amendment shall be instituted in the Superior Court for the City and County of San Francisco, and each party agrees to the exclusive jurisdiction of such court in any such suit, action, or proceeding (excluding bankruptcy matters). The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action, or proceeding in such court and irrevocably waive and agree not to plead or claim that any suit, action, or proceeding brought in San Francisco Superior Court relating to this Amendment has been brought in an inconvenient forum. The Parties also unconditionally and irrevocably waive any right to remove any such suit, action, or proceeding to Federal Court.

**Section 8. Further Instruments.** The parties to the Agreement and this Amendment agree to execute such further instruments and to take such further actions as may be reasonably required to carry out the intent of this Amendment.

**Section 9. Counterparts; Electronic Signature.** This Amendment may be executed in two or more counterparts, each of which will be deemed an original, but all of which taken together will constitute one and the same instrument. The Parties may execute this Amendment by electronic signature.

**[SIGNATURES ON FOLLOWING PAGE]**

**IN WITNESS WHEREOF**, Contractor and City have executed this Amendment as of the date first referenced above.

**CITY**

CITY AND COUNTY OF SAN FRANCISCO,  
a municipal corporation

\_\_\_\_\_  
Trent Rhorer  
Executive Director  
Human Services Agency

Approved as to Form:

David Chiu  
City Attorney

By: \_\_\_\_\_  
**Vincent L. Brown**  
Deputy City Attorney

**HOTEL**

KHP III SF SUTTER LLC, a Delaware limited  
liability  
company\_\_\_\_\_

\_\_\_\_\_  
**Judith C. Miles**  
**Executive Member and Secretary**  
**Supplier ID: 0000043439**

**Exhibit A**

**DRAFT - APPENDIX F**

**FINAL AGREEMENT CLOSEOUT AND RELEASE OF CLAIMS**

This Final Agreement Closeout and Release of Claims (“**Release**”) is made and entered into this **XXX** day of **XXXXXXX** by and between **XXXXXXXXXXXXXXXXXXXX** (“**Hotel**”), and the City and County of San Francisco, a municipal corporation, (“**City**”), acting by and through its Human Services Agency (collectively “**Parties**”).

**RECITALS**

**WHEREAS**, the City and Hotel entered into an Emergency Agreement, dated **XXXXXX**, as amended from time to time (the “**Agreement**”), to house individuals experiencing homelessness or individuals who are at risk of developing severe COVID-19 (**attached hereto as Attachment1, including all contract amendments**);

**WHEREAS**, issues arose between the Parties regarding final Agreement costs;

**WHEREAS**, the Parties now wish to resolve all issues and close out the Agreement by mutual consent, reserving Hotel’s right to file a Government Code Claim with the City for disputed amounts, if any;

**NOW, THEREFORE**, it is agreed between Hotel and City as follows:

**Agreement Closeout and Release**

1. **Effective Date.** This Release shall be effective as of the date last executed below. Execution by the Parties via electronic signature and DocuSign is permitted.

2. **Agreement Sum.** Hotel and the City agree as follows:

Payments to Date:	\$XXXXX
Invoices to Date ( <i>excluding Final Invoice</i> )	\$XXXXX
Advance/Deposit ( <i>if any</i> )	( <b>\$XXXXX</b> )
Final Invoice Due	\$XXXXX
<b>FINAL PAYMENT DUE TO HOTEL:</b>	<b>\$XXXXX</b>

Original Agreement Sum:	\$XXXXX
Total Payment ( <i>Including Final Payment</i> )	\$XXXXX
<b>Agreement Balance</b>	<b>\$XXXXX</b>

3. **Agreement Closeout.** The Parties agree that the Agreement will be fully and finally closed upon the City’s payment of the final invoice.

4. **Unpaid Agreement Funds.** Hotel agrees that the City will retain all unpaid funds under the Agreement, and that, subject to resolution of any Disputed Claims (as defined below), no unpaid amounts under the Agreement are due to Hotel beyond those included in the final invoice. Hotel and City each acknowledge and hereby agree that, except for any Disputed Claims there are no unresolved or outstanding claims in dispute against the City or Hotel arising from the Agreement and/or Project.

**DELETE PARAGRAPH 5 IF THERE ARE NO CLAIMS IN DISPUTE**

5. **Disputed Claim(s).** The following items are disputed (each a "*Disputed Claim*") and each is specifically excluded from the operation of this Agreement and Release:

- a. **XXXXXXXXXXXXXXXXXXXXX:** Hotel's demand for XXXXXXXXXXXXXXXX.
- b. **XXXXXXXXXXXXXXXXXXXXX:** Hotel's demand for XXXXXXXXXXXXXXXX.

**The parties shall endeavor in good faith to resolve the Disputed Claims pursuant to the procedure described in Section 11.6 of the Agreement. Nothing herein shall operate to toll, waive, or excuse Hotel's compliance with the Government Code Claim requirements under California Government Code Section 900, et seq., and San Francisco Administrative Code Chapter 10 as to the Disputed Claims.**

6. **Full and Final Release.** Hotel agrees that, in consideration of the payment set forth in Paragraph 2, above, and excluding each Disputed Claim described in paragraph 5, above, Hotel releases and forever discharges the City, its boards and commissions, and all of its officers, agents, members, employees, authorized representatives, assignees and transferees from any and all liability, claims, demands, actions or causes of action of whatever kind or nature arising out of or in any way concerned with the Agreement and/or Project.

7. **Waiver of Civil Code Section 1542.** Hotel certifies that it is aware of, understands, and expressly waives the protections of Section 1542 of the Civil Code of the State of California, which provides:

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.

Being aware of this code section, Hotel expressly waives and relinquishes all rights and benefits that it may have under Section 1542, as well as under any other statute or common law principle of similar effect with respect to the release contained herein.

8. **No Admission of Liability.** No aspect of this Release is intended to be, nor at any time shall be construed, deemed, or treated in any respect as an admission of any wrongdoing or liability on the part of either Party.

9. **Terms of Agreement; Headings.** The terms of this Release are contractual and not a mere recital. The headings are for convenience only and do not limit or alter the described paragraphs in any manner and cannot be used for determining any of the rights, remedies or obligations of the Parties.

10. **Representation of Understanding and Release.** The Parties each affirms and acknowledges that it has carefully read this Release, fully appreciate, and understand the Release's contents and legal effect and have executed this Release voluntarily and of their own free will and act.

11. **Attorneys' Fees and Costs.** The Parties each shall bear its own court costs, attorneys' fees and other expenses incurred in connection with the Agreement, the Project, and this Release.

12. **Severability.** If any provision of this Release is determined to be invalid, illegal or unenforceable, the remaining parts of this Release shall not be affected or impaired and shall continue to be valid, effective and enforceable to the fullest extent permitted by law.

13. **Authority to Execute and Bind.** The Parties each represents and warrants the persons executing this Release on each Party's behalf have full and complete legal authority to do so and to bind the Party on behalf of which this Release is executed.

14. **Governing Law.** This Release shall be construed and enforced in accordance with the laws of the State of California, with venue in San Francisco.

15. **Entire Release.** This Release contains the entire agreement of the Parties.

16. **Modification.** This Release may be modified or amended only by written agreement signed by a duly authorized representative of each Party.

17. **Cooperation in Drafting.** Each party has cooperated in the drafting and preparation of this Release. If there is any claimed uncertainty or ambiguity, this Release will be construed as if all parties to this Release jointly prepared it.

**IN WITNESS WHEREOF**, the Parties hereto have executed this Release on the day last reflected below.

**\*\*\*CAUTION: THIS IS A RELEASE – READ BEFORE EXECUTING\*\*\***

HOTEL

CITY

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

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

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

**END OF DOCUMENT**

DRAFT