



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

**FIRST AMENDMENT TO
LEASE NO. L- _____**

(MISSION ROCK – PHASE __, PARCEL __/LOT __)

BETWEEN THE

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

AS LANDLORD

AND

MISSION ROCK PARCEL __ OWNER, L.L.C.

AS TENANT

DATED AS OF _____, 202__

**ELAINE FORBES
EXECUTIVE DIRECTOR**

SAN FRANCISCO PORT COMMISSION

**KIMBERLY BRANDON, PRESIDENT
WILLIE ADAMS, VICE PRESIDENT
GAIL GILMAN, COMMISSIONER
ED HARRINGTON, COMMISSIONER
STEVEN LEE, COMMISSIONER**

FIRST AMENDMENT TO PARCEL LEASE

This **FIRST AMENDMENT TO PARCEL LEASE NO. _____** (“**First Amendment**”) dated for reference purposes as of _____, 202__ (the “**Effective Date**”), is by and between **THE CITY AND COUNTY OF SAN FRANCISCO** (the “**City**”) operating by and through the **SAN FRANCISCO PORT COMMISSION** (“**Port**”), as landlord, and Mission Rock Parcel ___ Owner, L.L.C., a Delaware limited liability company, as tenant (“**Tenant**”).

This First Amendment 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 (Cal. Stats. 1968, Ch. 1333, as amended) and the City’s Charter. The Waterfront Plan is Port’s adopted land use document for property within Port jurisdiction, which provides the policy foundation for waterfront development and improvement projects.

B. Port and Tenant entered into that certain Lease No ____ (Mission Rock – Phase _ Parcel___/ Lot ___), dated as of _____ __, 2020 (the “**Original Parcel Lease**”), as evidenced by that certain Memorandum of Lease, dated as of _____ __, 2020, by and between Port and Tenant, and recorded on _____ as Document Number _____ (the “**Original Memo of Lease**”) in the Official Records of the City and County of San Francisco (the “**Official Records**”), under which the Tenant leases the Premises from the Port.

C. The Parties desire to amend certain provisions of the Original Parcel Lease to: (i) revise and restate the definition of Net Refinancing Proceeds to exclude the value of a prior loan that is being refinanced, (ii) revise and restate the definition of Total Development Costs to clarify how the Affordable Housing Fee will be treated, and (iii) provide for certain other Parcel Lease modifications, all as more particularly set forth in this First Amendment. The Original Parcel Lease, as amended by this First Amendment, is referred to as the “**Parcel Lease**”. All initially capitalized terms used in this First Amendment are defined in the Original Parcel Lease or have the meanings given when first defined.

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

- 1. Net Proceeds.** As of the date of this First Amendment, Exhibit D and Attachment 1 to Exhibit D are deleted in their entirety and replaced by Exhibit D and Attachment 1 to Exhibit D, respectively, attached to this First Amendment as Exhibit A. References to Exhibit D and Attachment 1 to Exhibit D in the Parcel Lease shall mean Exhibit D and Attachment 1 to Exhibit D, respectively, as amended and restated by this First Amendment.
- 2. Recordation.** This First Amendment will not be recorded by either Party. The Parties agree to execute and record in the Official Records a Memorandum of First Amendment in the form attached as Exhibit B. Promptly upon Port’s request following the expiration of the Term or any other termination of the 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 public records the termination of Tenant's interest under the Lease. Port may record such quitclaim deed at any time on or after the termination of the Lease, without the need for any approval or further act of Tenant.

3. Miscellaneous.

- a. Successors and Assigns. This First Amendment is binding upon and will inure to the benefit of the successors and assigns of Port, Tenant, and any Lender. Where the term "Tenant," "Port," or "Lender" is used in this First Amendment, it means and includes their respective successors and assigns, including, as to any Lender, any transferee and any successor or assign of such transferee. Whenever this First Amendment specifies or implies Port as a Party or the holder of the right or obligation to give approvals or consents, if Port or the entity which has succeeded to Port's rights and obligations no longer exists, then the City will be deemed to be the successor and assign of Port for purposes of this First Amendment.
- b. No Third-Party Beneficiaries. This First Amendment 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 40 of the Parcel Lease with regard to any Lender.
- c. Counterparts. This First Amendment may be executed in counterparts, each of which is deemed to be an original, and all such counterparts constitute one and the same instrument.
- d. Entire Agreement. The Parcel Lease (including the Exhibits) constitutes the entire agreement between the Parties with respect to the subject matter set forth, 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 or other agreement will be permitted to contradict or vary the terms of the Parcel Lease.
- e. Amendment. Neither the Parcel Lease nor any of the terms hereof may be terminated, amended or modified except by a written instrument executed by the Parties. Except as provided in this First Amendment, the Original Parcel Lease is unmodified hereby, and as modified by this First Amendment, the Parcel Lease remains in full force and effect.
- f. Governing Law; Selection of Forum. This First Amendment 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 First Amendment, Tenant agrees that all actions or proceedings arising directly or indirectly under the Parcel 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 in the Parcel Lease for the delivery of notices.

- g. Counsel. Each Party acknowledges that: (i) it was represented by counsel in connection with this First Amendment; (ii) it executed this First Amendment with the advice of counsel; and (iii) this First Amendment is the result of negotiations between the Parties and the advice and assistance of their respective counsel.
- h. Severability. If any provision of this First Amendment, 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 First Amendment or the application of such provision to any other Person or circumstance, and the remaining portions of this First Amendment will continue in full force and effect, unless enforcement of this First Amendment 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 First Amendment.
- i. Authority. Each Party has the requisite power and authority to execute and deliver this First Amendment and the agreements contemplated hereby and to carry out and perform all of the terms and covenants of this First Amendment and the agreements contemplated hereby to be performed by Tenant and Port and upon execution, are legal, valid and binding obligations of Tenant and Port, enforceable against Tenant and Port in accordance with its terms; and do not violate any provision of any agreement or judicial order to which Tenant or Port is a party or to which Tenant or Port is subject.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have executed this First Amendment as of the day and year first above written.

Tenant:

MISSION ROCK PARCEL ____ OWNER, L.L.C.,
a Delaware limited liability company

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

Port:

CITY AND COUNTY OF SAN FRANCISCO,
operating by and through the
SAN FRANCISCO PORT COMMISSION

By: _____
Name: _____
Title: _____

APPROVED AS TO FORM:
DAVID CHIU, City Attorney

By: _____
Name: _____
Title: _____

Port Commission Resolution No. 23-46, adopted on October 10, 2023

Board of Supervisors Resolution No. _____, adopted on _____

Exhibit A

**AMENDED AND RESTATED
EXHIBIT D**

ARTICLE 3

RENT

3. Rent.

3.1 Prepaid Rent.

The Parties acknowledge that this Lease is a **Fully Pre-paid Lease**, as that term is defined in the Financing Plan attached as Exhibit C1 to the DDA. On the Commencement Date, the **Prepaid Rent**, as set forth in the Basic Lease Information, will be applied by Credit Bid in accordance with Article 3 of the Financing Plan attached to the DDA (“**Credit Bid**”).

3.2 Tenant’s Covenant to Pay Rent During Hold Over Period.

During any Hold Over Period, Tenant will pay Rent for the Premises to Port at the times and in the manner provided in this Article 3.

(a) Definitions.

(i) “**Adjusted Gross Income**” means Gross Income less Adjustments.

(ii) “**Adjustments**” means the following items (without duplication):

(1) all Impositions paid by Tenant and allocated on a straight-line basis during the Lease Year in which the applicable Imposition was paid;

(2) all charges and bills for utilities, including, without limitation, charges for water, gas, oil, sanitary and storm sewer, and electricity paid by Tenant; and

(3) insurance premiums for insuring the Improvements in compliance with **Section 20** of this Lease and allocated on a straight-line basis during the Lease Year in which the applicable insurance premium was paid.

(iii) “**Gross Income**” means for each Lease Year or portion thereof, the following: all payments, revenues, fees or amounts received by Tenant or by any other party for the account of Tenant from any Person for any Person’s use or occupancy of any portion of the Premises (excluding security or other deposits to be returned to such Person upon the termination of such use or occupancy), or from any other sales, advertising, concessions, licensing or programming generated from the Premises, including, without limitation, all base rent, percentage rent, payments made to Tenant from any Subtenant to reimburse Tenant for operating expenses, common area maintenance expenses, insurance expenses, Impositions, or, in the case of tenant improvements and finishes to prepare portions of the Premises for occupancy or use by such Subtenant (other than as set forth below with respect to tenant improvements), license fees,

parking charges, advertising revenues, event or promotional fees, charges and permit fees. Without limiting the foregoing, “**Gross Income**” also includes any and all payments made to Tenant from the Business Interruption or delayed opening insurance proceeds. “**Gross Income**” does not include any of the following: (i) proceeds from any sale, transfer, hypothecation or condemnation of all or any part of Tenant's interest in the Lease, (ii) any Refinancing Proceeds or any other capital proceeds, (iii) insurance proceeds arising from a Casualty at the Premises (provided that if such insurance proceeds exceed the actual cost incurred by Tenant to repair and restore the Premises, then the difference will be included in the calculation of Gross Income); (iv) payments from any Subtenant to Tenant to reimburse Tenant for actual costs paid by Tenant to an operator of a parking garage or surface parking lot within Mission Rock for the number of parking spaces paid by such Subtenant; or (v) payments from any Subtenant to reimburse Tenant for Tenant’s actual out-of-pocket costs related to materials, labor, and non-Affiliated general contractor fees for tenant improvement work performed by Tenant on behalf of Subtenant.

(b) Reporting of Gross Income.

(i) Commencing on the 72nd anniversary of the Effective Date, Tenant will deliver to Port a complete statement setting forth in reasonable detail its Adjusted Gross Income for each calendar quarter, including an itemized list of all Adjustments from Gross Income that Tenant claims and which are expressly permitted under this Lease substantially in the form of *Exhibit Z*, by the twentieth (20th) day of the immediately following calendar quarter. In addition, Tenant will furnish to Port, within sixty (60) days after the expiration of the 72nd Lease Year and each Lease Year thereafter, a complete statement, showing the computation of Gross Income, Adjusted Gross Income, including an itemized list of all Adjustments from Gross Income that Tenant claims and which are expressly permitted under this Lease substantially in the form of *Exhibit AA*.

(ii) Tenant will substantiate actual Adjustments with proof of expenditure, which may include: (i) copies of canceled checks, (ii) bills, contracts and invoices marked "Paid", and (iii) and such other proofs of expenditure as may be reasonably approved by Port.

(iii) If Tenant fails to deliver any rent statement required hereunder within the time period set forth in this Section 3.2(b) (irrespective of whether any Rent is actually paid or payable by Tenant to Port) and such failure continues for thirty (30) days after the date Port delivers to Tenant written notice of such failure, Port will have the right, among its other remedies under this Lease, to have a Port Representative examine Tenant’s Books and Records (and, to the extent permitted by the applicable Sublease, the Books and Records of any other occupant of the Premises) as may be necessary to determine the amount of Rent due to Port for the period in question. The determination made by Port Representative will be binding upon Tenant, absent manifest error, and Tenant will promptly pay to Port the total cost of the examination, together with the full amount of Rent due and payable for the period in question, including any Late Charge and interest at the Default Rate.

3.3 Intentionally Omitted.

3.4 Port Participation in Sale Proceeds.

(a) Distribution of, and Port's Participation in, Net Sale Proceeds before Early Transfer Date. Tenant will pay upon a Transfer occurring any time prior to the Early Transfer Date:

(i) One Hundred Percent (100%) of Net Sale Proceeds from such Transfer, less the following deductions in this Section 3.4(a), will be deposited into the DRP Fund.

(1) Tenant's Purchase Price;

(2) Port's Attorneys' Fees and Costs associated with Port's review of the Qualifying Early Sale;

(3) Costs of Sale; and

(4) If the work product that is the subject of the Certified Entitlement Cost is purchased by the Transferee and useful in the construction or entitlement of the Vertical Project, Certified Entitlement Costs related to such purchased work product, if any.

(ii) In addition to payment of Port's share of Net Sale Proceeds in accordance with Section 3.4(a)(i) of this Exhibit, Tenant will pay Port a sum equal to Seventy-Five Thousand Dollars (\$75,000) for each 12-month period following the Commencement Date until the effective date of the Sale. By way of example only, if the Sale occurs on the last day of the twenty-fourth (24th) month after the Commencement Date, then Tenant will pay Port One Hundred Fifty Thousand Dollars (\$150,000). If Sale occurs at any time after the first twelve-month period, then the Seventy-Five Thousand Dollar amount will be pro-rated for such shorter period.

(b) Distribution of, and Port's Participation in, Net Sale Proceeds and Reassessment Events after Early Transfer Date. (i) **Sale.** Tenant will pay Port one and one-half percent (1.5%) of the Net Sale Proceeds from each Sale occurring on or after the Early Transfer Date.

(ii) **Reassessment Event.** For purposes of calculating Net Sale Proceeds on a Reassessment Event, Tenant's Sale Proceeds from such Reassessment Event will be deemed to be an amount equal to (1) the total ownership interests in Tenant after the Reassessment Event held by the Person causing the Reassessment Event (expressed as a percentage of total ownership interests in Tenant), multiplied by (2) the value assigned to the Leasehold Estate, as evidenced by (A) the estimated fair market value of the Leasehold Estate provided to the Assessor-Recorder's in connection with the Reassessment Event, or (B) if no such estimate is provided to the Assessor-Recorder's, the appraised value of the Leasehold Estate established in an Appraisal Report reasonably approved by Port and Tenant.

(c) Manner of Payment. The estimated closing statement will be updated as of the date of closing of the Sale to show the actual (i) Sale Proceeds from such Sale, and (ii) line item description of the deductions and exclusions from Sale Proceeds to arrive at Port's share of Net Sale Proceeds. If escrow is opened for a Sale, then Port's share of the proceeds from such Sale must be distributed through escrow. If no escrow is opened for a Sale, Port's share of proceeds from such Sale must be paid upon the closing of any such Sale.

This provision constitutes notice to Tenant that Port is to be paid in full its share of Net Sale Proceeds through the close of escrow or the closing of the applicable Sale. If Port is not paid full by such closing date, the amount due Port will be subject to a Late Charge and will accrue interest at the Default Rate from and after the closing until paid in full to Port. Port may reference in any estoppel certificate or other representation requested from Port that payment to Port of Port's share of proceeds from a Sale is a material obligation under the Lease, due and owing upon the closing of any Triggering Event, provided, however, failure to reference such obligation will in no way negate Tenant's obligation to pay, and Port's right to receive, Port's share of Net Sale Proceeds.

Within forty-five (45) days after any Sale, transferor Tenant will submit to Port a statement prepared in accordance with sound accounting principles consistently applied, and certified by transferor Tenant's chief executive officer or chief financial officer (or equivalent position), as current, complete and correct, confirming the actual amount of proceeds received; line item description of the deductions and exclusions from proceeds to arrive at Port's share of Net Sale Proceeds. At Port's option, any overpayments may be either refunded to transferor Tenant or applied to any other amount then due and unpaid under the Lease. Tenant will accompany the statement of Net Sale Proceeds with the amount of any underpayments. The statements delivered to Port under this Section are subject to the audit provisions of Section 3.7 of this Exhibit for determination of the accuracy of Tenant's reporting of Port's share of Net Sale Proceeds.

(d) Survival. The provisions of this Section 3.4 will survive the earlier termination or expiration of this Lease for Sales occurring prior to such termination or expiration. Additionally, any release by Port of Tenant's obligations under this Lease in connection with any Sale is conditioned on Port's receipt of Port's share of Sale Proceeds.

(e) Additional Definitions. The following definitions apply for purposes of this Section 3.4:

"Cash Consideration" means (i) cash, or (ii) cash equivalents.

"Certified Entitlement Costs" means Entitlement Costs, as certified in accordance with *Attachment 1* to this *Exhibit D*.

"Certified Total Development Costs" means the Total Development Costs, as certified in accordance with *Attachment 1 to this Exhibit D*.

"CofO Issuance Date" means the date Port, in its regulatory capacity, issues a certificate of occupancy for the Initial Improvements.

"Costs of Sale" means only the following costs incurred by Tenant in connection with a Transfer: (i) 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), (ii) finder's fees (provided that in the case of finder's fees to Affiliates, such finder's fees must be commercially reasonable), (iii) reasonable and customary closing fees and costs including recording fees and transfer taxes, title insurance premiums and survey fees, (iv) reasonable advertising and marketing costs, and (v) reasonable Attorneys' Fees and Costs. "Costs of Sale" excludes adjustments to reflect prorations of rents, taxes or other items of income or expense customarily prorated in connection with sales of real property.

"**Early Transfer Date**" means the date that Port issues a site permit and first building permit addendum to allow commencement of construction of the Initial Improvements.

"**Entitlement Costs**" means Tenant's reasonable out-of-pocket costs actually incurred from and after the effective date of the Vertical DDA until the effective date of the Sale and attributable to the following only: designing the Initial Improvements; costs related to all land use approvals and entitlements, including preparation and processing of design review applications under the SUD and the Design Control, subdivision maps specific to the Premises that do not impact the initial Final Map recorded for the first Phase, and costs of compliance with all conditions of approval and CEQA mitigation measures legally required by the City, Port or any other Regulatory Authority as a condition to obtaining the entitlements; architectural, engineering, consultants, community outreach, attorney and other professional fees reasonably necessary to obtain the entitlements; financing costs for loans obtained to finance the Entitlement Costs; and Impositions paid (and not reimbursed by the transferee or adjusted at the closing of the Sale) prior to the effective date of the Sale.

"**Hard Costs**" means reasonable out-of-pocket costs actually incurred by Tenant attributable solely to the cost of labor, materials and construction of the Initial Improvements. "**Hard Costs**" do not include the cost of any improvements for any specific or speculative Subtenant or any costs incurred after the issuance of a Certificate of Completion in accordance with Article 13 of the Vertical DDA.

"**Initial Tenant**" means Mission Rock Parcel G Owner, L.L.C.

"**Net Sales Proceeds**" means Sale Proceeds less:

- (i) Costs of Sale; and
- (ii) Port's Attorneys' Fees and Costs associated with Port's review of the Sale or Reassessment Event; and
- (iii) if the transferor Tenant (x) constructed the Initial Improvements, Tenant's Purchase Price (but only if such amount is not included in Certified Total Development Costs) plus the Certified Total Development Costs, or (y) if transferor Tenant did not construct the Initial Improvements, Tenant's Purchase Price; and
- (iv) the total amount of any Net Refinancing Proceeds from any Qualifying Refinancing by the transferor Tenant where Port received its share in such proceeds in accordance with Section 3.5(a) below or any Net Sale Proceeds actually received by Port from any Reassessment Event prior to the last sale in accordance with Section 3.4(b)(ii) of this Exhibit.

"**Non-Cash Consideration**" means consideration received by Tenant in connection with a Sale that is not Cash Consideration.

"**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 that law is in effect as of August 15, 2018 and attached hereto as **Exhibit BB**.

"**Sale**" means either a Transfer (other than an Excluded Transfer) or Reassessment Event.

"**Sale Proceeds**" means all consideration received by or for the account of Tenant in connection with a Sale, 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. “**Sale Proceeds**” do not include a commitment by an owner (whether direct or indirect) of Tenant to fund its share of future capital calls to construct the Initial Improvements or Capital Items.

“**Soft Costs**” means reasonable out-of-pocket costs actually incurred by the Tenant that actually constructs the Initial Improvements and attributable solely to architectural, engineering, consultant, attorney, and other professional fees, regulatory fees, CEQA mitigation measures, community benefits, Impact Fees (as defined in the DDA), Port Costs and Other City Costs (as defined in the Vertical DDA), builder’s risk insurance, performance and payment bonds, safety and security measures, and thirty party costs to prepare Certified Total Development Costs, in each case in connection with the Initial Improvements described in the Scope of Development. “**Soft Costs**” do not include costs associated with the design or construction any specific or speculative Subtenant improvements or any costs incurred after the issuance of a Certificate of Completion in accordance with Article 13 of the Vertical DDA.

“**Tenant’s Purchase Price**” means (a) in the case of the Initial Tenant, the “**Acquisition Price**” under the Vertical DDA, and (b) in the case of each subsequent tenant following the Initial Tenant, the Sale Proceeds paid by such Tenant to the immediately prior tenant for the Leasehold Estate, except for purposes of the first Sale after a Foreclosure, the amount paid by Lender or a Lender Affiliate at such Foreclosure shall not be used as Tenant’s Purchase Price and shall be replaced with either: (i) if the Tenant in possession of the Leasehold Estate immediately prior to the Foreclosure (the “**Foreclosed Tenant**”) was the Initial Tenant, then the “**Acquisition Price**” under the Vertical DDA, or (ii) if the Foreclosed Tenant was not the Initial Tenant, then the Sales Proceeds paid by the Foreclosed Tenant. For the avoidance of doubt, if a Person other than Lender (or a Lender Affiliate) acquires title to the Leasehold Estate in the event of Foreclosure, then the first Sale after such Foreclosure shall use the amount paid at Foreclosure for purposes of Tenant’s Purchase Price.

“**Total Development Costs**” means Soft Costs and Hard Costs, excluding costs incurred by Tenant (if any) that are reimbursed by Master Developer or Phase 1 Horizontal Developer, as applicable, in connection with the construction of an engineered vapor mitigation system if required by the Environmental Covenants. For the avoidance of doubt, Total Development Costs shall account for the Affordable Housing Fee under the Vertical DDA by attributing: (a) a reduction of approximately \$77.7 million to Parcel A, (b) an increase of approximately \$90.2 million to Parcel B, (c) a reduction of approximately \$103.6 million to Parcel F, and (d) an increase of approximately \$91.1 million to Parcel G, when calculating the Total Development Costs for each parcel, respectively.

3.5 Port Participation in Refinancing Proceeds.

(a) Port’s Participation. In connection with any Qualifying Refinancing, Tenant will pay to Port an amount equal to one and ½ percent (1.5%) of Net Refinancing Proceeds.

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

- (i) Gross proceeds from the Qualifying 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 the Refinancing, as applicable to arrive at Net Refinancing Proceeds; and

(iii) The estimated Net Refinancing Proceeds allocated to Port and Tenant.

(c) Manner of Payment. The estimated closing statement will be updated as of the date for close of escrow under any Qualifying Refinancing to show the actual (i) gross Refinancing Proceeds, (ii) Net Refinancing Proceeds and Port's share thereof, as applicable, and (iii) with respect to any Qualifying Refinancing, line item description of the deductions and exclusions from Refinancing Proceeds to arrive at Net Refinancing Proceeds. Tenant must pay Port from the close of escrow of any Qualifying Refinancing, Port's share of the Net Refinancing Proceeds. Port may reference in any estoppel certificate or other representation requested from Port by a Mortgage lender, that payment to Port of Port's share of Net Refinancing Proceeds is a material obligation under the Lease, due and owing at close of escrow of any Qualifying 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, Port's share of Net Refinancing Proceeds. This provision constitutes notice to Tenant that Port is to be paid in full its share of Net Refinancing Proceeds through the close of escrow of any Qualifying Refinancing. If Port is not paid full by such closing date, the amount due Port will be subject to a Late Charge and will accrue interest at the Default Rate from and after the closing until paid in full to Port. Within forty-five days (45) after any Qualifying Refinancing, Tenant will submit to Port a statement, prepared in accordance with sound accounting principles consistently applied, and certified by Tenant's chief executive officer or chief financial officer (or equivalent position) as current, complete and correct, confirming the actual amount of Refinancing Proceeds, disbursed, permitted deductions made from such proceeds, and the amount of Net Refinancing Proceeds due to Port 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 of Net Refinancing Proceeds with the amount of any underpayments. The statements delivered to Port under this Section 3.5(c) will be subject to the audit provisions of Section 3.7 of this Exhibit for determination of the accuracy of Tenant's reporting of Net Refinancing Proceeds.

(d) Survival. The provisions of this Section 3.5 will survive the earlier termination or expiration of this Lease for any Qualifying Refinancing occurring prior to such termination or expiration.

(e) Additional Definitions. The following additional definitions will apply for purposes of this Section.

(i) **“Capital Items”** means replacements, repairs, and/or improvements to the Premises, the foundation and structural integrity of the Buildings, and all Material Systems serving the Improvements within the Premises that would be deemed capital assets under general accounting principles consistently applied.

(ii) **“Net Refinancing Proceeds”** means all gross principal amounts of any Refinancing occurring after the Effective Date hereof (plus, in the event of secondary financing, the original principal balance of any existing financing that is not repaid as a part of such secondary financing), after subtracting the following:

(1) amounts needed to pay the lenders' actual 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;

(2) amounts needed to pay Port's Attorneys' Fees and Costs associated with Port's review of the Refinancing;

(3) amounts needed to pay Tenant's Attorneys' Fees and Costs associated with the Refinancing;

(4) any portion of the Refinancing Proceeds that will be used for Capital Items approved in accordance with *Sections 10.2(d) and 12.1* of this Lease; and

(5) brokerage commissions paid to licensed real estate brokers to arrange the Refinancing (provided, however, if commissions are paid to Affiliate brokers, such commissions must be commercially reasonable); and

(6) in the case of any Refinancing following the First Permanent Loan, the outstanding indebtedness secured by a Mortgage to be paid off by the Refinancing.

(iii) “**Qualifying Refinancing**” means any Refinancing that results in positive Net Refinancing Proceeds that is not in connection with (1) a Sale; or (2) the first permanent financing following Completion of the Initial Improvements that is secured by Tenant's leasehold interest in this Lease (the “**First Permanent Loan**”)

(iv) “**Refinancing**” means any secured debt financing or refinancing incurred by Tenant and secured by any Mortgage, which may include secured financing from an Affiliate of Tenant and any refinancing or replacement of existing debt secured by a Mortgage (including any permanent take-out financing for financing the construction of the Initial Improvements (as defined in Article 47 of the Parcel Lease)); provided, however, the term "Refinancing" shall exclude any construction loan incurred by Tenant for the purpose of financing the construction of the Initial Improvements.

(v) “**Refinancing Proceeds**” means all sums actually disbursed by a lender in connection with a Refinancing.

3.6 Books and Records. Tenant will keep books and records according to generally accepted accounting principles consistently applied or such other method as is reasonably acceptable to Port. “**Books and Records**” means all of Tenant's books, records, and accounting reports or statements relating to this Lease and the operation and maintenance of the Premises, including, without limitation, cash journals, rent rolls, general ledgers, income statements, bank statements, income tax schedules relating to the Property, and any other bookkeeping documents Tenant utilizes in its business operations for the Premises or in connection with any Sale or Refinancing. 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, including proceeds and costs incurred from any Sale and Refinancing. If Tenant operates all or any portion of the Premises through a Subtenant or Agent (other than Port), Tenant will cause

such Subtenant or Agent to adhere to the foregoing requirements regarding books, records, accounting principles and the like.

3.7 Audit. Tenant agrees to make its Books and Records (and, to the extent within Tenant's control, the Books and Records of any other person relating to the matters identified in Section 3.4(b) of this Exhibit) available in the City and County of San Francisco 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 Income, Adjusted Gross Income, Sale Proceeds, Refinancing Proceeds and Port's share of the foregoing, for a period of five (5) years after the applicable rent statement in connection with Rent during the Hold Over Period (or closing statement with respect to a Sale or Refinancing) 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 after 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 an audit reveals that Tenant has understated its Sale Proceeds, Net Sale Proceeds, Gross Income during any Hold Over Period, Adjusted Gross Income during any Hold Over Period, Refinancing Proceeds, or Net Refinancing Proceeds 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 Adjusted Gross Income during any Hold Over Period, Net Refinancing Proceeds or Net Sale Proceeds, or Port's share of the foregoing proceeds 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.

3.8 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. Rent and Port's share of Sale Proceeds and 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.

3.9 Interest on Delinquent Rent. Rent not paid when due 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.

3.10 Late Charge. Tenant acknowledges and agrees that late payment by Tenant to Port of Rent 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 an 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 a rent statement required hereunder to Port within five (5) days following the date it is due, five percent (5%) of Rent due during a Hold Over Period for the subject period of such rent statement), or (b) One Thousand Dollars (\$1,000), which amount will be increased by an additional One Thousand Dollars (\$1,000) on the tenth (10th) anniversary of the Commencement Date and every ten (10) years thereafter; provided, however, Tenant will not be subject to a Late Charge more than once every calendar year if Tenant pays the unpaid Rent or delivers the Monthly Statement to Port, as applicable, within five (5) days of written notice from Port of such failure. The Parties agree that the Late Charge represents a fair and reasonable estimate of the cost that Port will incur by reason of a late payment by Tenant.

3.11 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, except as expressly set forth in *Section 28.2* of this Lease.

3.12 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 except as set forth in this Lease, 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.

3.13 Survival. Tenant's obligation to pay any unpaid Rent due and payable will survive the expiration or earlier termination of this Lease.

ATTACHMENT 1 TO EXHIBIT D

PROCEDURES TO CERTIFY ENTITLEMENT COSTS AND TOTAL DEVELOPMENT COSTS

1. PORT REPRESENTATIVE.

If Tenant fails to deliver either the Certified Entitlement Cost Statement or the Certified Total Development Cost Statement, as applicable, within the time periods set forth herein, and 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 as may be necessary to determine all the information required in the Certified Entitlement Cost Statement or Certified Total Development Cost Statement, as applicable. 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.

2. CERTIFIED COST STATEMENT.

(a) ***Certified Entitlement Cost Statement.*** Within thirty (30) days prior to a Transfer occurring before the Early Transfer Date or sixty (60) days following the Early Transfer Date for the Tenant that constructs the Initial Improvements, as applicable, Tenant will furnish Port with an itemized statement setting forth in detail the Entitlement Cost incurred by Tenant to the Building Permit Date or thirty (30) days prior to a Qualifying Early Sale, as applicable, certified as true, accurate and complete by an independent certified public accountant (the "**Certified Entitlement Cost Statement**").

(b) ***Certified Total Development Cost Statement.*** Within the earlier of one hundred twenty (120) days following the issuance of a Certificate of Completion or thirty (30) days prior to a Sale after the Early Transfer Date, the Tenant that constructed the Initial Improvements will furnish Port with an itemized statement setting forth in detail the Total Development Cost incurred by such Tenant to the CofO Issuance Date, certified as true, accurate and complete by an independent certified public accountant (the "**Certified Total Development Cost Statement**").

(c) ***Port Review.*** Port will notify the Tenant within sixty (60) days following Port's receipt of the Certified Entitlement Cost Statement or the Certified Total Development Cost Statement, as applicable, of Port's agreement or disagreement with such statement. If Port disagrees with any such statement, the Parties will meet to resolve the disagreement. If the Parties are unable to resolve their disagreement, either may Party exercise its rights under Section 3 (Audit Rights) of this Attachment 1 to Exhibit D.

3. AUDIT RIGHTS.

If Port disagrees with either the Certified Entitlement Cost Statement or the Certified Total Development Cost Statement, Port may request that such records be audited by an independent certified public accounting firm mutually acceptable to Port and Tenant, or if the Parties are unable to agree, either Party may apply to the Superior Court of the State of California in and for the County of San Francisco for appointment of an auditor meeting the foregoing qualifications. If the court denies or otherwise refuses to act upon such application, either Party may apply to the American Arbitration Association, or any similar provider of professional commercial arbitration services, for appointment in accordance with the rules and procedures of such organization of an independent auditor. Such audit will be binding on the Parties, except in the case of fraud, corruption or undue influence. Port will pay the entire cost of the audit unless the audit discovers that Tenant has overstated the Entitlement Cost or the Total Development Cost, as applicable, by more than three percent (3%) of the lower amount, in which case Tenant will pay the entire cost of the audit.

4. BOOKS AND RECORDS RELATED TO TOTAL DEVELOPMENT COSTS.

Tenant must keep accurate books and records of the Entitlement Costs and Total Development Costs incurred to date, funds expended by Tenant, outstanding Tenant capital, Tenant capital return accrued, and debt or other third-party proceeds received by or on behalf of Initial Tenant in connection with the development of the Initial Improvements, all in accordance with accounting principles generally accepted in the construction industry. Port, including its Agents, has the right to inspect Tenant's books and records regarding the development of the Initial Improvements, the costs incurred in connection therewith, and all other Entitlement Costs and Total Development Costs, including funds expended by Tenant, return accrued on such funds, and debt or other third party proceeds received by or on behalf of Tenant in connection with the development of the Initial Improvements in a location within San Francisco during regular business hours and upon reasonable advance notice.

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Exhibit B
Form Memorandum of Amendment to Lease

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