



**CITY AND COUNTY OF SAN FRANCISCO
EDWIN M. LEE, MAYOR**

LEASE DISPOSITION AND DEVELOPMENT AGREEMENT

BY AND BETWEEN

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

AND

HISTORIC PIER 70, LLC

20TH STREET HISTORIC BUILDINGS

[_____] , 2014

**MONIQUE MOYER
EXECUTIVE DIRECTOR**

SAN FRANCISCO PORT COMMISSION

**LESLIE KATZ, PRESIDENT
WILLIE ADAMS, VICE PRESIDENT
KIMBERLY BRANDON, COMMISSIONER
MEL MURPHY, COMMISSIONER
DOREEN WOO HO, COMMISSIONER**

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LEASE DISPOSITION AND DEVELOPMENT AGREEMENT

THIS LEASE DISPOSITION AND DEVELOPMENT AGREEMENT dated for reference purposes as of [_____], is by and between the **CITY AND COUNTY OF SAN FRANCISCO**, a municipal corporation (“**City**”), operating by and through the **San FRANCISCO PORT COMMISSION** (“**Port**”), and **HISTORIC PIER 70, LLC**, a California limited liability company (“**Developer**”). The exhibits, recitals and this Lease Disposition and Development Agreement are and shall be construed as a single instrument and are referred herein as this “**Agreement**.” All initially capitalized terms in this Agreement are defined in Article 19.

RECITALS

This Agreement 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 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 has jurisdiction of approximately 69 acres of land along San Francisco’s Central Waterfront, generally bounded by Mariposa Street, Illinois Street, 22nd Street, and San Francisco Bay, commonly known as Pier 70. Previously known as the San Francisco Yard and the Bethlehem Steel Shipyard, Pier 70 is a former 19th century ship building and repair facility, and the most intact historic maritime industrial complex of that era west of the Mississippi River. A portion of the site remains an active ship repair yard. On May 11, 2010, by Resolution 10-27, the Port Commission endorsed the vision, goals, objectives, and design criteria of the Pier 70 Preferred Master Plan (“**Master Plan**”) published in April 2010, and authorized staff to begin implementation of the Master Plan objectives by soliciting development partners for the “**Waterfront Site**” consisting of approximately 25 acres at the eastern edge of Pier 70 and the “**Historic Core**” consisting of historic buildings on 20th Street and other improvements, as further described in *Section 1.1*. Pier 70 is roughly divided into five key subareas: the Waterfront Site, the Historic Core, the ship repair lease area, the vacant parcels fronting Illinois Street, and planned parks and open spaces (collectively, “**Pier 70**”).

C. 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 transferred most of the San Francisco waterfront to the City in 1969. Port acquired much of Pier 70 subsequent to the Burton Act transfer, however, and parts of the Pier 70 are upland areas that are not tidelands. Pier 70’s complex ownership history and mix of tidelands, submerged lands, and uplands creates questions about whether certain parcels at Pier 70 are subject to public trust land use restrictions. AB 418 authorized the California State Lands Commission to approve internal transfers that will align the public trust parcels within Pier 70 to achieve the goals and objectives of the Master Plan.

D. On April 12, 2011, by Resolution 11-21, the Port Commission awarded Forest City Development California, Inc. (“**Forest City**”) the opportunity to negotiate for the development of the Waterfront Site and authorized Port staff to proceed with exclusive negotiations for the lease and development of the Waterfront Site. Port and Forest City entered into an Exclusive Negotiation Agreement as of July 12, 2011.

E. On February 28, 2012, by Resolution 12-18, the Port Commission awarded Developer’s predecessor-in-interest, Orton Development, Inc. (“**ODI**”), the opportunity to negotiate for development of the Historic Core and authorized Port staff to proceed with exclusive negotiations for the lease and development of the Historic Core. On April 24, 2012, by Resolution 12-36, the Port Commission authorized the Executive Director to enter into an Exclusive Negotiation Agreement with Developer for the Historic Core (“**Original ENA**”). On

March 12, 2013, by Resolution 13-11, the Port Commission authorized the Executive Director to enter into an amendment of the Original ENA. The ENA set forth the process, terms, and conditions upon which Port and Developer would negotiate terms for the rehabilitation, stabilization, and development of the Historic Core and seek to complete necessary documents.

F. On October 9, 2012, by Resolution No. 12-78, the Port Commission endorsed the proposed terms set forth in the term sheet agreed to by the Parties for the Project (the “**Term Sheet**”).

G. On December 4, 2012, by Resolution No. 440-12, the Board of Supervisors found that the proposed terms set forth in the Term Sheet was fiscally feasible and responsible pursuant to San Francisco Administrative Code Chapter 29 and endorsed the Term Sheet.

H. The Parties amended the Original ENA by that certain First Amendment to Exclusive Negotiation Agreement in March of 2013 (the “**First Amendment to ENA**”) and again pursuant to that certain Second Amendment to the Exclusive Negotiation Agreement dated as of June 18, 2014 (together with the Original ENA and the First Amendment to ENA, the “**ENA**”).

I. The Project is within the Eastern Neighborhoods Community Plan Area, for which the San Francisco Planning Commission certified the Eastern Neighborhoods Rezoning and Area Plans Final EIR (“**EN FEIR**”) (Planning Department Case No. 2004.0160E). The Planning Department reviewed the Project and determined that a community plan exemption under CEQA Guidelines Section 15183 would be appropriate because the Project is within the scope of the EN FEIR and would not have any additional or significant adverse effects that were not examined in the EN FEIR. The San Francisco Planning Department prepared a Community Plan Exemption for the proposed Project, which exemption was approved on May 7, 2014.

J. On May 13, 2014, by Resolution No. 14-33, the Port Commission, among other things, adopted the Mitigation, Monitoring, and Reporting Program and authorized and directed the Executive Director of Port to (i) enter into this Agreement and other Transaction Documents with Developer and (ii) seek approval from the Board to execute the Lease with Developer.

K. On [XX], 2014, by Resolution No. XX-14, the Board of Supervisors authorized the issuance of up to \$24 million of general obligation bonds to fund the City’s Unreinforced Masonry Building Seismic Safety Loan Program to partially finance seismic improvements to the Initial Site.

L. Following the Initial Close of Escrow, Developer’s Construction of the Improvements includes historic rehabilitation and structural and seismic upgrading, creation of certain public access, installation of utilities and other improvements, all as further described in the Scope of Development, the Schematic Drawings, and this Agreement (the “**Project**”).

M. The parties now desire to enter into this Agreement to set forth the terms and conditions upon which Port will deliver the Lease to Developer and Developer will Construct the Improvements.

AGREEMENT

Accordingly, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as set forth below.

1. GENERAL: SITE; TERM; RELATIONSHIP TO LEASE; OCCUPANCY OF SITE AT CLOSE OF ESCROW.

1.1. Site. The Historic Core is located on 20th Street, east of Illinois Street, in the City and County of San Francisco, and is more particularly described in the legal description (***Exhibit A-1***) and on the Site Plan (***Exhibit A-2***). The term “**Historic Core**” includes the area designated on the Site Plan as Buildings 101, 102, 104, 113, 114, 115, 116 and 14 (collectively, the “**Buildings**” and each, individually, a “**Building**”) and various other, structures, fixtures and other improvements located thereon. The parties reserve the right, upon mutual agreement of Port’s

Executive Director and Developer, to enter into memoranda of technical corrections hereto to reflect any non-material changes in the actual legal description and square footages of the Historic Core and the Improvements, and upon full execution thereof, such memoranda shall be deemed to become a part of this Agreement. The Lease to be delivered by Port to Developer pursuant to this Agreement shall initially cover only that portion of the Historic Core (the “**Initial Site**”) consisting of the Buildings commonly known as Buildings 113, 114, 115 and 116 and the adjacent courtyard space together with certain adjacent land, all as more particularly described on *Exhibit A-3* attached hereto and depicted as “**Parcel A**” on *Exhibit A-2* attached hereto. During the LDDA Term, the Initial Site may be expanded to include one or more of the areas designated as Parcels B, C, D, and E on *Exhibit A-2* attached hereto (each such individual parcel, an “**Expansion Site**”) in accordance with *Section 2.2*. If an Expansion Site is added to the Premises in accordance with *Section 2.2*, then from and after such date the Premises shall be deemed expanded to include such Expansion Site. The term “**Site**,” as used in this Agreement, means the Initial Site plus each Expansion Site added to the Premises. If the Initial Site is expanded to include an Expansion Site pursuant to the terms of this Agreement prior to the Closing Date, then the Premises in the Lease Delivered to Developer at the Initial Close of Escrow shall include such Expansion Site.

1.2. Term. The term of this Agreement shall be from the Effective Date until recording of the Certificate of Completion, unless this Agreement is earlier terminated in accordance with its provisions (the “**LDDA Term**”). If the Initial Close of Escrow does not occur by the Outside Closing Date, this Agreement shall automatically terminate.

1.3. LDDA Termination Fee. Unless this Agreement terminates solely as a result of a Port Event of Default, a Title Defect, or Unforeseen Condition set forth in *Section 2.3*, if this Agreement terminates prior to the Initial Close of Escrow, then Developer shall pay to Port, as liquidated damages, a termination fee (the “**LDDA Termination Fee**”) in the amount of Two Hundred Thousand Dollars (\$200,000), payable within ninety (90) days following the termination of this Agreement. The LDDA Termination Fee and Developer’s assignment to Port of the Project Materials (pursuant to *Section 17.6*) shall be Port’s sole and exclusive remedy for any such termination. The terms and conditions of this Section shall survive the expiration of earlier termination of this Agreement.

THE PARTIES AGREE THAT THE SUM OF TWO HUNDRED THOUSAND DOLLARS (\$200,000) IS A REASONABLE SUM CONSIDERING THE CIRCUMSTANCES EXISTING ON THE DATE OF THIS AGREEMENT, INCLUDING THE RELATIONSHIP OF THE SUM TO THE RANGE OF HARM TO PORT THAT REASONABLY COULD BE ANTICIPATED AND THAT THE ANTICIPATION THAT PROOF OF ACTUAL DAMAGES COULD BE EXTREMELY DIFFICULT OR IMPRACTICABLE TO DETERMINE. IN PLACING THEIR INITIALS BELOW, EACH PARTY SPECIFICALLY CONFIRMS THE ACCURACY OF EACH OF THE STATEMENTS MADE ABOVE AND THE FACT THAT EACH PARTY WAS REPRESENTED BY COUNSEL WHO EXPLAINED THE CONSEQUENCES OF THIS LIQUIDATED DAMAGES PROVISION AT THE TIME THIS AGREEMENT WAS MADE.

Developer _____

Port _____

1.4. Relationship of this Agreement to the Lease. This Agreement addresses, among other matters, the conditions to the Initial Close of Escrow and the Delivery of the Lease to Developer, the conditions to any subsequent Close of Escrow for the Expansion Sites, the scope of Developer’s obligations to design and Construct the Improvements, and the financing for Construction of the Improvements by Developer. If the conditions for the Close of Escrow as set forth in *Section 4* are satisfied, then upon the Initial Close of Escrow, Port will lease the Initial Site to Developer, and Developer will lease the Initial Site from Port, pursuant to the Lease. During the LDDA Term, the Initial Site may be expanded to include one or more Expansion

Sites as provided in **Section 2.2 below** and this Agreement will also govern Developer's obligations to design and Construct the Improvements, and the financing for Construction of the Improvements by Developer, on such Expansion Site(s). Before Completion, this Agreement shall control in the event of any inconsistency between this Agreement and the Lease. From and after Completion, the Lease will govern the rights and obligations of the Parties with respect to use and occupancy of the Initial Site and any Expansion Site that forms a part of the Premises. The Lease delivered at Close of Escrow shall substantially be in the form attached hereto as Exhibit XX.

1.5. Occupancy of Initial Site at Close of Escrow and the Expansion Sites on the Expansion Dates or Outside Expansion Dates. Port will deliver the Initial Site and as applicable, the Expansion Sites, free and clear of Use Agreements as of the Initial Close of Escrow or as of each Expansion Date or Outside Expansion Date, as applicable, at no cost or expense to Developer.

2. ACCESS TO HISTORIC CORE; ADDITION OF EXPANSION SITES; UNFORESEEN CONDITION.

2.1. Access to Historic Core .

(a) Prior to the Initial Close of Escrow, Developer will have access to the Historic Core pursuant to the terms and conditions of that certain License to Use Property (License No. 15140) dated May 16, 2012 between Port and ODI (the "**Access Agreement**"). The Parties hereby agree that, notwithstanding any provisions to the contrary contained in the Access Agreement, the Access Agreement will not terminate on the Effective Date but will remain in full force and effect according to its terms during the LDDA Term until (i) the Closing Date with respect to the Initial Site, and (ii) with respect to each Expansion Site, the earlier of (A) the Expansion Date or Outside Expansion Date (whichever is earlier) applicable to such Expansion Site, or (B) the date the Parties agree that the Expansion Site will not be included within the Premises due to an Unforeseen Condition, and (iii) with respect to the Building 102 Expansion Site only, the earlier of the Building 102 Expansion Date or the Option Termination Date.

(b) Developer may not perform any removal, salvaging operation, demolition, excavation or construction work before the Initial Close of Escrow on any portion of the Historic Core and with respect to each Expansion Site, before the Expansion Date or the Outside Expansion Date, as applicable, to such Expansion Site without the express written approval of Port, which Port may give or withhold in its sole and absolute discretion, or as otherwise provided in the Access Agreement. If Port grants such approval, Port may require additional insurance, bond, guaranty and Indemnification requirements as Port determines are appropriate to protect its interest in light of the proposed use.

(c) From and after the Initial Close of Escrow, Developer's right of access and entry upon the Site to Construct the Improvements will be in accordance with the Lease.

2.2. Addition of Expansion Site(s). During the LDDA Term, the Initial Site may be expanded to include all, some, or none of the Expansion Sites as and to the extent provided in accordance with this **Section 2.2** and **Section 2.3**. Each Expansion Site shall be added to the Premises and the Close of Escrow for the same shall occur no later than the Outside Expansion Date or with respect to Building 102 only, the Building 102 Expansion Date, unless otherwise provided in this **Section 2.2** or in **Section 2.3**. If Developer wishes to expand the Site to include any of the Expansion Sites prior to the applicable Outside Expansion Date, Developer shall deliver to Port in writing an expansion notice in the form attached hereto as Exhibit [XX] identifying the applicable Expansion Site to be added to the Site (each, an "**Expansion Notice**"). The Expansion Site will be added to the Site as of the earlier of the date set forth in the Expansion Notice or the first day of the full month immediately following the date of the applicable Expansion Notice (the "**Expansion Date**") and the Close of Escrow for such Expansion Site shall also occur on the Expansion Date. From and after the applicable Expansion Date or

the Outside Expansion Date, the term “**Site**” shall be expanded to also include the applicable Expansion Site(s), together with all other Improvements and appurtenances now and hereafter located on the Site and the applicable Expansion Site(s), by virtue of the construction or installation activities of Developer or its Agents or by others.

(a) Parcels B, C and D: No later than the third (3rd) anniversary of the Effective Date (“**Outside Expansion Date**”).

(b) Parcel E:

(i) Provided there is no uncured Tenant Event of Default, Unmatured Tenant Event of Default, uncured Developer Event of Default, or Unmatured Developer Event of Default, Developer at its option (the “**Building 102 Option**”), may expand the Site to include Parcel E during the LDDA Term by delivering to Port notice of Developer’s intention to exercise the Building 102 Option (“**Option Notice**”) not later than the earlier of (1) ninety (90) days after Port has completed all Building 102 Electrical Work and notified Developer of such completion, or (2) the Parties’ anticipated expiration date of the LDDA Term based on Completion of the Improvements for the then Site (the “**Option Termination Date**”). The term “**Option Period**” means the period from and after the Effective Date until the Option Termination Date.

(ii) If Developer fails to timely exercise the Building 102 Option during the Option Period, then from and after the date immediately following the Option Termination Date, the Building 102 Option will terminate and Port will have the absolute right to use, develop, license, or lease the Building 102 Expansion Site for any purpose or enter into any agreement with regard to the Building 102 Expansion Site with any other party.

(iii) If Developer delivers the Option Notice to Port within the Option Period, then the Building 102 Expansion Site will be added to the Site as of the earlier of the date set forth in the Option Notice or the first day of the full month immediately following the date of the Option Notice (“**Building 102 Expansion Date**”), and the Close of Escrow for the Building 102 Expansion Site shall also occur on the Building 102 Expansion Date. The Certificate of Completion will not be issued until the Improvements with respect to the Building 102 Expansion Site have also been Completed by Developer.

(iv) If Port has not commenced the Building 102 Electrical Work prior to the Parties’ anticipated expiration date of the LDDA Term and Developer exercises the Building 102 Option prior to the expiration of the LDDA Term, then Developer may perform the Building 102 Electrical Work in accordance with the plans and budget reasonably approved by Port; provided, however, that the Building 102 Electrical Work shall be treated as a Port Benefit Task and the cost of the Building 102 Electrical Work shall be treated as a Port Benefit Cost and not subject to a Developer Equity Return. The Parties shall comply with **Section 11.2(c)** for purposes of reimbursing Developer for its cost to complete the Building 102 Electrical Work.

(v) Nothing herein shall be construed to obligate Port to perform or complete any Building 102 Electrical Work by any particular date, or at all. For purposes of this Agreement, “**Building 102 Electrical Work**” means (i) the removal and remediation of all PCBs and other Hazardous Materials now or hereafter present in the electrical transformers, switches and other equipment located on the basement level and the main level of Building 102, and the removal and replacement of all transformers, all in accordance with applicable Environmental Laws to provide electrical service to users within Building 102 and outside the Historic Core, in particular, any operator of the shipyard within Pier 70; and (ii) and the repair or rehabilitation of the remaining equipment and related transmission lines as may be necessary to comply with all applicable state and local codes and to provide electrical service to users outside the Historic Core.

(vi) At any time during the LDDA Term, Port may request that Developer perform the Building 102 Electrical Work irrespective of whether Developer intends to exercise the Building 102 Option. If Port makes such request, Developer has the right to

accept or refuse such request in its sole discretion. If Developer accepts such request, then the Building 102 Electrical Work shall be treated as a Port Benefit Task, the cost of such work shall be treated as a Port Benefit Cost, and the Parties shall comply with **Section 11.2(c)** for purposes of reimbursing Developer for its cost to complete the Building 102 Electrical Work. If Developer elects to perform the Building 102 Electrical Work in accordance with this Section, Developer will perform the Building 102 Electrical Work in accordance with **Section 9** as if the term “**Improvements**” as used in such section included the Building 102 Electrical Work.

(c) Notwithstanding the provisions of this **Section 2.2**, if there exists an uncured Developer Event of Default, an Unmatured Developer Event of Default, a Tenant Event of Default, or an Unmatured Tenant Event of Default as of the Expansion Date or the Outside Expansion Date, as applicable, Port may, in its sole and absolute discretion, stop the expansion of the Premises by notifying Developer that the Premises will not be expanded to include the applicable Expansion Site. If Port stops the expansion of the Premises in accordance with this section and Developer has not cured the applicable default within [XX months] after the Expansion Date or Outside Expansion Date, as applicable, then at Port’s sole and absolute discretion, Developer’s rights to use, access, or develop such Expansion Site will be terminated, the Premises will not include such Expansion Site, and Port may lease, develop, or use such Expansion Site for any purpose whatsoever and enter into any agreement with any other party with regard to such Expansion Site.

2.3. Unforeseen Condition.

(a) Definition. “**Unforeseen Condition**” means one or more physical conditions in any of the Expansion Sites that causes the total anticipated Project Costs for a specific Expansion Site to exceed the anticipated Project Costs for that Expansion Site, as set forth in the Final Pro Forma, by more than \$1,000,000 (“**Unforeseen Condition Cost**”), but only if the physical condition(s) could not have been known or reasonably anticipated by Developer based on: (i) the information contained in the Existing Site Reports, and (ii) the due diligence that was actually conducted by Developer or should have been conducted by a developer exercising due care, taking into account Developer’s proposed use(s), the age, materials, and existing conditions of the Expansion Sites and the improvements located thereon. In no event will an Unforeseen Condition Cost include any cost overruns.

(b) Generally. If Developer encounters an Unforeseen Condition in any of the Expansion Sites prior to the applicable Outside Expansion Date, Developer may elect not to expand the Premises to include the applicable Expansion Site by notifying Port of its election (“**Unforeseen Condition Notice**”) at least ninety (90) days prior to the applicable Outside Expansion Date (“**Unforeseen Condition Notice Expiration Date**”). Developer will submit with its Unforeseen Condition Notice, information substantiating its determination that it has encountered an Unforeseen Condition at the applicable Expansion Site. Port shall have thirty (30) days after its receipt of the Unforeseen Condition Notice to review the information provided in the Unforeseen Condition Notice and notify Developer whether Port agrees or disagrees with Developer’s determination. If Developer fails to deliver the Unforeseen Condition Notice by the applicable Unforeseen Condition Notice Expiration Date, then Developer’s right to exclude the applicable Expansion Site from the Project and from the Premises shall terminate and as of the applicable Outside Expansion Date, subject to **Section 2.2(c)**, the Site will be expanded to include the applicable Expansion Site and the Parties shall comply with provisions of **Sections 4.2, 4.6, 4.7. and 5.**

(c) Port’s Agreement and Developer’s Agreement.

(i) If Port agrees with Developer’s determination that it has encountered an Unforeseen Condition at the applicable Expansion Site, then the Site will not be expanded to include such Expansion Site as of the applicable Outside Expansion Date.

(ii) Developer agrees and acknowledges that from and after the date

Port notifies Developer of its agreement that Developer has encountered an Unforeseen Condition, Port may or may not (i) lease, (ii) develop, or (iii) use the applicable Expansion Site for any purpose whatsoever and may or may not enter into any agreement with any other party with regard to such Expansion Site; provided, however, any development or improvement of the Expansion Site shall comply with the Secretary's Standards, as applicable. The provisions of this **Section 2.3(c)(ii)** shall survive the expiration of this Agreement.

(d) Port's Disagreement. If Port disagrees with Developer's determination that it has encountered an Unforeseen Condition at the applicable Expansion Site, then the Parties will meet to resolve their disagreement as many times as possible within thirty (30) days following Port's delivery of its disagreement notice. If the Parties are unable to resolve the disagreement within such thirty (30) days, then either Party may submit the matter to arbitration in accordance with the dispute resolution procedure set forth in **Section 2.3(e)**.

(e) Dispute Resolution for Unforeseen Condition. If the Parties are unable to resolve the disagreement over whether Developer encountered an Unforeseen Condition with respect to a specific Expansion Site within the time period set forth in **Section 2.3(d)**, then either party may invoke the provisions of this **Section 2.3(e)** within [forty-five (45)] days 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. If neither Party invokes the dispute resolution procedures set forth herein within such [forty-five (45)] day period, then Port's determination shall control.

(i) 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 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 managing and developing commercial real estate projects in San Francisco, including comparable mixed use light industrial/retail/office projects. 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 Parties will meet and mutually agree upon one 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.

(ii) The scope of the arbitrator's decision under this Section will be limited to whether or not Developer has encountered an Unforeseen Condition on the applicable Expansion Site. 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 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.

3. TRANSACTION COSTS.

3.1. *Definition of Transaction Costs.* Port will be reimbursed for reasonable expenses (collectively, the "**Transaction Costs**") it incurs during the LDDA Term directly and solely related to this Agreement, the Lease, other Transaction Documents, and the Project as a whole, as more particularly set forth herein and in the Lease. Transaction Costs includes time spent by Port staff (including City staff costs paid by Port), the services of an historic preservation staff member, the services of real estate, insurance, and economic consultants (including experts within the City

that are paid by Port), construction management services, and legal services (including costs for the City Attorney's office and outside counsel, except for any defense costs for the City Attorney's office and outside counsel arising out of a Port Event of Default). Transaction Costs also include costs reasonably incurred by Port for negotiating Transaction Documents; costs related to monitoring Developer's compliance with the Mitigation Monitoring and Reporting Program until the Certificate of Completion is recorded in the Official Records; costs related to pursuit of entitlements for which Port is required to be a co-permittee or co-applicant; costs related to review of public trust consistency with State Lands, including, if necessary, any State Lands Executive Officer Determination or legislative process pursued to obtain legislative authorization of trust consistency; costs of preparing materials to be submitted to the Board of Supervisors, the Port Commission, State Lands and any other Regulatory Agency; costs of preparing legislative reports, records, findings, and resolutions related to approval of the Project, this Agreement, the Lease, and other Transaction Documents by the Port Commission, the Board of Supervisors, the Planning Commission, and any other Regulatory Agency, as applicable; costs of the review of any architectural design or schematic drawings, plans and specifications; and costs associated with any event of Litigation Force Majeure; provided, however, that Transaction Costs shall specifically exclude the following: (i) \$80,000 of Transaction Costs incurred by Port during a portion of the ENA term that Developer has already reimbursed to Port prior to the date hereof; and (ii) all costs incurred by Port in connection with the pursuit of the State Lands Executive Officer Determination or any legislative process to obtain legislative authorization of public trust consistency for the Project if a State Lands Executive Officer Determination is not obtainable.

3.2. Reimbursement of Transaction Costs. Developer agrees to reimburse Port for all Transaction Costs that Port incurs from the Effective Date through the expiration or earlier termination of this Agreement (the "**LDDA Transaction Costs**"). The LDDA Transaction Costs will be added to the Deferred Port Transaction Cost and such amount will be used, credited, or applied in accordance with *Section 11.2(c)*. During any time that this Agreement and the ENA are in effect at the same time, the Developer's obligation for payment of Transaction Costs will be governed exclusively by this Agreement. The \$50,000 extension fee paid by Developer in December, 2013 in consideration of the extension of the ENA shall be credited toward, and shall serve to reduce, the Deferred Port Transaction Costs by such amount.

3.3. Transaction Costs Budget. Port has provided Developer with a budget for the estimated Transaction Costs that Port expects to incur during the LDDA Term, not including any extension of the LDDA Term under *Section 4.2(b)(i)* ("**Transaction Costs Budget**"). Developer has approved Port's Transaction Cost Budget. Within forty-five (45) days after January 1 and July 1 of each year during the LDDA Term (the "**Port Statement Date**"), beginning with January 1, 2015, Port will provide Developer with a Port Statement for the immediately preceding six (6) months; provided, however, if Port reasonably believes that the actual Transaction Costs incurred by Port for the applicable preceding six (6) months will materially and significantly differ from the Transaction Cost Budget, Port will use its commercially reasonable efforts to provide a Port Statement prior to the next Port Statement Date. The Parties agree and acknowledge that the Transaction Costs Budget is only an estimate of the total Transaction Costs that Port may incur during the LDDA Term. Developer shall be obligated to reimburse Port for the actual Transaction Costs incurred by Port, whether such amount is more or less than the amount set forth in the Transaction Costs Budget or in each Port Statement.

"**Port Statement**" means a reasonably detailed statement, including copies of invoices and other reasonable evidence of costs incurred by Port, showing Port's actual Transaction Costs incurred for the six (6) month period from and including (i) January 1 through and including June 30, and (ii) July 1 through and including December 31, as applicable, and Port's projected Transaction Costs for the next six (6) months.

3.4. Acknowledgements. The parties acknowledge that any payments paid, reimbursed, or credited to Port by Developer in connection with Transaction Costs, whether

directly or indirectly, are exempt as a “**source of income**” within the meaning of California Political Reform Act (pursuant to California Government Code Section 87103.6). The parties further acknowledge that Port reserves the full and sole discretion and authority to determine which consultants, contractors, or employees will be hired to work on matters related to the Project, and to direct and evaluate such work and to establish the amount of compensation paid. Developer will have no control over Port’s funds from which Port’s consultants, contractors or employees are paid.

4. DISPOSITION OF LEASE THROUGH ESCROW.

4.1. Agreement to Lease. Subject to satisfaction or waiver of all of the conditions to Close of Escrow, Port agrees to lease to Developer and Developer agrees to lease from Port, the Site (subject to the Permitted Title Exceptions) pursuant to the terms and conditions set forth in the Lease, all in accordance with and subject to the terms, covenants and conditions of this Agreement for the development, use, and operation of the Improvements.

4.2. Escrow.

(a) **Opening of Escrow.** Developer shall open an escrow (“**Escrow**”) for the Delivery of the Lease with a local office of Chicago Title Insurance Company (“**Title Company**”) selected by Developer. A new Escrow shall be opened, if required, for the issuance by the Title Company of a new title insurance policy or endorsement to the existing title insurance policy for each Expansion Site added to the Premises after the Closing Date in compliance with **Section 4.7**. Developer shall open each Escrow no later than the dates set forth in the Schedule of Performance attached hereto as **Exhibit XX**.

(b) Close of Escrow.

(i) **Initial Close of Escrow.** The date for the Close of Escrow for the Initial Site (“**Closing Date**” or the “**Initial Close of Escrow**”) shall be set forth in the Schedule of Performance; provided, that the Closing Date may not occur earlier than the date by which all of the conditions in **Sections 4.3 and 4.4** are either satisfied or waived by the Party which is benefited by such conditions. In the event that all of the conditions are not satisfied or waived by the Closing Date, the Closing Date may be extended by any one or more of the following: (i) by mutual agreement of the Parties, in their sole and absolute discretion, but in no event later than eighteen months following the original Closing Date set forth in the Schedule of Performance (“**Outside Closing Date**”); or (ii) at the written election of Developer, in Developer’s sole discretion, for up to two (2) periods of nine (9) months each (each an “**Extension Period**”), subject to Developer’s payment to Port of the sum of Fifty Thousand Dollars (\$50,000.00) (the “**Extension Fee**”) for each Extension Period on or prior to the commencement of each Extension Period. In other words, provided Developer pays the Extension Fee for each Extension Period, Developer may extend the Closing Date by an additional eighteen (18) months. The Extension Fee will not be pro-rated if the actual Closing Date occurs prior to expiration of the applicable Extension Period.

(ii) **Close of Escrow for Expansion Site(s).** The date for the Close of Escrow for the Expansion Sites (each, a “**Title Escrow Closing Date**”) shall be the earlier of the Expansion Date or Outside Expansion Date applicable to such Expansion Site or with respect to Building 102 only, the Building 102 Expansion Date; provided, that the Title Escrow Closing Date may not occur earlier than the date by which all of the conditions in **Section 5** are either satisfied or waived by the Party which is benefited by such conditions. Developer shall be deemed to be in default if all of its obligations under **Section 5(a)** are not satisfied or waived by the Title Escrow Closing Date.

(c) **Joint Escrow Instructions.** No later than thirty (30) days prior to Closing Date or the applicable Title Escrow Closing Date, the Parties will prepare joint escrow instructions as are necessary and consistent with this Agreement and execute and deliver the same to the Title Company no less than five (5) days prior to the Closing Date or any applicable

Title Escrow Closing Date (the “**Joint Escrow Instructions**”).

(d) Recordation of Certain Documents. The Joint Escrow Instructions will provide, as applicable, that the Title Company will record in the Official Records (i) on the Closing Date, the Memorandum of Lease substantially in the form attached hereto as **Exhibit XX**, and (ii) on each Title Escrow Closing Date, a memorandum or such other document in recordable form, sufficient to permit the Title Company to issue the title insurance required under **Section 4.7**, confirming the expansion of the Premises to include the applicable Expansion Site as of the applicable Expansion Date, Outside Expansion Date or Building 102 Expansion Date (“**Memorandum Confirming Premises Expansion**”).

(e) Costs of Escrow. Port shall not be required to pay any Closing Costs for any Escrow. Developer shall pay all fees, charges, costs and other amounts necessary for the opening and close of each Escrow (collectively, the “**Closing Costs**”), including (i) Escrow fees; (ii) the cost of any title reports, ALTA survey, or other surveys, inspections and premiums for all title insurance policies obtained by Developer, Port, and if applicable, any lender; (iii) recording fees; and (iv) transfer taxes, if any. Developer shall pay the Closing Costs promptly after the Title Company notifies Developer that such amounts are payable, but in any event before the applicable Close of Escrow. If the Title Company requires, Developer shall pay into Escrow any fees, costs, charges or other amounts required for the applicable Close of Escrow under this Agreement.

4.3. Conditions to Port’s Obligation to Close Escrow.

(a) Port’s Conditions Precedent. The following are conditions precedent to Port’s obligation to close Escrow for the Initial Site as of the Closing Date and each Expansion Site as of the applicable Title Escrow Closing Date:

(i) Developer has performed all obligations under this Agreement required to be performed on its part before the applicable Close of Escrow, no Unmatured Developer Event of Default or uncured Developer Event of Default exists and all of Developer’s representations and warranties made in **Section 20.20** were true and correct in all aspects when made and are true and correct in all aspects as of the applicable Close of Escrow. At each applicable Close of Escrow, Developer will deliver to Port a certificate to confirm the accuracy of such representations and warranties in all aspects substantially in the form of **Exhibit XX**.

(ii) Port has approved those aspects of the Construction Documents that are required under **Section 9.4** to be approved by the date(s) set forth in the Schedule of Performance applicable to each Close of Escrow.

(iii) Port has received and approved evidence of adequate financing for the Base Building Work for the Historic Core, including evidence of Developer’s ability to meet any debt service obligation(s) attendant thereto, as provided for below. In this regard, as to the following **Sections 4.3(a)(iii)(1), 4.3(a)(iii)(2), and 4.3(a)(iii)(3)**, no later than the date specified in the Schedule of Performance for submission of evidence of financing:

(1) Developer has submitted and Port has reasonably approved the then current Development Budget for the entire Project, which Development Budget will be substantially in the form of the Anticipated Development Budget attached hereto as **Exhibit XX**.

(2) Developer has submitted, and Port has reasonably approved, (i) evidence of a bona fide commitment or commitments for the financing of that portion of the Development Budget Developer intends to borrow to finance the Initial Improvements, certified by Developer to be a true and correct copy or copies thereof, with (1) no conditions to funding other than standard and customary conditions and (2) no provisions requiring acts of Developer prohibited in this Agreement or the Lease, or prohibiting acts of Developer required in this Agreement or the Lease, and (ii) such documentation showing sources and uses of funds as may be required by such leasehold lender.

(3) Developer has submitted a statement and appropriate supporting documents certified by Developer to be true and correct and in form reasonably satisfactory to Port showing sources and expected uses of funds sufficient to demonstrate that Developer has or will have funds equal to or exceeding the total development cost of the Initial Improvements to be constructed on the Historic Core (as shown on the Development Budget) as of the Initial Closing Date or applicable Title Escrow Closing Date, and such funds have been spent for uses described in the Development Budget or are committed and available for that purpose.

(4) Within thirty (30) days after Developer's submission of all of the applicable documents described in this *Section 4.3(a)(iii)*, Port will notify Developer in writing of Port's approval or disapproval (including the reasons for disapproval) of the evidence of financing.

(iv) If Developer elects to finance any part of the Base Building Work for the Historic Core through funding from a leasehold lender, then such financing has closed or will close simultaneously with the Initial Close of Escrow.

(v) Developer will have submitted and Port has approved (1) the Final Pro-Forma for the Project substantially in the form of [*Exhibit XX*] prior to the Initial Close of Escrow and (2) any updates of previously Port approved Final Pro-Forma as of each Title Escrow Closing Date.

(vi) Developer has deposited into Escrow the Lease and the Memorandum of Lease, duly executed by Developer.

(vii) Developer has in place all insurance required under this Agreement and the Lease and has deposited evidence thereof into Escrow.

(viii) The Initial Building Permits for the Base Building Work on the Initial Site as of the Closing Date and on each Expansion Site as of the applicable Title Escrow Closing Date are ready to be issued but for the execution of the Lease by Port and payment by Developer of all Building Permit fees that are required to be paid prior to commencement of the work described in the Initial Building Permit.

(ix) Developer has deposited into Escrow funds necessary for payment to the City of all development exaction fees that are required to be paid prior to commencement of the work described in the Initial Building Permit for the Initial Site as of the Closing Date and for each Expansion Site as of the applicable Title Escrow Closing Date.

(x) Developer has deposited into Escrow, a duly executed and authorized Performance Bond in the form attached hereto as *Exhibit XX* for the Base Building Work on the Initial Site as of the Closing Date and on each Expansion Site as of the applicable Title Escrow Closing Date.

(xi) Developer has caused J.R. Orton, III to deposit into Escrow, at Developer's election, either (A) a completion guaranty from J.R. Orton, III or a performance bond issued by a surety reasonably acceptable to Port, guaranteeing completion of the Base Building Work for the Initial Site and any Expansion Site that forms a part of the Premises in the form attached hereto as *Exhibit XX*, or (B) a Letter of Credit.

(xii) Port has reasonably approved evidence of a guaranteed maximum price contract for Construction of the Base Building Work for the Initial Site and any Expansion Site that forms a part of the Premises consistent with the Construction Documents ("Construction Contract"). Port's approval of the Construction Contract shall solely be for purposes of determining consistency with the Development Budget and the Scope of Development attached hereto as *Exhibit XX*, and consistency with the terms of this Agreement and the Lease. Port's approval of the Construction Contract is in addition to, and not as a limitation of, Port's approval rights of the Construction Documents pursuant to *Article 9*.

(xiii) Developer will have submitted to Port evidence that the Historic Preservation Certification Application, Part 1 for the Project has been submitted to NPS.

(xiv) City has approved the submissions Developer is required to make before the Initial Close of Escrow relating to Developer's obligations to comply with the "First Source Hiring Ordinance for the Project and Developer and [insert name of agency] have entered into that certain [Community Benefits Agreement], substantially in the form attached hereto as *Exhibit XX*.

(xv) Developer has executed and delivered to Port a certification of compliance with San Francisco Administrative Code Chapters 12B and 12C on the "**Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits**" form (Form HRC-12B-101), as set forth in *Section 18.1(d)*, together with supporting documentation, and has submitted evidence to Port that it has secured approval of the form by the City's Human Rights Commission.

(xvi) Port has approved Developer's integrated pest management plan as set forth in *Section 18.17*.

(xvii) Developer has obtained all Regulatory Approvals set forth in the Schedule of Performance required to commence Construction of the Base Building Work on the Site as of the Initial Close of Escrow, on each Expansion Site as of the applicable Title Escrow Closing Date, and the same have been Finally Granted.

(xviii) Developer has deposited into Escrow such evidence of authority to enter into the Lease, this Agreement and any other Transaction Documents, as Port and the Title Company may reasonably require (including certificates of good standing, board resolutions and certificates of incumbency).

(xix) The Title Company shall be prepared to issue to Port the title insurance policy required by *Section 4.7(a)(ii)* to be delivered to Port as of the Initial Close of Escrow.

(xx) The Port Commission's authorization and approval, by resolution, of this Agreement, the Lease, and any other Transaction Document to be executed by Port, and the Board of Supervisors' authorization and approval, by resolution, of the Lease, has been completed and has become and remain effective, and such approvals shall be Finally Granted.

(xxi) A State Lands Executive Officer Determination has been issued.

(xxii) The City's Mayor's Office of Housing and Community Development or such other City entity responsible for administering the Seismic Safety Loan Program has approved or conditionally approved Developer's application for a loan of no less than Nineteen Million Dollars (19,000,000) from the City's Seismic Safety Loan Program to finance a portion of the seismic retrofitting costs for Buildings 113 and/or 104 ("**SSLP Loan**") and the security for the SSLP Loan shall be subordinated to the most senior Permitted Mortgage securing Developer's construction loan to finance construction of the Base Building Work on the Project or any permanent take-out financing of the same; provided, however, Developer may instead provide Port with evidence of adequate financing that complies with *Section 4.3(a)(iii)* to replace the SSLP Loan and Port has approved such replacement.

(b) Satisfaction of Port's Conditions. The conditions precedent set forth in *Section 4.3(a)* are intended solely for the benefit of Port. If any such condition precedent is not satisfied on or before the required completion date specified therefor in the Schedule of Performance, Port's Executive Director, or, if the Executive Director determines that waiver of the condition precedent materially affects the rights, obligations, or expectations of Port, the Port Commission by resolution, has the right in its sole discretion to (i) waive in writing the condition precedent in question and proceed with Delivery of the Lease, or (ii) terminate this Agreement and exercise its rights and remedies hereunder.

4.4. Conditions to Developer's Obligation to Close Escrow.

(a) Developer's Conditions Precedent. The following are conditions precedent to Developer's obligation to close Escrow for the Initial Site and any Expansion Site that forms a part of the Premises as of the Initial Close of Escrow:

(i) Port has performed all obligations under this Agreement that Port is required to perform before the Close of Escrow and no Unmatured Port Event of Default or uncured Port Event of Default exists.

(ii) Port has approved those aspects of the Construction Documents that are required under *Section 9.4* to be approved by Port by the Close of Escrow and in accordance with the Schedule of Performance, provided that Developer has timely submitted all required information and documents.

(iii) Port has approved evidence of adequate financing for the Construction of the Initial Improvements in accordance with *Sections 4.3(a)(iii)*.

(iv) If Developer elects to finance any part of the Base Building Work through funding from a leasehold lender, then such financing has closed or will close simultaneously with the Close of Escrow.

(v) Port has approved prior to Close of Escrow, the Development Budget and the Final Pro-Forma.

(vi) Port has deposited into Escrow the Lease and the Memorandum of Lease, duly executed by Port.

(vii) The Initial Building Permits for the Base Building Work on the Site are ready to be issued but for the execution of the Lease by Port and payment by Developer of all Building Permit fees that are required to be paid prior to commencement of the work described in the Initial Building Permit.

(viii) Developer has obtained all Regulatory Approvals required to commence Construction of the Base Building Work on the Site and the same has been Finally Granted.

(ix) City has approved the submissions Developer is required to make before the Initial Close of Escrow relating to Developer's obligations to comply with the First Source Hiring Ordinance for the Project and Developer and [insert name of agency] have entered into that certain [insert name of agreement], substantially in the form attached hereto as Exhibit XX.

(x) The Title Company is prepared to issue to Developer, upon payment by Developer of the Closing Costs, the title insurance policy required by *Section 4.7(a)(i)* to be delivered to Developer for the applicable Close of Escrow.

(xi) The Port Commission's authorization and approval, by resolution, of this Agreement, the Lease, and any other Transaction Documents to be executed by Port, and the Board of Supervisors' authorization and approval, by resolution, of the Lease, has been completed and has become and remain effective, and such approvals shall be Finally Granted.

(xii) A State Lands Executive Officer Determination has been issued.

(xiii) The City's Mayor's Office of Housing and Community Development or such other City entity responsible for administering the Seismic Safety Loan Program has approved or conditionally approved Developer's application for the SSLP Loan and the security for the SSLP Loan shall be subordinated to the most senior Permitted Mortgage securing Developer's construction loan to finance construction of the Base Building Work on the Project or any permanent take-out financing of the same; provided, however, Developer may instead provide Port with evidence of adequate financing that complies with *Section 4.3(a)(iii)* to

replace the SSLP Loan and Port has approved such replacement.

(b) Satisfaction of Developer's Conditions Precedent. The conditions precedent set forth in **Section 4.4(a)** are intended solely for the benefit of Developer. If any such condition precedent is not satisfied on or before the Closing Date, Developer has the right in its sole discretion to waive in writing the condition precedent in question and proceed with the Initial Close of Escrow and acceptance of the Site.

4.5. *Delivery of the Lease.*

(a) Port's Obligation to Close Escrow for the Initial Site. Provided that the conditions to Port's and Developer's obligations with respect to Initial Close of Escrow as set forth in **Sections 4.3 and 4.4** have been satisfied or expressly waived by the benefited party on or before the Closing Date, Port and Developer shall instruct the Title Company to complete the Initial Close of Escrow as set forth below. Upon the Initial Close of Escrow, the Lease will be Delivered to Developer, and Developer will accept such Delivery.

(b) Steps to Close Initial Escrow. The Initial Close of Escrow will be completed as follows:

(i) On or before the Closing Date, Port will execute and acknowledge, as necessary, and deposit into Escrow with the Title Company the following documents: (1) the Lease; (2) the Memorandum of Lease, (3) copies of the resolution(s) of the Port Commission authorizing and approving the Lease, this Agreement and related Transaction Documents; and (4) copies of the resolution(s) of the Board of Supervisors authorizing and approving the Lease.

(ii) On or before the Closing Date, Developer will execute and acknowledge (or cause to be executed and acknowledged), as necessary, and deposit into Escrow with the Title Company the following: (1) the Lease; (2) the Memorandum of Lease; (3) the certificate as to the accuracy of the representations and warranties under this Agreement required by **Section 4.3(a)(i)**; (4) such resolution(s) of Developer and its constituent members authorizing the execution and delivery of the Lease, this Agreement and the related Transaction Documents, and any other evidence of authority as Port or the Title Company may reasonably require; (5) all Closing Costs; (6) the Security Deposit, Environmental Oversight Deposit, and Environmental Financial Performance Deposit; and (7) the Performance Bond, Completion Guaranty or Letter of Credit.

(iii) Port and Developer will instruct the Title Company to close the Escrow. Upon the Initial Close of Escrow, the Title Company will record in the Official Records, the Memorandum of Lease, and any other documents reasonably required to be recorded in the Official Records under the terms of Regulatory Approvals.

(iv) The Title Company will issue title policies to Developer and Port as required under **Section 4.7**.

(c) Waiver of Pre-Delivery Conditions. Unless the Parties otherwise expressly agree at the time of Close of Escrow, if a Party benefited by a condition or conditions to Close of Escrow authorizes Close of Escrow notwithstanding that such condition(s) is not yet satisfied, such condition(s) will, upon Close of Escrow, be deemed waived by the Party benefited by such condition(s).

4.6. *Condition of Title.*

(a) Permitted Title Exceptions. Except for the "Permitted Title Exceptions" attached hereto as **Exhibit [XX]** and such other matters as Developer shall cause or suffer to arise (collectively, "Permitted Title Exceptions"), Port will Deliver to Developer the Initial Site and any Expansion Site(s), as applicable, under and subject to the provisions of the Lease for the term specified in the Lease, free and clear of (i) Use Agreements, and (ii) liens, encumbrances, covenants, assessments, easements, and taxes.

(b) Title Defect. If at the time scheduled for Close of Escrow with respect to the Initial Site and any Expansion Site, other than as set forth in **Section 4.6(a)**, any (i) possession by others, (ii) rights of possession other than those of Developer or Port as reserved under the Lease, or (iii) lien, encumbrance, covenant, assessment, easement, lease, tax or other matter which is not a Permitted Title Exception, encumbers the Initial Site or the Expansion Site, as applicable, and would materially and adversely affect the Construction of the Initial Improvements (“**Title Defect**”), Port will have up to thirty (30) days from the date scheduled for applicable Close of Escrow, to remove the Title Defect (the “**Title Defect Cure Period**”). In such event, the Closing Date or the applicable Title Escrow Closing Date will be extended to the earlier of seven (7) days after the Title Defect is removed or the expiration of the applicable Title Defect Cure Period. If the Title Defect can be removed by bonding and Port has not so bonded within the Title Defect Cure Period, Developer may cause a bond to be issued. If Developer causes a bond to be issued in accordance with this **Section 4.6(b)**, Port, at its option, shall reimburse Developer for the cost of such bond within thirty (30) days of demand therefor or include such amounts as part of Developer Equity if third-party financing is unavailable to fund such amounts.

(c) Developer’s Remedies With Respect to Uncured Title Defect.

(i) The Initial Site. If after expiration of the Title Defect Cure Period, a Title Defect still exists at the time scheduled for the Initial Close of Escrow, Developer may by written notice to Port either terminate this Agreement or accept Delivery of the Initial Site. If Developer accepts Delivery, the Title Defect will be deemed waived by Developer. If Developer does not accept Delivery and fails to terminate this Agreement within thirty (30) days after expiration of the Title Cure Period, Port may terminate this Agreement upon three (3) days written notice to Developer. If this Agreement is terminated under this **Section 4.6(c)(i)**, Developer will have no further remedies against, or other obligations to Port with respect to such termination (other than those that survive expiration or earlier termination of this Agreement). In the event that Developer does not accept Delivery and fails to terminate this Agreement within such thirty (30) days after the expiration of the Title Defect Cure Period and Port elects not to terminate this Agreement as set forth in this Section, then this Agreement will continue in full force and effect and any Title Defect will be deemed waived by Developer.

(ii) Any Expansion Site. If after expiration of the Title Defect Cure Period, a Title Defect still exists at the time scheduled for the applicable Close of Escrow, Developer may by written notice to Port either elect not to expand the Site to include the Expansion Site with the Title Defect or expand the Site to include the Expansion Site with the Title Defect. If Developer elects to expand the Site to include the Expansion Site with the Title Defect, the Title Defect will be deemed waived by Developer. If Developer elects not to expand the Site to include the Expansion Site with the Title Defect within thirty (30) days after expiration of the Title Cure Period, Developer will have no further remedies against, or other obligations to Port with respect to such election and notwithstanding **Section 2.2**, the Site will not be expanded to include the Expansion Site with the Title Defect.

(d) Reservation of Mineral Rights by the State. In accordance with Sections 2 and 3.5(c) of the Burton Act, Developer and Port acknowledge that the State reserves certain subsurface mineral rights from a point of entry outside of the Historic Core, and subject to certain limitations, as more particularly described in the Lease.

4.7. Title Insurance.

(a) Title Insurance to be Issued at the Close of Escrow. Each Joint Escrow Instructions will provide that concurrently with each applicable Close of Escrow, the Title Company will issue and deliver:

(i) To Developer, an A.L.T.A. extended coverage title insurance policy issued by the Title Company (or with respect to any Expansion Site, an endorsement, if

appropriate, including the applicable Expansion Site in such title insurance policy), with such coinsurance or reinsurance and direct access agreements as Developer may request reasonably, in an amount designated by Developer which is satisfactory to the Title Company, insuring that the leasehold estate in the Site is vested in Developer subject only to the Permitted Title Exceptions, and with such C.L.T.A. form endorsements as may be requested reasonably by Developer, all at the sole cost and expense of Developer; and

(ii) To Port, an A.L.T.A. extended coverage title insurance policy issued by Title Company (or with respect to any Expansion Site, an endorsement, if appropriate, including the applicable Expansion Site in such title insurance policy) in an amount specified by Port and satisfactory to the Title Company, insuring Port's fee interest in the Site subject to the Public Trust, the Lease and the other Permitted Title Exceptions which are applicable to the fee, and with such C.L.T.A. endorsements as Port may reasonably request, all at the sole cost and expense of Developer, provided that subject to **Section 4.7(c)**, Port pays any incremental cost for such policy (including endorsements) in excess of the cost of the title insurance policy and endorsements referred to in **Section 4.7(a)(i)**.

(b) Surveys. Developer is responsible for securing any and all surveys and engineering studies at its sole cost and expense, as needed for the title insurance required under this Agreement or as otherwise required to consummate the transactions contemplated by this Agreement. Developer, at no cost to Port, shall provide Port with complete and accurate copies of all such final surveys (which surveys shall be certified to Port in a form reasonably acceptable to Port) and engineering studies.

(c) Construction Endorsement. In the event that any of the title insurance policies described in **Section 4.7(a)(ii)**, are issued to Port, and in the event that Developer obtains an endorsement to its title insurance policy insuring Developer that the Initial Improvements on the Initial Site or Expansion Site, as applicable, have been completed free and clear of all mechanics' and materialmen's liens, Developer will also obtain such an endorsement for Port with respect to Port's title insurance policy, all at the sole cost and expense of Developer.

4.8. *Taxes and Assessments.*

(a) Ad Valorem Taxes and Assessments Before and After Initial Close of Escrow. For any period before the Initial Close of Escrow, Developer is responsible for the payment of any ad valorem taxes (including possessory interest and special taxes) assessed by reason of this Agreement, Developer's entry upon the Historic Core under any Transaction Document or otherwise. Ad valorem taxes and assessments levied, assessed, or imposed for any period from and after the Initial Close of Escrow, including possessory interest and special taxes, are the sole responsibility of Developer, as provided in the Lease.

(b) Possessory Interest Taxes. Developer recognizes and understands that this Agreement may create a possessory interest subject to property taxation and that Developer may be subject to the payment of property taxes levied on such interest. San Francisco Administrative Code Sections 23.38 and 23.39 (or any successor statute) require that the City report certain information relating to this Agreement, and any renewals of this Agreement, to the County Assessor within sixty (60) days after any such transaction, and that Developer report certain information relating to any assignment under this Agreement to the County Assessor within sixty (60) days after such assignment transaction. Developer agrees to provide such information as may be requested by Port to enable Port to comply with this requirement.

4.9. *Compliance with Laws; Regulatory Approvals and Other Requirements.*

(a) Compliance with Laws and Other Requirements. As to the Site and the Improvements, at its sole cost and expense, Developer will comply (taking into account any variances or other deviations properly approved) at all times throughout the LDDA Term, with: (i) all Laws; (ii) all requirements of all policies of insurance which may be applicable to the Site, the Improvements, or Developer's personal property; (iii) the Lease (to the extent then in effect);

and (iv) all applicable requirements for qualification of the Improvements for Historic Preservation Tax Credits; and (v) all of the Mitigation Monitoring and Reporting Program attached hereto as ***Exhibit XX***. It is expressly understood and agreed that the performance required of Developer by the preceding sentence includes the obligation to make, at Developer's sole cost and expense, all additions to, modifications of, and installations on the Site which may be required by any Laws regulating the Site, the Improvements, or any of Developer's insurance policies covering the Site, the Improvements, or Developer's personal property, regardless of, among other factors, the relationship of the cost of curative action to the rent payable under the Lease, the length of the then remaining term thereof, the relative benefit of the repairs to Developer or Port, the degree to which the curative action may interfere with Developer's use or enjoyment of the Site, the likelihood that the parties contemplated the particular Laws involved, and whether the Laws involved is related to Developer's particular use of the Site. Developer will, promptly upon request, provide Port with evidence of Developer's compliance with its obligations under this ***Section 4.9(a)***. The parties acknowledge and agree that Developer's obligation to comply with this ***Section 4.9(a)*** is a material part of the bargained for consideration under this Agreement. Except as otherwise expressly set forth in this Agreement, no occurrence or situation arising during the LDDA Term, nor any present or future Law, whether foreseen or unforeseen, and however extraordinary, will relieve Developer of its obligations hereunder, nor give Developer any right to terminate this Agreement in whole or in part or to seek redress against Port, except to the extent Developer may have remedies against Port pursuant to this Agreement or applicable Law. Developer waives any rights now or hereafter conferred upon it by any existing or future Law to terminate this Agreement, to receive any abatement, diminution, reduction or suspension of payment of rent under the Lease, or to compel Port to make any repairs to comply with any such Laws, on account of any such occurrence or situation. Developer will, promptly upon request, provide Port with evidence of compliance with Developer's obligations under this ***Section 4.9(a)***.

(b) Regulatory Approvals.

(i) Developer understands and agrees that Port is entering into this Agreement in its capacity as a landowner with a proprietary interest in the Site (subject to the Public Trust) and not as a Regulatory Agency with certain police powers. Developer agrees and acknowledges that Port has made no representation or warranty that the necessary Regulatory Approvals to allow for Construction of the Improvements can be obtained. Developer 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 Construction of the Improvements will be issued by the appropriate Regulatory Agency and Developer understands and agrees that neither entry by Port into this Agreement nor any approvals given by Port under this Agreement will be deemed to imply that Developer will obtain any required approvals from Regulatory Agencies which have jurisdiction over the Site, including Port itself in its regulatory capacity. Subject to ***Section 4.9(b)(iii)***, Port's status as an agency of the City will in no way limit the obligation of Developer, at Developer's own cost and initiative, to obtain Regulatory Approvals from Regulatory Agencies that have jurisdiction over the Site or Construction of the Improvements. By entering into this Agreement, Port is in no way modifying or limiting the obligations of Developer to Construct the Improvements in accordance with all Laws. Without limiting the foregoing and subject to ***Section 4.9(b)(iii)***, Developer 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 Improvements, this Agreement or the Lease, and any such advocacy, promotion or lobbying will be done by Developer at Developer's sole cost and expense. Subject to ***Section 4.9(b)(iii)***, Port's sole obligation will be to negotiate with Developer in compliance with this Agreement and to present any final negotiated agreement to the Port Commission and the Board of Supervisors (with respect to the Lease only) for their

review and consideration. Developer hereby waives any Losses 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 Improvements.

(ii) Developer understands that its construction of the Improvements 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. Subject to **Section 4.9(b)(iii)**, Developer will be solely responsible for obtaining any such Regulatory Approvals, as further provided in this Section.

Developer will not seek any Regulatory Approval without first obtaining the approval of Port, which (except as set forth herein) will not be unreasonably withheld, conditioned or delayed. Throughout the LDDA Term, Developer 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 Developer's efforts to obtain Regulatory Approvals. Port will provide Developer with its approval or disapproval thereof in writing to Developer within ten (10) business days after receipt of Developer's written request, or if Port's Executive Director determines that Port Commission or Board of Supervisors action is necessary, at the first Port and subsequent Board hearings after receipt of Developer's written request subject to notice requirements and reasonable staff preparation time. If Port fails to respond to Developer's request for Port's consent within such ten (10) business day period, then Developer shall provide a second notice to Port requesting Port's approval (the "**Second Notice**"). The Second Notice shall display prominently on the envelope enclosing such request and the first page of such request, substantially the following: "APPROVAL REQUEST FOR 20th STREET HISTORIC CORE REGULATORY MATTERS. IMMEDIATE ATTENTION REQUIRED; FAILURE TO RESPOND WITHIN THREE (3) BUSINESS DAYS WILL RESULT IN THE REQUEST BEING DEEMED APPROVED." If Port fails to approve or disapprove within three (3) business days following receipt of the Second Notice, Port's failure to respond shall be deemed approval.

Port will cooperate reasonably with Developer in its efforts to obtain the Regulatory Approvals required for the Project. However, Developer 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-Site or could otherwise encumber, restrict or change the use of Port property (other than the Site), 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-Site that Developer has not agreed to assume, or could otherwise encumber, restrict or change the use of the Site, unless in each instance Port has previously approved, in Port's reasonable discretion such conditions and/or restrictions.

Developer will bear, and will pay as they are incurred, all costs associated with (x) applying for and obtaining any necessary Regulatory Approval, and (y) 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-Site or require off-Site improvements, removal, or other measures. Developer has the right to appeal or contest any condition in any manner permitted by law imposed upon any such Regulatory Approval. Developer will provide Port with prior notice of any such appeal or contest and keep Port informed of such proceedings. Developer will pay or discharge any fines, penalties or corrective actions imposed as a result of Developer's failure to comply with the terms and conditions of any Regulatory Approval. No Port Approval will limit Developer's obligation to pay all the costs of complying with any conditions or restrictions.

Without limiting any other indemnification provisions of this Agreement, Developer will Indemnify Port and the Indemnified Parties from and against any and all Losses which may arise in connection with Developer's failure to obtain or seek to obtain in good faith any required Regulatory Approval (other than the State Lands Executive Officer Determination subject to Developer's obligations in Section 4.9(b)(iii)), 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 negligent or willful acts or omissions of Port acting in its proprietary capacity.

(iii) The Parties agree and acknowledge that if a State Lands Executive Officer Determination is required for the Project, Port will be the lead in the Parties' efforts to obtain a State Lands Executive Officer Determination. Developer understands that Port has no authority or influence over State Lands and that there is no guarantee that a State Lands Executive Officer Determination will be issued. Developer will reasonably cooperate with Port's efforts to obtain a State Lands Executive Officer Determination. Developer acknowledges that Developer may be required to modify its design, create more public access within the Buildings, or make such other changes that State Lands may require as a condition to issuing a State Lands Executive Officer Determination.

5. DEVELOPER'S EXPANSION SITE OBLIGATIONS PRIOR TO OUTSIDE EXPANSION DATE; STEPS TO CLOSE ESCROW FOR EXPANSION SITES .

(a) Developer's Obligations. If the Parties have determined that the applicable Expansion Site is not to be excluded from the Site due to an Unforeseen Condition pursuant to **Section 2.3**, then prior to the earlier of the Expansion Date or Outside Expansion Date applicable for each Expansion Site, Developer shall have performed, or caused others to perform, all of the following with respect to each Expansion Site:

(i) All the conditions precedent to Port's obligation to close Escrow set forth in **Sections 4.3(a)(i)--4.3(a)(xxii)** shall have been satisfied.

(ii) There is no event of default under any Permitted Mortgage, including the SSLP Loan that remains uncured after the expiration of any applicable notice and cure periods.

(b) Steps to Close Escrow for Expansion Sites. The Close of Escrow for each of the Expansion Sites will be completed as follows:

(i) On or before the applicable Title Escrow Closing Date, the Parties will execute and acknowledge and deposit into Escrow with the Title Company, the Memorandum Confirming Premises Expansion.

(ii) The Title Company will issue title insurance policies to Developer and Port as required under **Section 4.7**.

(iii) The Parties will instruct the Title Company to close the applicable Escrow. Upon the close of Escrow for each Expansion Site, the Title Company will record in the Official Records, the Memorandum Confirming Premises Expansion for the applicable Expansion Site.

6. AS IS CONDITION OF THE SITE; RELEASE; INDEMNIFICATION.

The provisions of this **Section 6** shall survive the expiration or earlier termination of this Agreement.

6.1. Site As Is; Risk of Loss.

(a) Acceptance of Site in "AS IS WITH ALL FAULTS" Condition. Port will not prepare the Historic Core for any purpose whatsoever, except solely for its obligations to Deliver the Site as provided in **Sections 1.5 and 4.6**. Subject to the provisions of **Section 4.6**,

Developer agrees to accept the Initial Site in its “**AS IS WITH ALL FAULTS**” condition on the Closing Date and each of the Expansion Sites in its “**AS IS WITH ALL FAULTS**” condition on each of the applicable Expansion Date, Outside Expansion Date, or the Building 102 Expansion Date, all as further described in *Sections 6.1(b) and 6.1(c)*.

(b) Independent Investigation by Developer. Developer acknowledges that it has been afforded a full opportunity to inspect Port’s records relating to conditions of the Historic Core, including the items described in [*Exhibit XX*] attached hereto and the Remedial Action Plan (collectively, the “**Existing Site Reports**”). Port makes no representation or warranty as to the accuracy or completeness of any matters contained in such records. Developer is not relying on any such information. All information contained in such records is subject to the limitations set forth in Section 6.1(c). Developer represents and warrants to Port that Developer has performed a diligent and thorough inspection and investigation of the Historic Core, either independently or through its own experts including (i) the quality, nature, adequacy and physical condition of the Historic Core including the structural elements, foundation, and all other physical and functional aspects of the Historic Core; (ii) the quality, nature, adequacy, and physical, geotechnical and environmental condition of the Historic Core, 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 of the Historic Core for the Improvements and Developer’s planned use of the Historic Core; (iv) the zoning, land use regulations, historic preservation laws, and other Laws governing use of or construction on the Historic Core; and (v) all other matters of material significance affecting the Historic Core and its development under this Agreement.

(c) DISCLAIMER OF REPRESENTATIONS AND WARRANTIES. DEVELOPER AGREES THAT THE INITIAL SITE IS BEING DELIVERED AND WITH RESPECT TO ALL OF THE EXPANSION SITES, WILL BE DELIVERED BY PORT AND ACCEPTED BY DEVELOPER IN THEIR AS IS WITH ALL FAULTS CONDITION. DEVELOPER REPRESENTS AND WARRANTS TO PORT THAT DEVELOPER HAS RECEIVED AND REVIEWED THE EXISTING SITE REPORTS. DEVELOPER 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, OR PERTAINING TO THE INITIAL SITE OR ANY OF THE EXPANSION SITES, THE SUITABILITY OR FITNESS OF THE INITIAL SITE, THE EXPANSION SITES, OR APPURTENANCES TO THE INITIAL SITE OR THE EXPANSION SITES 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 OF THE INITIAL SITE OR ANY OF THE EXPANSION SITES, OR ANY OTHER MATTER WHATSOEVER PERTAINING TO THE INITIAL SITE OR THE EXPANSION SITES.

Developer _____

6.2. Release. As a material condition to Port’s agreement to enter into this Agreement, as part of Developer’s agreement to accept the Initial Site and the Expansion Sites in their “**As Is With All Faults**” condition, Developer, on behalf of itself and its successors and assigns, shall be deemed to waive any right to recover from, and forever release, acquit and discharge, Port, the City, and their respective Agents of and from any and all Losses, whether direct or indirect, known or unknown, foreseen or unforeseen, that Developer 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 Initial Site or any of the Expansion

Sites (including soil and groundwater conditions), including any Hazardous Materials in, on, under, above or about the Initial Site or any of the Expansion Sites, (ii) the suitability of the Initial Site or any of the Expansion Sites for Construction of the Improvements, (iii) any Laws applicable thereto, including Environmental Laws or Laws pertaining to rehabilitation or historic preservation of historic resources, or any applicable Laws that arose during or relate to the period before (x) the Closing Date with respect to the Initial Site, or (y) the Expansion Date, Outside Expansion Date, or the Building 102 Expansion Date applicable to each Expansion Site, (iv) damages by death of or injury to any Person, or to property of any kind whatsoever and to whomever belonging, and (v) goodwill, or business opportunities arising at any time and from any cause, in, on, under, or about the Initial Site or any of the Expansion Sites, including all claims arising from the joint, concurrent, active or passive negligence of any of Indemnified Parties.

Developer expressly acknowledges and agrees that the amount payable by Developer 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 Agreement 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 Developer expressly assumes the risk with respect thereto. Accordingly, without limiting any Indemnification obligations of Developer or other waivers contained in this Agreement and as a material part of the consideration of this Agreement, Developer 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 Agreement or the uses authorized hereunder, including, any interference with uses conducted by Developer pursuant to this Agreement regardless of the cause, and whether or not due to the negligence of the Indemnified Parties.

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

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR EXPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN TO HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Developer _____

Developer agrees that the release contemplated by this **Section 6.2** includes all known and unknown, disclosed and undisclosed, and anticipated and unanticipated claims pertaining to the subject matter of this release regarding the physical condition of the Historic Core and applicable Laws and for consequential, incidental or punitive damages. Accordingly, Developer 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 contained in this Section.

6.3. General Indemnification.

(a) Indemnification Prior to Closing. Before the Close of Escrow and without limiting any Indemnity contained in any other Transaction Document or under Law, except as set forth in **Section 6.3(b)(ii)**, Developer will Indemnify the Indemnified Parties from and against any and all Losses incurred in connection with or arising directly or indirectly, in whole or in

part, out of: (i) the death of any person or any accident, injury, loss or damage whatsoever caused to any person or to the property of any person (including the person or property of Developer or its Agents) which may occur in, on, under, or pertaining to the Site, and which may be directly or indirectly caused by any acts done in, on, under, or pertaining to the Site, or acts or omissions of Developer, its Agents or Invitees, (ii) any failure by Developer or its Agents or Invitees, as applicable, in the observation or performance of any of the terms, covenants or conditions of this Agreement; (iii) the entry, use, or any acts, omissions or negligence of Developer, its Agents or Invitees in, on, under, or pertaining to the Site; and (iv) performance of any labor or services or the furnishing of any materials or other property with respect to the Site or any part thereof by Developer or its Agents during the LDDA Term; and (v) any acts, omissions, or negligence of Developer, its Agents or Invitees during the LDDA Term.

(b) General Provisions Regarding Indemnities.

(i) Immediate Obligation to Defend. Except as set forth in *Section 6.3(b)(ii)*, Developer's Indemnification obligations are 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. Developer agrees to immediately defend the Indemnified Parties against any claims that are actually or potentially within the scope of the Indemnity provisions of this Agreement even if such claims may be groundless, fraudulent or false. The Indemnified Party against whom any claim is made which may be within the scope of the Indemnity provisions of this Agreement shall provide notice to Developer of such claim within a reasonable time after learning of such claim, and thereafter shall cooperate with Developer in the defense of such claim. Developer's obligation to defend shall arise at the time such claim is tendered to Developer by the Indemnified Parties and shall continue at all times thereafter until finally resolved; provided, however, any failure to provide such notice shall not affect Developer's obligations under any such Indemnity provisions except to the extent Developer is materially prejudiced by such failure.

(ii) Exclusion. Notwithstanding the foregoing, Developer shall not be required to Indemnify the Indemnified Parties to the extent such Losses are caused solely and directly by the gross negligence or willful misconduct of any of the Indemnified Parties.

(iii) Survival. Developer's Indemnification obligations set forth in this Agreement will survive the expiration or earlier termination of this Agreement as to any acts or omissions occurring prior to such date, provided that after Close of Escrow, Developer's indemnification obligations under this Agreement will be subsumed in the Indemnification obligations of Developer under the Lease.

(iv) Defense. Developer shall, at its option but subject to the reasonable consent and approval of Port, be entitled to control the defense, compromise, or settlement of any indemnified matter through counsel of Developer's own choice; provided, however, in all cases Port shall be entitled to participate in such defense, compromise, or settlement at its own expense. If Developer shall fail, however, within a reasonable time following notice from Port describing in reasonable detail the nature of Developer's alleged failure, to take reasonable and appropriate action to defend such suit or claim, Port shall have the right promptly to use the City Attorney or to hire outside counsel to carry out such defense, which expense shall be due and payable to Port within thirty (30) days after receipt by Developer of an invoice therefor.

(v) Additional Obligations. The agreements to Indemnify under this Agreement are in addition to, and may not be construed to limit or replace any other obligations or liabilities that Port may have to Developer or that Developer may have to Port under applicable Law.

(vi) Not Limited by Insurance. The insurance requirements and other provisions of this Agreement will not limit Developer's Indemnification obligations under

any other Transaction Document.

(c) Indemnification On and After Closing. On and after the Close of Escrow, Developer will Indemnify the Indemnified Parties in accordance with the provisions of the Lease.

7. DAMAGE OR DESTRUCTION.

7.1. *Post Closing*. If at any time after the Close of Escrow, a fire or other casualty damages or destroys the Site or any portion thereof, the Lease will govern the obligations of the Parties.

7.2. *Prior to Closing*.

(a) If prior to the Initial Close of Escrow, the Historic Core, or any part thereof, suffers any damage from fire or other casualty that would add less than One Million Dollars (\$1,000,000) to the Development Budget, Developer agrees that it will consummate the Close of Escrow in accordance with this Agreement. The Schedule of Performance will be adjusted, as necessary, to reflect the additional work.

(b) If prior to the Initial Close of Escrow, the Historic Core, or any part thereof, suffers any damage from fire or other casualty that would add in excess of One Million Dollars (\$1,000,000) to the Development Budget, which amount is not offset by available or to be available insurance proceeds, then either Party may elect to terminate this Agreement, by written notice to the other Party delivered not less than sixty (60) days following the event that caused such damage. If neither Party so terminates this Agreement, the Parties shall consummate the Initial Close of Escrow, in which event all of Port's right, title and interest in and to the proceeds of any insurance covering such damage and applicable to the Site, will be assigned to Developer at Initial Close of Escrow and this Agreement will remain in effect. Developer (or any permitted assignee) will not be entitled to any additional rent credit, abatement or allowance under the Lease as a result of such casualty. Unless contemplated to be demolished or modified as described in this Agreement, Developer will, to the extent reasonably practicable, restore or secure the damaged property to the condition it was in immediately preceding the casualty. The Schedule of Performance will be adjusted, as necessary, to reflect the time for such restoration or security work.

(c) Following a termination pursuant to this **Section 7.2**, neither Party will have any further right or obligation hereunder other than those that survive the termination of this Agreement.

8. HAZARDOUS MATERIALS.

(a) Generally. Developer must comply with all Environmental Laws applicable to the Site and the activities it conducts on the Site. Except as set forth in **Section 8(d)**, Developer must perform any required Investigation and Remediation of Hazardous Materials as required by applicable Laws regarding any condition of the Site existing before or after the Effective Date to the extent necessitated by Developer's construction of the Improvements, at no cost to Port, in accordance with applicable Laws. Developer must comply with all Environmental Laws and with all conditions for Regulatory Approval of Hazardous Materials Remediation. Without limiting Developer's obligations to comply with Environmental Laws and other Hazardous Materials obligations under any other Transaction Document, from and after the Initial Close of Escrow, Developer's obligations related to Hazardous Materials will be set forth in the Lease.

(b) Environmental Notice. If a notice of violation or other regulatory order regarding Hazardous Materials from an Environmental Regulatory Agency with jurisdiction over the Site and/or Developer's activities and operations in, on, under, or pertaining to the Site (in each case, an "**Environmental Notice**") is delivered to Developer and such notice of violation arises from Developer's activities in, on, under, or pertaining to the Site and cannot be cured, or

such regulatory order cannot be complied with, within fourteen (14) calendar days after delivery of such Environmental Notice, Developer will reimburse Port, within five (5) days following demand, for Port's administrative costs and expenses incurred while inspecting and monitoring the conditions of the Site and enforcing and administering Developer's obligations under this Agreement (including staff time corresponding with and responding to Regulatory Agencies and collection and laboratory analysis of environmental samples).

If an Environmental Notice is delivered to Developer and such notice of violation is cured, or regulatory order is complied with, within fourteen (14) calendar days after delivery of such Environmental Notice, Developer shall pay to Port within five (5) days following demand, Five Hundred Dollars (\$500.00) for each Environmental Notice delivered to Developer to reimburse Port for its administrative cost and expense. The parties agree that the foregoing charge relating to each Environmental Notice delivered to Developer represents a fair and reasonable estimate of the administrative cost and expense Port will incur by reason of Port staff time devoted to its response and action to each Environmental Notice.

(c) Rights Against Third Parties. Nothing in this Agreement is intended in any way to preclude or limit Developer from pursuing any remedies Developer may have with regard to the existence of Hazardous Materials in, on, under, or pertaining to the Site, against any Third Party; provided, however, Developer may pursue remedies against Third Parties only at Developer's sole cost and expense and with advance written notice to, and approval from, Port. Port will have the right, in its sole election and at its sole cost, to join in any such suit or claim.

(d) Any previously unidentified below-ground Hazardous Materials will be Port's responsibility in accordance with [Section 23.3 of the Lease].

9. DEVELOPMENT OF THE SITE.

9.1. *Developer's Construction Obligations; Project Requirements.*

(a) Project Requirements. Developer must Construct all of the Improvements in compliance with: (i) the Construction Documents; (ii) all applicable Laws, including Port Building Code, required Regulatory Approvals, the Waterfront Plan, Environmental Laws, State Historical Building code, disabled access Laws, Laws regulating construction on the Site, and the City's Bicycle Ordinance (Planning Code §155.1); (iii) the Secretary's Standards attached hereto as **Exhibit XX** for all proposed work affecting any of the structures and buildings within the Site (regardless of whether Developer seeks Historic Preservation Tax Credits), (iv) the FOG Ordinance and the inclusion of automatic grease removal devices on all kitchen sinks in any café, restaurant or other food establishment on the Site, (v) the Mitigation Monitoring and Reporting Program; (vi) Equal Opportunity Program, (vii) the Atrium/Plaza Design Criteria, (viii) the HREs; (ix) the SSLP Loan requirements, including use of the SSLP Loan proceeds solely for seismic work in Buildings 113, 114, and 104 and (ix) this Agreement (sometimes referred to collectively as the "**Project Requirements**"). Notwithstanding any other provision of this Agreement or the Lease to the contrary, Port's approval of the Schematic Drawings attached hereto as **Exhibit XX** and the site plan in the form attached hereto as Exhibit XX is in no manner intended to, and shall not, evidence or be deemed to evidence Port's approval of the Construction Documents.

(b) Scope of Development; Schedule of Performance. Developer will Construct or cause to be Constructed the Improvements in accordance with the Project Requirements within the times and in the manner set forth in this Section 9, the Schedule of Performance, the Scope of Development, and the Schematic Drawings.

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

(d) Standards. All Construction must be performed diligently, commenced and Completed within the time frames under the Schedule of Performance or with respect to any Port Benefit Tasks only, within the time frames in accordance with **Section 11.1**, and in accordance with good construction and engineering practices and applicable Laws. Dust, noise and other effects of the Construction shall be controlled using commercially reasonable methods customarily used to control deleterious effects associated with construction projects in populated or developed urban areas. Developer shall make adequate provision for the safety of all persons affected by the Construction, and Developer shall undertake commercially reasonable measures in accordance with good construction practices to: (i) minimize damage, disruption, or inconvenience caused by the Construction, (ii) minimize the risk of injury or damage to the Site and the surrounding property, or the risk of injury or death to members of the public and (iii) make adequate provision for the safety of all Persons affected by the Construction.

(e) Mitigation Monitoring and Reporting Program and Risk Management Plan. In order to mitigate potential significant environmental impacts of development of the Site, Developer agrees that the Construction of the Improvements will be in accordance with the Mitigation Monitoring and Reporting Program. Developer will comply with all provisions of the Risk Management Plan, including requirements to notify all site users, compliance with risk management measures during construction, and to inspect, document and report site conditions to Port annually. Developer shall perform and comply with the Mitigation Monitoring and Reporting Program and the Risk Management Plan at no cost to Port. As appropriate, Developer shall incorporate the Mitigation Monitoring and Reporting Program into any contract for the Construction of the Improvements and cause such contractors to comply with such provisions.

9.2. The Construction Documents.

(a) Generally.

(i) “**Schematic Drawings**” generally means: (a) a site plan at appropriate scale showing relationships of the Improvements and their respective uses, designating public access areas, open spaces, walkways, loading areas, streets, parking, and adjacent uses--adjacent existing and proposed streets, arcades and structures also should be shown; (b) conceptual plans for public access areas showing details of features intended to be constructed as part of the Improvements; (c) building plans, floor plans and elevations at appropriate scale and in detail sufficient to describe the Improvements, the general architectural character, and the location and size of uses; (d) perspective drawings sufficient to illustrate the Improvements; and (e) building sections showing all typical cross sections at appropriate scale and height relationships of those areas noted above. Schematic Drawings for the Improvements include the schematic drawings dated [_____] attached as **Exhibit XX**. The schematic drawings attached as **Exhibit XX** do not include Schematic Drawings for the Atrium and Plaza (“**Atrium/Plaza Schematic Drawings**”) or the Approved Revised Schematic Drawings, if any. The Atrium/Plaza Schematic Drawings will be submitted to Port by Developer and reviewed and approved or disapproved by Port in accordance with **Section 9.4(a)(ii)** and the Approved Revised Schematic Drawings, if any, will be submitted to Port by Developer and reviewed and approved or disapproved by Port in accordance with **Section 9.4(a)(iii)**. The term “**Schematic Drawings**” include Port approved Atrium/Plaza Schematic Drawings and Approved Revised Schematic Drawings, if any.

(ii) “**Construction Documents**” means the plans, drawings, specifications, design criteria and other documents necessary or appropriate to obtain the issuance of the applicable Building Permit(s) or addendum thereto for the Improvements to be constructed pursuant to this Agreement. The Construction Documents must also comply with **Sections 9.2(a)(iii), 9.2(a)(iv), and 9.2(a)(v)** and the terms and conditions of this Agreement. As used in this Agreement “**Construction Documents**” does not mean any contracts between Developer and any contractor, subcontractor, architect, engineer or consultant.

(iii) Construction Documents must be in sufficient detail and

completeness to show the Improvements to be constructed pursuant to any Building Permit or Initial Building Permit or addendum for which Developer is applying and will generally include the following to the extent required by Port's permitting and review process, in its regulatory capacity:

- (1) Site plan(s) at appropriate scale showing the building, streets, walks, and other open spaces. All land uses shall be designated. All site development details and bounding streets, points of vehicular and pedestrian access shall be shown.
- (2) All building plans and elevations at appropriate scale.
- (3) Building sections showing all typical cross sections at appropriate scale.
- (4) Floor plans.
- (5) Plans for public access areas showing details of features intended to be Constructed as part of the Improvements.
- (6) Outline specifications for materials, finishes and methods of construction.
- (7) Plans for interior and exterior signs required by the Port Building Code.
- (8) Site and exterior and interior (for common areas only) lighting plans.
- (9) Material and color samples for exterior facades, public plazas and open space, and other public areas.
- (10) Roof plans showing all proposed mechanical and other equipment, vents, photo-voltaic panels, satellite dish(es), antennae(s), and mechanical or elevator penthouses.
- (11) Geotechnical, structural, and other engineering assessments and investigation reports.
- (12) Stormwater management plan.

(iv) The Construction Documents must be in conformance with the Schematic Drawings and the Scope of Development, and must incorporate conditions, modifications and changes specified by Port or required as a condition of Regulatory Approvals as approved by Port. The Construction Documents must also be in sufficient detail and completeness to show that the Improvements will be in compliance with **Section 9.1(a)** and matters previously approved by Port. "**Construction Documents**" also includes the Mobilization and Staging Plan, if required or deemed necessary by Port and as approved by Port.

(v) Construction Documents must include all plans and specifications required under applicable Laws to be submitted with an application for a Building Permit or Initial Building Permit or addendum thereto, including the following but only to the extent applicable: (i) geotechnical, structural, and other engineering assessments and investigation reports, and (ii) a technical report summarizing rehabilitation and repair objectives and methodology, operational requirements, project design criteria, and preliminary cost estimates. The Construction Documents must include all drawings, specifications and documents necessary for the Improvements to be constructed and completed in accordance with this Agreement.

(b) Preparation of Construction Documents by Licensed Architect. The Construction Documents must be prepared by or signed by an architect (or architects) duly licensed to practice architecture in and by the State of California, in consultation with a licensed historic preservation architect for purposes of complying with the Secretary's Standards as

determined by SHPO and NPS. A California licensed architect will coordinate the work of any associated design professionals, including engineers and landscape architects.

(c) Inspection. A California licensed architect must inspect all Construction of the Improvements.

(d) Certification by Structural Engineer. A California licensed structural engineer must review and certify (by wet-stamp on the Construction Documents) all final structural plans and the sufficiency of structural support elements to support the Improvements.

9.3. *Submission of Various Documents.*

(a) Atrium/Plaza Schematic Drawings and Construction Documents. Developer will prepare and submit the Atrium/Plaza Schematic Drawings and Construction Documents to Port for review and approval or disapproval, as provided in **Sections 9.4 and 9.5** at the time or times established in the Schedule of Performance. Developer may submit the Atrium/Plaza Schematic Drawings and Construction Drawings concurrently.

(b) Changes to Port Approved Schematic Drawings. If Developer proposes to make any material or substantial changes from the Schematic Drawings attached as **Exhibit XX** or Port approved Atrium/Plaza Schematic Drawings, Developer shall first submit to Port for its review, revised Schematic Drawings incorporating such changes (“**Proposed Changes to Schematic Drawings**”). Port shall have thirty (30) days after Port’s receipt of the Proposed Changes to Schematic Drawings to approve, disapprove or conditionally approve the Proposed Changes to Schematic Drawings; provided, however, with respect to any Proposed Changes to Schematic Drawings that relate solely to the Building interior or structural elements of a Building (“**Shorter Review Proposed Changes**”), Port will notify Developer of its approval or disapproval within ten (10) business days following receipt of the Proposed Changes to Schematic Drawings. If Port fails to respond to Developer’s request for Port’s response to the Shorter Review Proposed Changes within such ten (10) business day period, then Developer shall provide a second notice to Port requesting Port’s (the “Second Schematic Drawings Notice”). The Second Schematic Drawings Notice shall display prominently on the envelope enclosing such request and the first page of such request, substantially the following: **“APPROVAL REQUEST FOR 20th STREET HISTORIC CORE REGULATORY MATTERS. IMMEDIATE ATTENTION REQUIRED; FAILURE TO RESPOND WITHIN THREE (3) BUSINESS DAYS WILL RESULT IN THE REQUEST BEING DEEMED APPROVED.”** If Port fails to approve or disapprove Shorter Review Proposed Changes within three (3) business days following receipt of the Second Schematic Drawings Notice, Port’s failure to respond shall be deemed approval.

(c) Port’s Response to Proposed Changes to Schematic Drawings. If Port approves the Proposed Changes to Schematic Drawings (“**Approved Revised Schematic Drawings**”), then Developer may submit any Construction Documents incorporating the Approved Revised Schematic Drawings Port’s review and approval or disapproval. If Port disapproves aspects of the Proposed Changes to Schematic Drawings in whole or in part, Port in the written disapproval will state the reason or reasons for such disapproval and may recommend changes and make other recommendations. If Port conditionally approves the Proposed Changes to Schematic Drawings in whole or in part, the conditions will be stated in writing and a time will be stated for satisfying the conditions. Developer will resubmit as expeditiously as possible. Developer may continue making resubmissions until the earlier of (i) approval of the submissions, or (ii) the time specified in any conditional approval. Developer’s failure to obtain a required Port approval of a submission by the time specified in any conditional approval will be deemed a Port disapproval of the Proposed Changes to Schematic Drawings, unless Developer resubmits revised schematic drawings incorporating Port’s conditions within ten (10) days following the time specified in any conditional approval.

9.4. Port Review of Atrium/Plaza Schematic Drawings, Approved Revised Schematic Drawings, and Construction Documents.

(a) Scope of Review.

(i) Generally. Port's review and approval or disapproval of the Construction Documents under this Agreement will be reasonable and address (i) conformity and compliance with the Project Requirements, (ii) exterior architectural appearance and aesthetics of structures on the Historic Core, (iii) alterations to any structures on the Historic Core, (iv) design and appearance of interior and exterior historic fabric and spaces subject to regulation under the State's Historical Building Code, and the Secretary's Standards, (v) landscape and design of all outdoor areas, including those required under Regulatory Approvals or pursuant to this Agreement to be accessible to the public, and (vi) the design and appearance of all exterior Signs (whether temporary or permanent), including the Signs described in Section 9.13.

(ii) Review of Atrium/Plaza Schematic Drawings. Port's review and approval or disapproval of the Atrium/Plaza Schematic Drawings will be reasonable and address (i) conformity and compliance with the Project Requirements, (ii) exterior architectural appearance and aesthetics of structures on the Site, (iii) design and appearance of interior and exterior historic fabric and spaces subject to regulation under the State's Historical Building Code and the Secretary's Standards, and (iv) landscape and design of all outdoor areas, including those required under Regulatory Approvals, Port's stormwater guidelines or requirements, or pursuant to this Agreement to be accessible to the public; provided, however, if Port's Executive Director, in his or her sole discretion, determines Port Commission action is necessary, the Atrium/Plaza Schematic Drawings will be presented to the Port Commission for action at the first Port Commission hearing after determination that Port Commission action is necessary, subject to notice requirements and reasonable staff preparation time. The Port Commission may, in its sole and absolute discretion, elect not take any action, approve, disapprove or conditionally approve the Atrium/Plaza Schematic Drawings. The Parties agree and understand that **Section 9.4(a)(iv)** does not apply to Port's review of the Atrium/Plaza Schematic Drawings.

(iii) Review of Approved Revised Schematic Drawings. Port's review and approval or disapproval of the Approved Revised Schematic Drawings will be reasonable and address the items set forth in **Sections 9.4(a)(i)** and **9.4(a)(ii)**; provided, however, if Port's Executive Director determines, in his or her sole discretion that Port Commission action is necessary, the Approved Revised Schematic Drawings will be presented to the Port Commission for action at the first Port Commission hearing after determination that Port Commission action is necessary, subject to notice requirements and reasonable staff preparation time. The Port Commission may not take any action, approve, disapprove or conditionally approve the Approved Revised Schematic Drawings in its sole and absolute discretion. The Parties agree and understand that **Section 9.4(a)(iv)** does not apply to Port's review of any Proposed Changes to Schematic Drawings.

(iv) Review of Elements Subject to Secretary Standards by SHPO. At least ten (10) business days before submitting to SHPO, the final Historic Preservation Certification Applications, Part 2 – Description of Rehabilitation, for the Initial Site and Expansion Sites, if any (“**SHPO Submittals**”), Developer shall provide copies of same to Port for review and comment. Port's review of the SHPO Submittals will be subject to the standards outlined in **Section 9.4(a)(i)**. So long as the SHPO Submittals comply with the Project Requirements, Port will co-sign the SHPO Submittals if required, and if SHPO has approved or subsequently approves elements of the SHPO Submittals that are part of the interior of the Buildings as being consistent with the Secretary's Standards, Port will also agree that such SHPO approved elements are consistent with the Secretary's Standards. The Parties agree and understand that this **Section 9.4(a)(iv)** does not apply to Port's review of the Atrium/Plaza Schematic Drawings or any Proposed Changes to Schematic Drawings.

(b) Effect of Review. Subject to **Section 9.4(a)(iv)**, Port's review and

approval or disapproval of Construction Documents will be final and conclusive. Except by mutual reasonable agreement with Developer, Port will not disapprove or require changes subsequently in, or in a manner that is inconsistent with, matters that it has approved previously.

(c) Method of Port Action/Prior Approvals. Port will approve, disapprove or approve conditionally each set of the Construction Documents, in writing, within the time frames set forth in the Schedule of Performance, so long as each set of the applicable Construction Documents are properly submitted within the time frames set forth in the Schedule of Performance. Failure by Port to either approve or disapprove within such times will entitle Developer to an extension of time equal to the period of such delay. Notwithstanding any other provision of this Agreement or the Lease to the contrary, Port's approval of the Schematic Drawings and the site plan in the respective forms attached hereto is in no manner intended to, and will not, evidence or be deemed to evidence Port's approval of the Construction Documents in its regulatory capacity. Approval of Construction Documents by Port will not be construed as approval of such documents by SHPO or NPS.

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

9.5. *Changes in Final Construction Documents.*

(a) Approval of Changes in Required Elements. Developer will not make or cause to be made any material or substantial changes in any Port-approved Construction Documents as to elements requiring Port approval as provided in Section 9 (each a "**Required Element**") without Port's express written approval. Prior to making any changes that Developer considers to be non-material to any Port approved Construction Documents as to Required Elements, including substituting materials that are the architectural equivalent as to aesthetic appearance, quality, color, transparency, design and texture, Developer must first notify Port in writing of such changes in Required Elements. If Port determines that such noticed changes are material or substantial, then such changes will be subject to Port's approval under Section 9.5(b). Port's determination of whether such changes are material or substantial will be conclusive.

(b) Response. Developer will request Port's approval for all material or substantial changes in Required Elements in writing. Port will respond to Developer as promptly as reasonably possible, but in no event later than twenty (20) days after receipt of Developer's request. If Port fails to respond to such request on or after fifteen (15) days after Developer's written request, Developer will submit a second written notice to Port requesting Port's approval or disapproval within five (5) days after receipt by Port Developer's second notice. The second notice shall display prominently on the envelope enclosing such request and the first page of such request, substantially the following: "APPROVAL REQUEST FOR 20th STREET HISTORIC CORE CONSTRUCTION REVIEW MATTERS. IMMEDIATE ATTENTION REQUIRED; FAILURE TO RESPOND WITHIN FIVE (5) DAYS WILL RESULT IN THE REQUEST BEING DEEMED APPROVED." If Port fails to respond within such five (5) day period, such changes will be deemed approved. All changes to the Construction Documents must be consistent with the Secretary's Standards, and with all other Laws as determined by Port in the exercise of its reasonable discretion.

9.6. *Conflict With Other Governmental Requirements.*

(a) Approval by Port. Port will not withhold its approval, where otherwise

required under this Agreement, of elements of the Construction Documents or changes in Construction Documents required by any other governmental body with jurisdiction if all of the following have occurred:

- (i) Port receives written notice of the required change;
- (ii) Port is afforded at least thirty (30) days to discuss such element or change with the governmental body having jurisdiction of and requiring such element or change and with Developer's architect;
- (iii) Developer cooperates fully with the governmental body having jurisdiction in seeking reasonable modifications of such requirement, or reasonable design modifications of the Improvements, or some combination of such modifications, all to the end that a design solution reasonably satisfactory to Port may be achieved despite the imposition of such requirement; and
- (iv) any conditions imposed in connection with such requirements are subject to Section 4.9.

(b) Best Efforts to Attempt to Resolve Disputes. Developer and Port recognize that the foregoing kind of conflict may arise at any stage in the preparation of the Construction Documents, but that it is more likely to arise at or after the time of the preparation of the Final Construction Documents and may arise in connection with the issuance of Building Permits. Accordingly, time is of the essence when such a conflict arises. Both Parties agree to use their best effort to reach a solution expeditiously that is mutually satisfactory to Developer and Port.

9.7. *Progress Meetings/Consultation.* During the preparation of Construction Documents and the Construction of the Improvements, Port staff and Developer agree to hold periodic progress meetings, as appropriate considering Developer's progress, to coordinate the preparation of, submission to, and review by Port of Construction Documents and the Construction process, including occasional attendance by Port at on-Site construction meetings. Additionally, Developer shall provide Port with at least two (2) business days advance notice of any on-Site mock-ups, on-Site trial installations, and in-plant visual mock-ups (if any). Port staff and Developer (and its applicable consultants) agree to communicate and consult informally as frequently as is reasonably necessary to assure that the formal submittal of any Construction Documents to Port can receive prompt and speedy consideration. Developer will keep Port reasonably informed of all meetings taking place in connection with Construction and will give Port the opportunity to attend and participate in such meetings. Port may, but is not obligated to, have one or more individuals present on the Site at any time and from time to time during Construction, to observe the progress of Construction and to monitor Developer's compliance with this Agreement.

9.8. *Submittals after Completion.*

(a) Record Drawings. Developer shall furnish Port Record Drawings of the Improvements Constructed on, in, under and around the Site within the timeframe set forth in the Schedule of Performance in electronic format as (1) full-size scanned TIF files, and (2) AutoCAD files of the completed and updated Construction Documents, as further described below. As used in this **Section 9.8(a)**, "**Record Drawings**" means drawings, plans and surveys showing Improvements as built on the Site and prepared during the course of Construction. If Developer fails to provide Record Drawings to Port within such period of time, Port shall give written notice to Developer requesting such Record Drawings, and if Developer has not provided the Record Drawings within ninety (90) days after Developer's receipt of such notice from Port, Port shall have the right, but not the obligation, to cause the preparation of the Record Drawings by an architect of Port's choice, at Developer's cost. Such cost shall be deemed an Operating Expense (as defined in the Lease) under the Lease.

(b) Record Drawing Requirements. Record Drawings must be based on no less than 24" x 36", with mark-ups neatly drafted to indicate modifications from the original design drawings, scanned at 400 dpi. Each drawing must have a Port-assigned number placed onto the title block prior to scanning. An index of drawings shall be prepared correlating drawing titles to the numbers. A minimum of ten (10) drawings must 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 shall be coherently addressed within the environment of the compact disc. Discs containing files that do not open automatically without searching or reassigning X-REF addresses will be returned for reformatting. 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) Certified Total Project Costs. Developer will furnish Port a Certified Total Project Costs Statement in accordance and within the time frame set forth in *Section 10.6(b)*.

9.9. Insurance Requirements.

(a) Before Initial Close of Escrow. Before the Initial Close of Escrow, Developer will procure and maintain insurance coverage set forth in the Lease for the Historic Core (other than Building 102).

(b) After Initial Close of Escrow. From and after the Initial Close of Escrow, Developer's requirement to maintain insurance under this Agreement will be as set forth in the Lease. [Note: Lease to be revised to insure Expansion Sites (other than Building 102)]

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

(d) Indemnity. The Indemnification requirements under this Agreement, the Lease, or any other agreement between Port and Developer, will in no way be limited by any insurance requirements under any such agreements.

9.10. Building Permit. Developer will submit to Port a complete application for the Initial Building Permits and will make deferred submittals in accordance with the Port Building Code for the remainder of the Improvements within a time adequate to obtain the same before the date set forth in the Schedule of Performance, taking into account normal processing time by Port and notwithstanding the dates set forth in the Schedule of Performance for submission of Construction Documents. Upon any such submission, Developer will prosecute the application diligently to issuance.

9.11. Port Rights of Access. Without limiting the rights of Port in its regulatory capacity, Port and its Agents will have the right of access to the Site to the extent necessary to carry out the purposes of this Agreement, including to observe the progress of Construction, to inspect the work being performed in Constructing the Improvements, and to monitor Developer's compliance with the Mitigation Monitoring and Reporting Program and the Risk Management Plan; provided however, Port will use commercially reasonable efforts not to adversely impact Developer's work on the Site in connection with Port's access to the Site. Port will not be estopped from taking any action (including later claiming that the construction of the

Improvements is defective, unauthorized or incomplete) nor be required to take any action as a result of any such inspection.

9.12. *Construction Barriers; Signs.*

(a) Construction Fencing and Barriers. Developer will provide appropriate construction fencing and barriers on-Site during the period of Construction, to the extent required by applicable building and/or health and safety codes.. Developer will obtain from Port a building permit prior to the placement of any such construction fencing and/or barrier. Port shall not remove any existing fencing on the Site without Developer's prior written consent.

(b) Construction Signs. Developer will provide appropriate construction Signs and post the Signs on-Site during the period of Construction. All Signs will comply with Port's Sign Guidelines attached hereto as *Exhibit XX*. The size, design, color, dimensions, text, materials, location, and method of installation of such Signs must be submitted to Port for approval prior to installation.

9.13. *Coordination with City Projects and Nearby Development.*

(a) Generally. Developer acknowledges that during the LDDA Term, development may occur at the following locations near the waterfront or the Historic Core, in addition to the areas described in *Section 9.13(b)*: various development parcels in Mission Bay (including potentially the Warriors' arena), Seawall Lot 337, various America's Cup events throughout and near land under Port jurisdiction, Seawall Lot 330, Piers 30-32, and other Port locations (collectively, "*City Projects*"). Developer is aware that construction of the City Projects and other construction projects of Port tenants, licensees or occupants within or in the vicinity of the Historic Core and the activities associated with such construction may generate adverse impacts on construction of the Improvements, use and/or operation of the Historic Core after construction, or may result in inconvenience to or disturbance of Developer and its Agents and Invitees. Impacts may include increased vehicle and truck traffic, traffic delays and re-routing, loss of street and public parking, dust, dirt, construction noise, and visual obstructions. Developer hereby waives any and all Losses against the Indemnified Parties arising out of any inconvenience or disturbance to Developer, its Agents or Invitees, increased vehicle and truck traffic, traffic delays and re-routing, loss of street and public parking, dust, dirt, construction noise, and visual obstructions due to construction of the City Projects. The Parties will each use reasonable efforts to coordinate their construction efforts with each other and with others engaged in construction on other projects in a manner that will seek, to the extent reasonably possible, to reduce construction conflicts.

(b) Pier 70 Development. Developer acknowledges that the Port Commission endorsed the vision, goals, objectives, and design criteria of the Pier 70 Master Plan. A brief description of the some of the anticipated development in Pier 70 is as follows, all of which will create, among other things, Construction Impacts, view impacts, and traffic impacts:

(i) *Pier 70 "cove" and "hill" sites.* The Pier 70 Master Plan identifies development opportunities to the west of the Premises (site at south west corner of 20th Street and Illinois Street) and to the north of the Premises. Development of these sites will impede views from the Premises. Prior to finalizing any plans that would materially impact views from the Premises, Port will provide Developer with copies of the proposed plans and provide Developer opportunity to comment on, and to participate in planning meetings for, the same. If Port reasonably believes it to be necessary, Port shall also commission a preservation architect to analyze the impact of any related new development at the "Cove" and "Hill" sites on the Historic Core.

(ii) *New 21st Street and Michigan Street.* Changes to streets adjacent to and within the Premises.

(iii) *New 19th Street.* Proposed extension of 19th Street east from

Illinois Street that will accommodate heavy truck traffic for the ship repair facility and connect to the reopened Georgia Street.

(iv) *Crane Cove Park.* North of the planned 19th Street extension, Port anticipates commencing and completing construction of Crane Cove Park during the Term of this Lease.

(v) *Louisiana Street.* At any time during the Lease term, Port will explore alternate permanent configurations, redesign, or path of travel, of or on Louisiana Street, including a one way southbound twenty (20) foot path of travel that would continue to allow truck and emergency vehicle access to the Atrium/Plaza, and may construct an alternate permanent configuration, redesign, or path of travel, of or on Louisiana Street so long as such alternate configuration does not have a materially adverse impact on vehicular circulation and vehicular loading and unloading within the Premises.

(vi) *Waterfront Site.* Port and Forest City entered into an exclusive negotiation agreement and anticipate entering into a lease and other agreements for the Waterfront Site at some point during the Term of this Lease (collectively, the “**Forest City Agreements**”). The Forest City Agreements will, among other things, permit the construction of new public open space and parks, up to approximately [XX] million square feet of new construction, and up to approximately [XX] square feet of historic rehabilitation, which construction will take place throughout the LDDA Term and the term of the Lease. The Waterfront Site is immediately adjacent to certain portions of the Historic Core and is generally to the east and south of the Historic Core.

Developer agrees and acknowledges that it will cooperate with Port, the tenant or operator of the ship repair facility, Forest City, and any other future tenants or occupants of Pier 70 (collectively, the “**Pier 70 Parties**”) in the implementation of the Pier 70 Master Plan, which includes the construction of the Waterfront Site and Crane Cove Park. If financially feasible, does not increase Port’s costs, and conforms with the infrastructure and utility planning for Pier 70 as a whole, Port shall use commercially reasonable efforts to cause the Pier 70 Parties to connect, as necessary, utilities constructed after the Closing Date, to Developer’s existing utility lines.

9.14. Construction Staging. During construction of the Improvements, Developer will use the portions of the Site as staging areas for construction laydown and parking, construction equipment, and related materials. Port will have no responsibility for providing additional areas for construction staging, but agrees to reasonably cooperate with Developer in any consultations with the Department of Parking and Traffic and DPW on construction staging needs.

9.15. Exterior Improvements. Developer acknowledges that any Exterior Improvements not otherwise approved in Construction Documents will need Port’s prior approval before installation, which may require, in Port’s sole discretion, review by the WDAC. Developer will provide to Port the size, design, color, dimensions, text, materials, location, and method of installation of the Exterior Improvements to enable Port to evaluate the proposed request for approval; provided, however, any Signs requiring Port’s prior approval under Section 9.12 will be approved as set forth in Section 9.12.

9.16. Performance and Payment Bond and Additional Security. Prior to commencement of any Construction covered by a Building Permit, Developer will deliver to Port:

(a) With respect to any Base Building Work on the Initial Site or any Expansion Site, at Developer’s election, either (i) a duly executed and authorized performance and payment bond guaranteeing completion of the Improvements, or a completion guaranty from J.R. Orton III in the form attached hereto as Exhibit XX, guaranteeing completion of the Improvements, or (ii) a Letter of Credit; and

(b) With respect to any tenant improvements to be constructed on any portion of the Site, one of the following: (i) a duly executed and authorized Performance Bond; (ii) a completion guaranty from J.R. Orton III; or (iii) if the tenant improvements are to be constructed by a tenant of a Building, a completion guaranty from a tenant or lease guarantor whose credit is reasonably acceptable to Port.

10. CALCULATION OF DEVELOPER EQUITY AND DEVELOPER EQUITY RETURN; PROJECT COST STATEMENTS.

10.1. Definitions.

“**Approved Final Inspection**” means a passing final inspection of the Base Building Work from the Port’s Building Inspection Department.

“**Deferred Port Transaction Cost**” means Port’s Transaction Costs that were not reimbursed by Developer to Port as of the Effective Date, including any “**Deferred Transaction Costs**” as defined in and pursuant to the ENA, and which amount equals [\$_____], plus Transaction Costs incurred by Port during the LDDA Term. [Note: The amount is to be determined and inserted at execution of the LDDA and does not include the \$80K previously paid by ODI].

“**Developer Equity**” means, as of any applicable date, funds expended by Developer or Orton Development, Inc. for Project Costs for development of the Initial Improvements only, minus the sum of the following: (i) Port Loan; (ii) construction and permanent debt proceeds, including any SSLP proceeds, and any other third-party debt proceeds received by or on behalf of Developer in connection with the development and construction of the Project; (iii) investment funds from the sale of Historic Preservation Tax Credits, or if Developer elects not to sell Historic Preservation Tax Credits to Tax Credit Investors, the imputed value of such investment as calculated pursuant to **Section 13.2**; (iv) the amount of any Net Revenues, Transfer Proceeds, Refinancing Proceeds, and any other funds generated from the Project that are used or required to be used to pay down, or applied or required to be applied against, Outstanding Developer Equity pursuant to [Sections XX] of the Lease; and (v) any other third party or Port or City funds provided for the Project. Developer Equity does not include any funds expended by Developer or any Affiliate associated with tenant improvements or any funds set aside for tenant improvements, leasing commissions, or Capital Items, which funds shall be specifically excluded in the calculation of the Developer Equity. Developer Equity also does not include any accrued Developer Equity Return or any funds (other than for Deferred Items) expended by Developer for the Initial Site after the Initial Site’s Project Cost Cut-Off Date or any funds expended by Developer for any Expansion Site that forms a part of the Premises after the Project Cost Cut-Off Date applicable to such Expansion Site, which funds shall be specifically excluded in the calculation of the Developer Equity, except for Deferred Items which shall be included. If Developer expends funds in excess of the Developer Equity Cap, such funds will not be subject to a Developer Equity Return.

“**Developer Equity Cap**” means Fourteen Million Dollars (\$14,000,000).

“**Developer Equity Repayment Date**” means the date that the Outstanding Developer Equity is reduced to zero and the Developer Equity Return is paid in full.

“**Developer Equity Return**” is defined in Section 10.2(a).

“**Developer Equity Return Rate**” means a monthly rate of 1.167% and an annual rate of fourteen percent (14%).

“**Early Work Costs**” means costs incurred by Developer or ODI between February 28, 2012, and the Effective Date of the LDDA to weatherize, clean-up, implement additional security, and such other activities as described and approved by Port pursuant to that certain License No. License No. 15140 dated as of May 16, 2012 between Port and Developer. The Parties agree that the total Early Work Costs is equal to \$_____. [Note: Insert amount prior to execution of LDDA—maximum amount is \$75K—No costs approved to date for this

category]

“Hard Costs” means reasonable out-of-pocket costs actually incurred by Developer or ODI attributable to the cost of labor, materials and installation of the Initial Improvements. The following do not constitute **“Hard Costs”**: any Soft Costs, Early Work Costs, Pre-Development Costs, and other than any Hard Costs attributable to Deferred Items, any Hard Costs attributable to (x) the Initial Site after the Project Cost Cut-Off Date for the Initial Site, or (y) any of the Expansion Sites that form a part of the Premises after the Project Cost Cut-Off Date applicable for each such Expansion Site.

“Outstanding Developer Equity” means the amount of Developer Equity outstanding from time to time.

“Outstanding Developer Equity Return” means the amount of Developer Equity Return outstanding from time to time.

“Outstanding Port Loan” means as of any date, the Port Loan, less any amounts of Monthly Port Loan Payments that were previously applied toward Port Loan Interest and Port Loan pursuant to *Section 10.3(b)*.

“Permissible Financing Costs” means debt service and other customary financing costs incurred in connection with obtaining, negotiating and closing any financing for the development and construction of the Project, including financing from an Affiliate of Developer (provided the terms of any such financing are market when compared with other debt financing provided by Bona Fide Institutional Lenders), a Bona Fide Institutional Lender (including, but not limited to any mezzanine financing) or the City in connection with the SSLP proceeds, or from the sale of Historic Preservation Tax Credits or issuance of industrial revenue bonds, and all interest costs and other customary payments made by Developer pursuant to the terms thereof, including all application fees, transaction costs, due diligence expenses, professional fees if the services of such professionals are customary in the type of financing obtained by Developer, reasonable legal fees, and title, appraisal and survey costs actually incurred in connection with such financing and paid or reimbursed by Developer.

“Port Loan” means, as of any applicable date, funds expended by Port to reimburse Developer for a portion of the Building 113 Seismic Work of no less than One Million Five Hundred Thousand Dollars (\$1,500,000.00). Funds from the [CCHE Grant] will not be considered part of Port Loan.

“Port Loan Repayment Date” means the date Outstanding Port Loan is reduced to zero and Outstanding Port Loan Interest is paid in full.

“Port Loan Interest” is defined in *Section 10.3(a)*.

“Port Loan Interest Rate” means [insert interest rate equal to Port’s revenue bond sale in May of 2014].

“Pre-Development Costs” means reasonable costs actually incurred and paid by Developer or ODI and directly related to the development, entitlement, acquisition and implementation of the Project incurred by Developer between the execution of the ENA and the Effective Date, including the Early Work Costs and to the extent not otherwise accounted for in Early Work Costs, architectural, engineering, environmental, community outreach, reasonable legal and other professional fees; insurance expenses; title and survey, sales and marketing expenses; fees and charges for bonds and permits; and reimbursement of Port Transaction Costs in the amount of [\$80,000]; and so long as the following have not already been accounted for in Hard Costs or Soft Costs, the wages, salaries and other compensation and benefits, including taxes levied thereon, of all employees of Developer or ODI who devote substantially all of their employed time to the Project. The following do not constitute **“Pre-Development Costs”**: (1) repayment of the principal, fees and interest of any loan or other expense; or (2) distributions, dividends, preferred return or other capital return to the members or shareholders of the Developer, Tenant,

or any of their respective Affiliates, (3) the wages, salaries and other compensation and benefits, including taxes levied thereon, attributable to J.R. Orton III, or (4) a development, project management, or guaranty fee, or (5) any Developer costs associated with the related to the Request for Interest (the “RFI”) for the 20th Street Historic Buildings issued by Port in February 2011 and the Request for Proposals (“RFP”) for development of the 20th Street Historic Buildings issued by Port on October 4, 2011. The Parties agree that the total Pre-Development Costs is equal to \$_____. [NOTE: The amount to be inserted in connection with execution of the LDDA]

“**Project Costs**” means the Total Project Costs incurred to date for the applicable Initial Site and each Expansion Site that forms a part of the Premises.

“**Project Cost Cut-Off Date**” means the date(s) the Port’s Building Inspection Department issues an Approved Final Inspection with respect to the Base Building Work for each of the Initial Site and any Expansion Site(s) that forms a part of the Premises, as applicable.

“**Soft Costs**” means reasonable out-of-pocket costs actually incurred by Developer or ODI except to the extent specifically excluded under this Agreement and directly attributable to the following only: designing the Initial Improvements; architectural, engineering, reasonable attorney and other professional fees incurred in connection with the Initial Improvements and negotiation of the Transaction Documents; Permissible Financing Costs; premiums for builder’s risk insurance and other insurance expenses directly related to construction of the Initial Improvements, including environmental insurance; surety bonds; premiums for the title insurance required in *Section 4.7*; security and site maintenance; leasing and marketing expenses; any Extension Fees paid by Developer to Port to extend the Closing Date, and so long as the following have not already been accounted for in Hard Costs or other Soft Costs, the wages, salaries and other compensation and benefits, including taxes levied thereon, of all employees of Developer or ODI who devote substantially all of their employed time to the Project. The following do not constitute “**Soft Costs**”: (1) distributions, dividends, preferred return or other capital return to the members or shareholders of Developer, Developer, or any of their respective Affiliates, (2) the wages, salaries and other compensation and benefits, including taxes levied thereon, attributable to J.R. Orton III, or (3) a development, project management, or guaranty fee, or (4) any Hard Costs, Early Work Costs, or Pre-Development Costs, or (5) any Soft Costs attributable with the (x) Initial Site after the applicable Project Cost Cut-Off Date, or (y) any of the Expansion Sites that form a part of the Premises after the applicable Project Cost Cut-Off Date for each such Expansion Site.

“**Total Project Cost**” means the sum of Pre-Development Costs and all Hard Costs and Soft Costs, except to the extent specifically excluded under this Agreement. The following do not constitute “**Total Project Cost**”: (1) a developer fee or project management fee, (2) any costs associated with or related to the RFI or RFP for the 20th Street Historic Buildings, or (3) other than Deferred Items, any costs associated with the Initial Site or any Expansion Site that forms a part of the Premises incurred after the Project Cost Cut-Off Date applicable to each such Initial Site or Expansion Site(s), or (4) other than any Pre-Development Costs or Soft Costs associated with the Building 102 Electrical Issues only, any Project Costs associated with any Expansion Site that Developer has elected not to include as part of the Premises in accordance with *Section 2.3*.

“**Total Project Cost Cut-Off Date**” means the date(s) the Port’s Building Inspection Department issues an Approved Final Inspection with respect to the Base Building Work (i) on the Initial Site only if due to Developer’s election in accordance with *Section 2.3*, none of the Expansion Sites form a part of the Premises; or (ii) the last Expansion Site to receive such Approved Final Inspection if the Premises includes Expansion Site(s).

10.2. Calculation and Repayment of Developer Equity and Developer Equity Return.

(a) Calculation of Developer Equity and Developer Equity Return.

Outstanding Developer Equity and Developer Equity Return will be calculated on a monthly basis from and after the Effective Date until the Developer Equity Repayment Date as described in this **Section 10.2**. Subject to **Sections 10.2(b), 10.2(c), and 10.2(d)**, Outstanding Developer Equity will accrue simple interest at a rate equal to the Developer Equity Return Rate until the Developer Equity Repayment Date (“**Developer Equity Return**”). In no event will Developer Equity Return be considered or deemed Developer Equity or added to the principal of Outstanding Developer Equity. An example of the calculation and repayment of Developer Equity and Developer Equity Return is set forth in **Exhibit XX** attached hereto. **[NOTE: Add an example of calculation, including addition of Expansion Site(s)] [Note: Same exhibit as repayment of Port capital and return]**

(b) Cap on Developer Equity Subject to Developer Equity Return. Developer Equity Return will not accrue on any funds expended by Developer (including any Developer Equity Return on such amount) (i) on the Initial Site or any Expansion Site, as applicable, that forms a part of the Premises, that exceeds the Developer Equity set forth in the Interim Certified Total Project Cost Statement applicable for the Initial Site and the Expansion Sites that form a part of the Premises, or (ii) that exceed the Developer Equity Cap.

(c) No Developer Equity Return Under Certain Circumstances. In no event will Outstanding Developer Equity accrue any Developer Equity Return during any period when there remains an uncured Developer Event of Default or an uncured Tenant Event of Default. Once Developer has cured all uncured Developer Event of Default(s) or Tenant Event of Default(s), as applicable, Developer will again be entitled to accrue a Developer Equity Return on the Outstanding Developer Equity. Additionally, if Developer fails to include any specific Developer Equity expenditure in three (3) or more consecutive Monthly Project Cost Statements, Developer shall not be entitled to accrue Developer Equity Return on such expenditure for the period it failed to include such amount in a Monthly Project Cost Statement.

(d) Limitations on Sources of Funds to Pay Down Outstanding Developer Equity and Developer Equity Return. Developer agrees and acknowledges that Net Revenues generated from third party leases at the Premises will be used to pay down Outstanding Developer Equity and Outstanding Developer Equity Return. Accordingly, other than Net Revenues, there may not be additional funds available for Developer to recoup either or both of Developer Equity Return and Developer Equity in full and the period for Developer to recoup either or both of Developer Equity Return and Developer Equity may be much longer than Developer anticipated in the Final Pro-Forma. Developer further agrees and acknowledges that (i) there will be no Developer Equity Return on any amount of Developer Equity that exceeds the Developer Equity Cap, (ii) Port has no obligation to use any of its funds (other than Port Loan, Port’s Participation Rent generated from the Premises, or at Port’s sole election, Port’s share of Transfer Proceeds or Refinancing Proceeds), City funds, or any other funds or to seek any other funds to pay Outstanding Developer Equity Return or Outstanding Developer Equity, and (iii) neither Port nor City has an obligation to pay, reimburse, or credit Developer or Developer for any Outstanding Developer Equity Return or Outstanding Developer Equity remaining at the expiration or earlier termination of this Agreement or the Lease, and Developer hereby releases Port and City from any obligation or liability for payment, reimbursement or credit against any Outstanding Developer Equity Return or Outstanding Developer Equity remaining at the expiration or termination of this Agreement.

(e) Port Right to Pre-Pay. At any time prior to the Developer Equity Repayment Date, Port has the right to pay down, in any number of installments, all or any portion of any Outstanding Developer Equity Return or Outstanding Developer Equity, without payment of any additional interest, charge, fee, or penalty (“**Pre-Payment Amount**”). Any Pre-Payment Amount shall be applied as follows: first to reduce Outstanding Developer Equity Return and thereafter, to reduce Outstanding Developer Equity, in which case Developer Equity Return shall cease to accrue on the Outstanding Developer Equity so prepaid.

10.3. Calculation of Port Loan and Port Loan Interest.

(a) Calculation of Port Loan and Port Loan Interest. Outstanding Port Loan and Port Loan Interest will be calculated on a monthly basis from and after the Effective Date until the Port Loan Repayment Date as described in this **Section 10.3**. Outstanding Port Loan will accrue simple interest at a rate equal to the Port Loan Interest Rate until the Port Loan Repayment Date (“**Port Loan Interest**”). In no event will Port Loan Interest be considered part of or added to the principal of Outstanding Port Loan or otherwise earn any Port Loan Interest.

(b) Repayment of Port Loan and Port Loan Interest. On the first day of the first full calendar month following the Developer Equity Repayment Date (the “**Payment Start Date**”), the respective amounts of Outstanding Port Loan and accrued unpaid Port Loan Interest shall each be determined as of such Payment Start Date, and such amounts shall be repaid by Developer to Port in equal monthly installments (each, a “**Monthly Port Loan Payment**”) in an amount equal to the sum of the following: (i) an amount sufficient to fully amortize that Outstanding Port Loan at the Port Loan Interest Rate in one hundred twenty (120) equal monthly installments; plus (ii) the quotient of the accrued unpaid Port Loan Interest as of the Payment Start Date divided by 120. An example of the calculation and repayment of Port Loan and Port Loan Interest is set forth in **Exhibit XX** attached hereto. [Note: Exhibit should be same as exhibit for Developer equity and return] The first Monthly Port Loan Payment is due and payable on the Payment Start Date and will continue on a monthly basis until the Port Loan Repayment Date. From and after the Developer Equity Repayment Date, the Monthly Port Loan Payment shall be an Operating Expense (as defined in the Lease) of the Project and deducted from Gross Revenues for purposes of calculating Net Revenues. Provided, however, if the Lease terminates for any reason other than due to a Port Event of Default, all Outstanding Port Loan and Outstanding Port Loan Interest shall be immediately due and payable as of the date of termination and Outstanding Port Loan will continue to accrue interest at the Port Loan Interest Rate until fully paid to Port.

(c) Developer Right to Pre-Pay. At any time prior to the Port Loan Repayment Date, Developer has the right to pay down, in any number of installments, all or any portion of any accrued and unpaid Port Loan Interest or Outstanding Port Loan without payment of any additional interest, charge, fee, or penalty. Any such prepayments shall be applied as follows: first, to reduce accrued unpaid Port Loan Interest; and thereafter, to reduce Outstanding Port Loan in which case Port Loan Interest shall cease to accrue on the Outstanding Port Loan so prepaid.

10.4. Developer Equity Memorandum. Within thirty (30) days following the Parties’ agreement with the Certified Total Project Cost Statement in accordance with **Sections 10.6 or 10.7** and the Outstanding Developer Equity and Outstanding Developer Equity Return as of the Total Project Cost Cut-Off Date, the Parties will memorialize in a separate document (the “**Developer Equity Memorandum**”), the Outstanding Developer Equity and Outstanding Developer Equity Return as of the Total Project Cost Cut-Off Date.

10.5. Monthly and Annual Project Cost Statements.

(a) Monthly Project Cost Statement.

(i) From and after the Effective Date until [XX] days following the Developer Equity Repayment Date, Developer will furnish to Port by the twentieth (20th) day of each calendar month, a complete statement setting forth in reasonable detail for the immediately preceding month (the “**Monthly Project Cost Statement**”): (i) the Total Project Cost incurred as of the last day of the immediately preceding calendar month for each of the Initial Site and the Expansion Sites, if any, and the Premises as a whole, including as line items, increases over (or decreases under) the items listed in the Development Budget, (ii) Outstanding Developer Equity, if any, as of the last day of the immediately preceding calendar month, (iii) Outstanding Developer Equity, if any, during the immediately preceding calendar month only, (iv) total

Developer Equity Return accrued, if any, as of the last day of the immediately preceding calendar month, (v) Developer Equity Return accrued, if any, for the immediately preceding calendar month only, (vi) Outstanding Port Loan and total Port Loan Interest accrued as of the last day of the immediately preceding calendar month, (vii) all debt or other third party proceeds received by or on behalf of Developer in connection with the Project as of the last day of the immediately preceding calendar month, (viii) any Transfer Proceeds or Refinancing Proceeds received by Developer, and (ix) any disputed amounts or expenditures from prior monthly or annual project cost statements or from the Interim Certified Total Project Cost Statements or Certified Total Project Cost Statement. An example of the Monthly Project Cost Statement is attached hereto as ***Exhibit XX***. A financial officer of Developer must certify each Monthly Project Cost Statement as true, accurate, complete and current.

(ii) Within [thirty (30)] days following receipt of the applicable Monthly Project Cost Statement, Port will notify Developer if it agrees or disagrees with all or any of the amounts set forth in the Monthly Project Cost Statement. If Port disagrees with all or any of the amounts set forth in the applicable Monthly Project Cost Statement, then the Parties will meet as many times as necessary over the next twenty-one (21) days to resolve their disagreement. If the Parties are unable to resolve their disagreement within such twenty-one (21) day period, Developer will include in all future Monthly Project Cost Statements, Annual Project Cost Statements, Interim Certified Total Project Cost Statements, and Certified Total Project Cost Statement, a separate line item for such disputed amount or expenditure until such dispute is resolved between the Parties or either Party exercises its rights under ***Section 10.7***.

(b) Annual Project Cost Statement.

(i) Within ninety (90) days after the end of each calendar year until [ninety (90)] days following the end of the calendar year that includes the Developer Equity Repayment Date, Developer will deliver to Port a complete statement setting forth in reasonable detail (the “**Annual Project Cost Statement**”): (i) the Total Project Cost incurred as of the last day of the immediately preceding calendar year for each of the Initial Site and the Expansion Sites, if any, and the Premises as a whole, including as line items, increases over (or decreases under) the items listed in the Development Budget, (ii) total Outstanding Developer Equity expended, if any, as of the last day of the immediately preceding calendar year, (iii) total Developer Equity Return accrued, if any, as of the last day of the immediately preceding calendar year, (iv) Outstanding Port Loan and total Port Loan Interest accrued as of the last day of the immediately preceding calendar year, (v) all debt or other third party proceeds received by or on behalf of Developer in connection with the Project as of the last day of the immediately preceding calendar year, (vi) any Transfer Proceeds or Refinancing Proceeds received by Developer as of the last day of the immediately preceding calendar year, (vii) any adjustments to any of the Monthly Project Cost Statements applicable to such calendar year and previously delivered to Port, and (viii) any disputed amounts or expenditures from prior monthly or annual project cost statements or from the Interim Certified Total Project Cost Statements or Certified Total Project Cost Statement. A financial officer of Developer must certify each Annual Project Cost Statement as true, accurate, complete and current.

(ii) Within [sixty (60)] days following receipt of the applicable Annual Project Cost Statement, Port will notify Developer if it agrees or disagrees with all or any of the amounts set forth in the Annual Project Cost Statement. If Port disagrees with all or any of the amounts set forth in the applicable Annual Project Cost Statement, then the Parties will meet as many times as necessary over the next twenty-one (21) days to resolve their disagreement. If the Parties are unable to resolve their disagreement within such twenty-one (21) day period, then Developer will include in all future Monthly Project Cost Statements, Annual Project Cost Statements, Interim Certified Total Project Cost Statements, and Certified Total Project Cost Statement, a separate line item for such disputed amount or expenditure until such dispute is resolved between the Parties or either Party exercises its rights under ***Section 10.7***.

(c) Port Representative. If Developer fails to deliver any Monthly Project Cost Statement, Annual Project Cost Statement, Interim Certified Total Project Cost Statement, or Certified Total Project Cost Statement, as applicable, within the time period set forth in **Sections 10.5 and 10.6**, as applicable, and such failure continues for thirty (30) days after the date Port delivers to Developer written notice of such failure, Port has the right, among its other remedies under this Agreement, to have a Port Representative examine Developer's books and records as may be necessary to determine all the information required in the Monthly Project Cost Statement or Annual Project Cost Statement, as applicable. The determination made by Port Representative will be binding upon Developer, absent manifest error, and Developer must promptly pay to Port the total cost of the examination.

10.6. *Interim Certified Total Project Cost Statement; Certified Total Project Cost Statement.*

(a) Interim Certified Total Project Cost Statement. Within [ninety (90)] days following the applicable Project Cost Cut-Off Date for each of the Initial Site and as applicable, the Expansion Site(s) that form a part of the Premises, Developer will furnish Port with an itemized statement setting forth in reasonable detail: (i) the Total Project Cost incurred by Developer as of the applicable Project Cost Cut-Off Date, including as line items, increases over (or decreases under) the items listed in the Development Budget, (ii) all debt proceeds secured by Permitted Mortgages used as of the applicable Project Cost Cut-Off Date, (iii) Developer Equity expended by Developer as of the applicable Project Cost Cut-Off Date, (iv) Developer Equity Return accrued as of the applicable Project Cost Cut-Off Date, (v) Outstanding Port Loan and total Port Loan Interest accrued as of the applicable Project Cost Cut-Off Date, and (vi) any disputed amounts or expenditures from prior monthly or annual project cost statements or from the Interim Certified Total Project Cost Statements, certified as true, accurate and complete by an independent certified public accountant (the "**Interim Certified Total Project Cost Statement**"). Other than the first Interim Certified Total Project Cost Statement, all subsequent Interim Certified Total Project Cost Statement(s), if any, must also show changes from the previously submitted Interim Certified Total Project Cost Statement(s).

(b) Certified Total Project Cost Statement. Within [one hundred twenty (120)] days following the Total Project Cost Cut-Off Date, Developer will furnish Port with an itemized statement setting forth in detail: (i) the Total Project Cost incurred by Developer to as of the Total Project Cost Cut-Off Date, including as line items, increases over (or decreases under) the items listed in the Development Budget, (ii) all debt proceeds secured by Permitted Mortgages used as of the applicable Project Cost Cut-Off Date, (iii) Developer Equity expended by Developer as of the applicable Project Cost Cut-Off Date, (iv) Developer Equity Return accrued as of the applicable Project Cost Cut-Off Date, (v) Port Loan and total Port Loan Interest accrued as of the applicable Project Cost Cut-Off Date, and (vi) any disputed amounts or expenditures from prior monthly or annual project cost statements or from the Interim Certified Total Project Cost Statements, certified as true, accurate and complete by an independent certified public accountant (the "**Certified Total Project Cost Statement**"). The Certified Total Project Cost Statement must also show changes from the previously submitted Interim Certified Total Project Cost Statement.

(c) Port will notify Developer within [sixty (60)] days following Port's receipt of the Interim Certified Total Project Cost Statement or the Certified Total Project Cost Statement, as applicable, of Port's agreement or disagreement with such statement. If Port disagrees with the Interim Certified Total Project Cost Statement or the Certified Total Project Cost Statement, as applicable, the Parties will meet to resolve the disagreement. If the Parties are unable to resolve their disagreement, the subsequent Interim Certified Total Project Cost Statement or the Certified Total Project Cost Statement, as applicable, will each delineate the items that have not been resolved between the Parties and each Party's position on such item(s). If the Parties are unable to agree on the amount of Developer Equity expended by Developer to date as of the applicable Project Cost Cut-Off Date and as shown in the applicable Interim

Certified Total Project Cost Statement, then the disputed amount will be noted in subsequent monthly and annual project cost statements until there is agreement between the Parties on the Certified Total Project Cost or either Party exercises its rights under **Section 10.7**. If Port agrees with the Certified Total Project Cost Statement or the records are audited as described in **Section 10.7**, then the total amount of Developer Equity expended by Developer will be as set forth in the Certified Total Project Cost Statement, or the audited records, as applicable (“Certified Total Project Cost”).

10.7. Audit Rights. If Port disagrees with the Certified Total Project Cost Statement, Port may request that such records be audited by an independent certified public accounting firm mutually acceptable to Port and Developer, 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 Developer has overstated the Total Project Cost by more than three percent (3%) of the lower amount, in which case Developer will pay the entire cost of the audit.

10.8. Books and Records Related to Project Costs. Developer must keep accurate books and records of the Project Costs incurred to date, funds expended by Developer, Outstanding Developer Equity, Developer Equity Return accrued, and debt or other third party proceeds received by or on behalf of Developer in connection with the development of the Project, all in accordance with accounting principles generally accepted in the construction industry. Port, including its Agents, has the right to inspect Developer’s books and records regarding the development of the Improvements, the costs incurred in connection therewith, and all other Total Project Costs, including funds expended by Developer, Developer Equity Return accrued, and debt or other third party proceeds received by or on behalf of Developer in connection with the development of the Project in a location within San Francisco during regular business hours and upon reasonable advance notice.

10.9. Survival. The provisions of this **Section 10** shall survive the expiration of this Agreement until the earlier of the Developer Equity Repayment Date or termination of this Agreement.

11. PORT BENEFIT TASKS; PORT BENEFIT COSTS.

11.1. Port Benefit Tasks.

(a) Generally. Developer will perform the Required Port Benefit Tasks on behalf of Port within the time frame set forth in the Schedule of Performance. Additionally, Port may request during the LDDA Term, that Developer perform certain other Port Benefit Tasks on behalf of Port. “Port Benefit Tasks” means (i) activities described in [**Exhibit XX**] attached hereto that are undertaken by Developer, (ii) the Building 102 Electrical Work if Developer exercises its rights to perform the Building 102 Electrical Work in accordance with **Section 2.2(b)(iv)**, and (iii) such other activities that are not listed on **Exhibit XX** attached hereto that are outside the scope of Developer’s obligation to Construct the Project but are undertaken by Developer at the request of Port. [**Note: Parties to agree on exhibit that describes/itemizes the tasks; Exhibit to also include Required Port Benefit Tasks and the Building 102 Electrical Work.**]

(b) Required Port Benefit Tasks. Developer will Construct the following Port Benefit Tasks within the time frame set forth in the Schedule of Performance: [(i) **XX**, and (ii) **XX**] (the “Required Port Benefit Tasks”). Within [XX days] of the Effective Date, Developer will provide Port with Developer’s proposed scope and budget for the Required Port Benefit Tasks. Port and Developer will meet as many times as necessary to finalize the scope and budget

for the Required Port Benefit Tasks and once the same are finalized and agreed to between the Parties, Developer will promptly commence such work and diligently pursue such work to completion in accordance with the terms and conditions of this Agreement.

(c) Request to Perform Port Benefit Task. At any time during construction of the Improvements, Port may request Developer to perform any of the Port Benefit Tasks. Within [thirty (30)] days of Port's request, Developer will notify Port of Developer's election to either perform or not perform the requested Port Benefit Task. If Developer notifies Port that Developer elects not to perform the requested Port Benefit Task, neither Port nor Developer will have any obligation or liability to commence and complete such task. If Developer notifies Port that Developer elects to perform the requested Port Benefit Task, then within [forty-five (45) days] of Developer's notice to proceed, Developer will provide Port with Developer's proposed scope and budget for the requested Port Benefit Task. Port and Developer will meet as many times as necessary to finalize the scope and budget for the requested Port Benefit Task. If the Parties are unable to finalize the scope and budget for the requested Port Benefit Task within [XX] days after Developer's delivery of its proposed scope and budget for the same, then Port may withdraw its request, in its sole and absolute discretion any time after such [XX] day period. The Required Port Benefit Tasks are not subject to this *Section 11.1(c)*.

(d) Performance of Port Benefit Task. Once the scope and budget for the requested Port Benefit Task are finalized and agreed to between the Parties, Developer will promptly commence such work and diligently pursue such work to completion in accordance with the terms and conditions of this Agreement. Developer will perform each Port Benefit Task in accordance with *Section 9* as if the term "**Improvements**" as used in such section included each Port Benefit Task. Additionally, Port may require that Developer put out to bid all or any portion of the requested Port Benefit Task.

(e) Developer Failure to Perform Port Benefit Task. If Developer fails to Construct the Port Benefit Task in compliance with *Section 9* or the agreed upon scope and budget for such task, Port may require Developer to stop all work related to such Port Benefit Task. If Port requests that Developer stop work on a Port Benefit Task, then Developer will be entitled to the actual Port Benefit Cost incurred to date for such Port Benefit Task, provided that the actual Port Benefit Cost is reasonably within the agreed upon scope and budget for such Port Benefit Task, certified in accordance with *Section 11.2*, less all costs incurred by Port as a result of Developer's failure to comply with the foregoing; provided, further, Port will deduct from any certified Port Benefit Cost due Developer, any additional costs in excess of the agreed upon budget incurred by Port to complete the Port Benefit Task and any outstanding Port Deferred Transaction Costs. Any amounts owed to Developer in accordance with this *Section 11.1(e)* will be paid to Developer, in accordance with *Section 11.2(c)*.

11.2. Port Benefit Costs.

(a) Definition. "**Port Benefit Costs**" means actual costs incurred by Developer in connection with the design, construction, and permitting of the Port Benefit Tasks, all within Port's previously approved scope and budget for each such Port Benefit Task. The following do not constitute "**Port Benefit Costs**:" (1) distributions, dividends, preferred return or other capital return to the members or shareholders of Tenant, Developer, or any of their respective Affiliates, (2) the wages, salaries and other compensation and benefits, including taxes levied thereon, attributable to personnel above the level of manager or J.R. Orton III, or (3) a development, project management, or guaranty fee.

(b) Certification of Port Benefit Cost. Within [sixty (60)] days following completion of the Port Benefit Task, Developer will provide Port with a statement ("**Port Benefit Cost Statement**") setting forth in detail the total Port Benefit Cost incurred by Developer, 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 Developer. Developer will also include with such statement, documentation reasonably satisfactory to Port

evidencing the Port Benefit Cost. 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 Port Benefit Task. All such proofs of expenditure must be attributable directly to work or materials performed, constructed or installed in connection with the requested Port Benefit Task. Port will notify Developer within [XX] days following Port's receipt of the Port Benefit Cost Statement of Port's agreement or disagreement with such statement. If Port disagrees with the Port Benefit Cost 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 an independent certified public accounting firm in accordance with the procedures set forth in **Section 10.7**. If Port agrees with the Port Benefit Cost Statement or the records are audited as described in **Section 10.7**, then the total amount of Port Benefit Cost will be as set forth in the Port Benefit Cost Statement, or the audited records, as applicable ("**Certified Port Benefit Cost**").

(c) Payment of Port Benefit Cost. Developer will be reimbursed only for the Certified Port Benefit Cost. The Certified Port Benefit Cost will be reduced by one hundred percent (100%) of the outstanding Port Deferred Transaction Costs, if any. If there remains a balance of Certified Port Benefit Costs after application of any outstanding Port Deferred Transaction Costs ("**Outstanding Port Benefit Cost**"), then the Outstanding Port Benefit Cost will accrue simple interest on a monthly basis at a rate equal [insert monthly interest rate for the construction loan]. The balance of Outstanding Port Benefit Cost and interest may be paid by Port at any time either through one or more installments or through Port's share of Net Revenues generated from the Premises. [Note: Repayment terms subject to further discussion and refinement between the Parties]

If there remains instead, a balance of Port Deferred Transaction Costs after application of the Certified Port Benefit Cost, then Port will be reimbursed for such amount in accordance with [Section XX of the Lease].

12. PORT LOAN FOR BUILDING 113 SEISMIC WORK.

(a) As part of the Base Building Work, Developer will seismically retrofit Buildings 113/114 to comply with applicable building codes and Laws (the "**Building 113 Seismic Work**"). In consideration of Developer completing the Building 113 Seismic Work within the timeframe set forth in the Schedule of Performance, Port will provide Developer the Port Loan to offset a portion of the cost for the Building 113 Seismic Work. [Note: Need to discuss refinement/phasing of 113 Seismic Work—need exhibit]

(b) Subject to **Section 12(c)**, Port will reimburse Developer for a portion of the Building 113 Seismic Work in the amount equal to the lesser of: (i) Port Loan, plus subject to the requirements of the [CCHE grant], up to an additional Two Hundred Fifty Thousand Dollars (\$250,000.00), or (ii) the actual costs expended by Developer in connection with the Building 113 Seismic Work. If the actual cost of the Building 113 Seismic Work is less than the Port Loan, then the difference will be promptly applied against the then outstanding amount of Orton Equity. So long as Developer completes the Building 113 Seismic Work, other than the Port Loan, Developer Equity Return, or any reimbursement obligation of Port with respect to any Port Benefit Cost, Port has no obligation to provide, and Developer is not entitled to, any other funds, contribution, allowance, or any other form of reimbursement or credit in connection with the Construction of the Improvements.

(c) Promptly following completion of the Building 113 Seismic Work, Developer will deliver to Port an itemized statement of the actual costs expended by Developer in connection with the Building 113 Seismic Work, accompanied by documentation

substantiating all said expenditures. Such documentation of expenditures will include, without limitation, (a) copies of executed contracts; (b) copies of invoices for labor, services and/or materials, copies of bills of lading, and/or copies of other bills or receipts for goods, materials and/or services; (c) copies of canceled checks, (d) unconditional lien waivers from all the general contractors and all subcontractors and suppliers; (e) a copy of the record documents for the Building 113 Seismic Work, and (f) such other proofs of expenditure as may be reasonably requested by Port (collectively, the “**Evidence of Building 113 Seismic Costs**”). Appropriate proofs of expenditure may include copies of canceled checks; copies of contracts or invoices for labor, services and/or materials marked “**Paid**”, or otherwise evidenced as having been paid bills of lading marked “**Paid**”; other bills, contracts, receipts for goods materials and/or services marked “**Paid**” and such other proofs of expenditure as may be reasonably approved by Port.

(d) Provided that both Port and Developer have determined that the Building 113 Seismic Work has been completed, within thirty (30) days after receipt and approval by Port of all of the Evidence of Building 113 Seismic Costs, Port will deliver to Developer the Port Loan. Notwithstanding anything to the contrary contained herein, at Port’s sole election, in no event shall Developer receive any Port Loan if there is an uncured Developer Event of Default.

13. HISTORIC PRESERVATION TAX CREDITS.

13.1. *Qualifying for Tax Credits.* Developer will use its best efforts during the LDDA Term to obtain Historic Preservation Tax Credits available for the Project in a timely manner. After NPS has reviewed the Part 1 Applications and made a determination that the Project is eligible for Historic Preservation Tax Credits, Developer will timely submit to NPS, a final Historic Preservation Certification Applications, Part 2 – Description of Rehabilitation for each of the Initial Site and the Expansion Site(s) that form a part of the Premises within the timeframes set forth in the Schedule of Performance.

13.2. *Use of Tax Credits.*

(a) Developer is expected to sell Historic Preservation Tax Credits to one or more tax credit investors and, in connection therewith, shall submit to Port an executed master sublease for the entire Premises to a new partnership or limited liability company to be formed with one or more third parties (collectively, “**Tax Credit Investors**”) and controlled by Developer or its Affiliate, together with an executed operating agreement or limited partnership agreement and all related authority and governing documents or such other evidence that is reasonably satisfactory to Port, indicating that Developer has entered into, or has a binding commitment to enter into, an agreement with the Tax Credit Investors to utilize the Historic Preservation Tax Credits in such partnership or limited liability company (each, a “**master subtenant**”). So long as the terms and conditions of this Lease are not changed in any way, Port hereby consents to any master sublease with such master subtenant.

(b) Developer agrees and acknowledges that, if Developer does not enter into an agreement with Tax Credit Investors to utilize the Historic Preservation Tax Credits, then the imputed value of such Historic Preservation Tax Credits (determined as hereafter provided) will be applied to reduce the amount of Outstanding Developer Equity as follows. As used in this section, the “imputed value” of any unsold Historic Preservation Tax Credits shall be an amount equal to the sum of (a) the purchase price, in the form of a capital contribution to Developer or the master subtenant, for which the Historic Preservation Tax Credits could have been sold by Developer in a hypothetical arm’s length transaction entered into with Tax Credit Investors not affiliated with Developer, as modeled in the Final Pro-Forma [attached to the Lease as **Exhibit XX**,] minus (b) all costs, expenses and obligations that would have been incurred by Developer in such transaction, including without limitation the following: (i) accounting, legal, consulting and other professional fees payable by Developer for itself and the Tax Credit Investors; (ii) appraisal fees, escrow fees and title policy premiums; (iii) application fees, asset management or other fees paid for the benefit of the Tax Credit Investors; (iv) the agreed amount

required to be paid to the Tax Credit Investors to redeem their interest(s) in Developer or the master subtenant at a future date; and (v) all cash distributions that would have been paid or payable to Tax Credit Investors while they were partners or members in Developer or the master subtenant. In the event the purchase price referred to in clause (a) above would have been contributed by the Tax Credit Investors over time in installments, the amount of such hypothetical installments of the purchase price shall not be applied to reduce Outstanding Developer Equity until the date each such installment would have been so contributed. For purposes of determining the terms and conditions on which the Historic Preservation Tax Credits could have been sold by Developer in a hypothetical arm's length transaction, Developer and Port agree to use customary market-rate terms and conditions for such transactions prevailing immediately prior to the Effective Date, as determined by the Tax Credit Investment Group of Bank of America, N.A. or other nationally-recognized investor in or syndicator of Historic Preservation Tax Credits.

(c) In the event any of the hypothetical receipts or payments described in *Sections 13.2(a) and 13.2(b)* are not known as of the date the Developer Equity Memorandum described in *Section 10.4* is prepared, the Parties agree to make appropriate adjustments to the calculation of Developer Equity and Developer Equity Return when such amounts can be finally determined. [Note: Section 13 Under discussion between the Parties]

14. CERTIFICATE OF COMPLETION.

14.1. *Certificate of Completion.*

(a) Issuance Process.

(i) Other than in connection with the Construction of the Improvements, Developer may not occupy or use the Buildings, Improvements, the Historic Core, or any portion thereof where a temporary or final certificate of occupancy has not been issued. A Certificate of Completion is not required to occupy or use portions of the Site where a temporary or final certificate of occupancy has been issued.

(ii) After Developer has Completed the Construction of the Improvements in accordance with all the provisions of this Agreement, Developer will request from Port, a Certificate of Completion substantially in the form of *Exhibit XX* attached hereto ("**Certificate of Completion**") and concurrently therewith shall submit an executed architect's certificate in the form of *Exhibit XX*. Port will act on Developer's request within thirty (30) days of receipt.

(iii) Port's issuance of the Certificate of Completion does not relieve Developer or any other Person from any and all requirements or conditions of any Regulatory Approval of any Regulatory Agency to occupancy of any Building or other Improvement. Developer will comply with all such requirements or conditions separately.

(b) Condition to Issuance. If there remain (i) uncompleted customary punch list items; (ii) landscaping (to the extent (i) and (ii) are subject to the Port's approval); (iii) exterior finishes (to the extent Developer can demonstrate to Port's reasonable satisfaction that such finishes would be damaged during the course of later construction of interior improvements); or (collectively, "**Deferred Items**"), Port may reasonably condition issuance of the Certificate of Completion upon provision of security or other assurances in form, substance and amount satisfactory to Port that all of the Deferred Items will be diligently pursued to completion. Such security may consist of any one or more of the following forms of assurance: a personal completion guaranty from J.R. Orton III, a letter of credit (in a form and issued by an institution acceptable to Port) or funds in an escrow account acceptable to Port (with joint escrow instructions acceptable to both Parties). Any such letter of credit and/or escrowed funds shall be in the amount of one hundred ten percent (110%) of the cost of completion of the Deferred Items as reasonably determined by Port. "**Deferred Items**" also includes (i) the actual issuance by the U.S. Green Building Council of a LEED certification of silver or higher for the Improvements so

long as Developer has promptly after Completion of the Improvements, submitted all documents necessary to the U.S. Green Building Council to obtain such certification, and (ii) any repairs to the Initial Improvements within the Initial Site or Expansion Site, as applicable, identified by, and performed by or on behalf of, Developer during the twelve (12) month period after the Project Cost Cut Off Date applicable to such Initial Site or Expansion Site, as the case may be, that are not a result of defective work by or on behalf of the general contractor, latent defects, or fall within the general contractor's scope of work in the GMP and the cost of which is covered by the general contractor, its subcontractors, or its insurance policy. The obligations set forth in this **Section 14.1(b)** survive the expiration or earlier termination of this Agreement.

(c) **Definition of Completed and Completion.** For purposes of Port's issuance of the Certificate of Completion in accordance with the provisions of **Section 14.1(a) above**, "**Completed**" and "**Completion**" mean (i) completion by Developer of all aspects of the Improvements on the Initial Site and all Expansion Site(s) that form a part of the Premises, free of any mechanics' and materialmen's liens and all in accordance with the approved Construction Documents, the Scope of Development, and Laws, (ii) issuance of applicable certificates of occupancy for all the Improvements on the Initial Site and all Expansion Site(s) that form a part of the Premises, together with completion of all Improvements which are required under conditions of any Regulatory Approvals needed for Construction of the Improvements, (iii) no uncured Developer Event of Default or Unmatured Developer Event of Default exists, (iv) Developer has paid all development exaction fees required to be paid to City or Port that are due and payable, and (v) the Parties have agreed on the Total Project Cost set forth in the Certified Total Project Cost Statement.

14.2. Form and Effect of Certificate.

(a) **Form of Certificate.** The Certificate of Completion will be in a form that permits it to be recorded in the Official Records. For purposes of this Agreement, the Certificate of Completion will be a conclusive determination of Completion of the Improvements (except for completion of Deferred Items).

(b) **Effect.** The Certificate of Completion is not a notice of completion as referred to in Section 3093 of the California Civil Code, and is not in lieu of a certificate of occupancy to be issued by Port in its regulatory capacity, which is separately required for occupancy.

(c) **Termination of Agreement Upon Recordation.** Recording of the Certificate of Completion by Port (or by Developer at the written request and authorization of Port) will terminate this Agreement (subject to any obligations that survive hereunder) and except as set forth in the Certificate of Completion or any of the Deferred Items, Port's issuance of the Certificate of Completion will constitute conclusive evidence that Developer has satisfied all its construction obligations under this Agreement.

14.3. Failure to Issue. If Port refuses or fails to issue the Certificate of Completion, Port shall provide Developer with a written statement specifying the reasons for Port's refusal or failure to issue the Certificate of Completion and identifying the items Developer shall complete or requirements it shall satisfy in order to obtain the Certificate of Completion.

15. ENCUMBRANCES AND LIENS.

15.1. No Mortgage of Fee. Developer may not under any circumstance engage in any financing or other transaction creating any mortgage, deed of trust, lien or other encumbrance on Port's fee interest in the Historic Core. The Public Trust and Port's interest under the Lease (including the rent payable thereunder) will not be subordinated under any circumstance whatsoever to any Mortgage.

15.2. Leasehold Liens. Following the Initial Close of Escrow, Developer will have the right pursuant to the terms and conditions of the Lease, to assign, mortgage, pledge, hypothecate

or encumber all of its right, title and interest in the Initial Site or any of the Expansion Sites that form a part of the Premises by way of leasehold mortgages, deeds of trust or other security instruments to the extent permitted in the Lease. In addition, Developer may assign, mortgage, pledge, or encumber its interest under this Agreement with the prior written consent of Port to any Mortgagee, and in such event all of the provisions set forth in the Lease relating to the rights of Mortgagees will also apply to the rights and obligations of Developer and Port under this Agreement.

15.3. *Mechanics' Liens.* Developer will keep the Historic Core and any Improvements thereon free from any liens arising out of any work performed, materials furnished or obligations incurred by Developer or its Agents. If Developer does not, within twenty (20) days following Developer's receipt of notice of the imposition of any such lien, cause the same to be released of record or sufficiently bonded over to Port's reasonable satisfaction or take such other action reasonably acceptable, Port will have 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 for such purpose and all expenses incurred by Port in connection therewith will be payable to Port by Developer within ten (10) days following written demand by Port.

15.4. *Contests.* Developer will be permitted to contest the validity or amount of any tax, assessment, encumbrance or lien related directly to the Site and to pursue any remedies associated with such contest subject to all of the terms and conditions of the Lease.

16. ASSIGNMENT AND TRANSFER.

16.1. *Prohibition Against Transfer of this Agreement or Significant Change.* Except as otherwise permitted under Section 15.2 and following the Initial Close of Escrow, as permitted under the Lease, Developer may not sell, convey, assign, transfer, alienate or otherwise dispose of all or any of its interest or rights in this Agreement, including any right or obligation to acquire a leasehold estate in the Site, Construct the Improvements or otherwise do any of the above or make any contract or agreement to do any of the same (each a "**Transfer**"), or permit a Significant Change to occur, without in each instance obtaining the prior written approval of Port, which approval may be given, withheld, or conditioned in Port's absolute discretion; provided, however, if a Transfer or Significant Change is requested solely in connection with an Historic Preservation Tax Credit transaction or other form of financing to finance the Construction of the Improvements, Port's consent will not be unreasonably withheld, conditioned or delayed. Any Transfer or Significant Change made in violation of this Section 14.1 is a Developer Event of Default from and after the time of Transfer or Significant Change, without necessity of Port's giving of notice or passage of time. Consent to any one Transfer or Significant Change will not be a waiver of Port's right to require such consent for each and every Transfer or Significant Change. Developer shall reimburse Port for its reasonable costs of reviewing a proposed Transfer, as provided in the Lease.

16.2. *No Release of Developer's Obligations.* No Transfer or Significant Change will relieve Developer or any other party from any obligations under this Agreement. Developer may request Port approval of a release of Developer's obligations hereunder. Port will not unreasonably withhold its consent to the release of Developer so long as (1) the Transfer is not in connection with the purpose of taking advantage of Historic Preservation Tax Credits or tax-exempt bonds, (2) Port has received a fully executed and Approved Assignment and Assumption Agreement under which the transferee assumes all of Developer's obligations under the Transaction Documents and cures any Developer Event of Default or Unmatured Developer Event of Default existing as of the effective date of the Transfer, and (3) Port has reasonably determined that the transferee has sufficient financial capacity and experience to satisfy the obligations under this Agreement.

17. DEFAULTS, REMEDIES, TERMINATION AND PROJECT MATERIALS.

17.1. *Developer Events of Default.* The following shall each constitute a “**Developer Event of Default**”:

(a) Developer fails to use its good-faith efforts to obtain all Regulatory Approvals within the time frames set forth in the Schedule of Performance and such failure is not cured within ten (10) days following notice from Port;

(b) Developer fails to use its good-faith efforts to obtain all the elements of the financing described in Sections 4.3(a)(iii) and 4.3(a)(iv) within the time frames set forth in the Schedule of Performance and such failure is not cured within ten (10) days following notice from Port;

(c) After the Initial Close of Escrow, Developer fails to commence in accordance with the Schedule of Performance, or after commencement fails to prosecute diligently to Completion (except for Deferred Items, if any), the Construction of the Improvements to be constructed on the Historic Core in accordance with the Scope of Development, approved Construction Documents, and this Agreement, on or before the required completion dates set forth in the Schedule of Performance, or abandons or substantially suspends Construction for more than ten (10) consecutive days, and such failure, abandonment or suspension continues for a period of twenty (20) days from the date of written notice from Port;

(d) Developer fails to pay any amount required to be paid under this Agreement when due and such failure continues for five (5) business days following written notice from Port to Developer;

(e) Developer fails to comply with any of the Mitigation Monitoring and Reporting Program or the Risk Management Plan and Developer fails to cure the foregoing within twenty-four (24) hours following written notice from Port. If such failure cannot reasonably be cured within such twenty-four (24) hour period, it shall not be a Developer Event of Default so long as Developer commences to cure within such twenty-four (24) hour period and diligently and in good faith continues to cure the failure;

(f) Developer does not accept Delivery of the Lease within the times set forth in this Agreement, provided that all pre-Delivery conditions to Developer’s obligation to accept Delivery have been satisfied, and such failure continues for a period of twenty (20) days after written notice from Port;

(g) Developer fails to perform its obligations under Article 12 (collectively, the “**Special City Requirements**”); provided, however, that any rights to cure and Port’s remedies for any default under any of the Special City Requirements will be only as set forth in such applicable Special City Requirement;

(h) Developer does not submit the Construction Documents that are required to be submitted within the times provided in the Schedule of Performance and Developer does not cure such default within thirty (30) days after the date of written demand by Port specifying the items missing or due;

(i) Developer commits an uncured Tenant Event of Default or Unmatured Tenant Event of Default under the Lease (as such terms are defined in the Lease) but such Developer Event of Default under this Agreement shall be deemed cured if the uncured Tenant Event of Default or Unmatured Tenant Event of Default is cured pursuant thereto within the cure period set forth in the Lease;

(j) Developer commits an uncured event of default under any Permitted Mortgage (as such term is defined in the Lease) but such Developer Event of Default under this Agreement shall be deemed cured if the uncured event of default is cured pursuant thereto within the cure period set forth in the applicable Permitted Mortgage;

(k) Developer files a petition for relief, or an order for relief is entered against Developer, 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 Developer are not dismissed or stayed within one hundred twenty (120) days;

(l) A writ of execution is levied on this Agreement 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 Developer, which appointment is not dismissed within one hundred twenty (120) days;

(m) Developer makes a general assignment for the benefit of its creditors;

(n) Developer fails to maintain the insurance required pursuant to Section 9.9, or fails to deliver certificates and endorsements or policies evidencing such coverage, and such failure continues for three (3) days following written notice from Port to Developer;

(o) Any Transfer or Significant Change made in violation of Section 16.1 without the necessity of Port's giving of notice or the passage of time. If Port declares a Developer Event of Default, Developer will have fifteen (15) days to cure such default by effectively rescinding the Transfer or Significant Change, or obtaining Port's consent which may be given or withheld in Port's sole and absolute discretion. If Developer fails to cure such Developer Event of Default within such fifteen (15) day period, Port will be entitled to all remedies available to it hereunder, by law or at equity, including termination of this Agreement without necessity of Port's giving of further notice or the passage of further time; and

(p) Without limiting any other provisions of this Section 17.1, Developer violates any other covenant, or fails to perform any other obligation to be performed by Developer under this Agreement or the 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 Developer 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, but in no event more than sixty (60) days.

17.2. Remedies of Port. Except as otherwise provided in Section 17.1(g), upon the occurrence of a Developer Event of Default, Port has the remedies set forth below:

(a) Termination. Port may terminate this Agreement upon thirty (30) days' written notice to Developer.

(b) Termination Fee. If such termination occurs prior to the Initial Close of Escrow, Port shall be entitled to collect the LDDA Termination Fee (except as otherwise set forth in Section 1.3), obtain copies of the Project Materials, and to the extent provided in Section 17.6, have the applicable Project Materials assigned to Port, as its sole right to damages. If such termination occurs after the Initial Close of Escrow, Port's remedies shall be as set forth in Sections 17.2(c)--(e).

(c) Project Materials. Port shall be entitled to the Project Materials, as provided in **Section 17.6.**

(d) Specific Performance. Except where Section 1.3 applies, Port may institute an action for specific performance.

(e) Additional Remedies of Port. Except as provided in Sections 17.1(g) and 17.2(b), the remedies provided for in this Agreement are in addition to and not in limitation of other remedies including those provided (i) in the Lease, (ii) in the Special City Requirements, (iii) at Law; or (iv) in equity; or (v) in the Control Agreement or completion guaranty].

(f) Nonliability of Developer's Members, Partners, Shareholders, Directors, Officers and Employees. No member, officer, partner, agent, shareholder, director, or employee of Developer will be personally liable to Port, for a Developer Event of Default or for any amount which may become due to Port or for any obligations under the terms of this Agreement.

17.3. Port Events of Default. The following shall each constitute a "Port Event of Default":

(a) The conditions to the Initial Close of Escrow in Port's favor have been satisfied, or waived by Port, and Port fails to Deliver the Lease where such failure is in violation of this Agreement, and continues for a period of twenty (20) days from the date of written notice from Developer;

(b) Port violates any covenants or fails to perform any other obligations and duties provided in this Agreement after the time for any cure or the expiration of any grace period specified therefor in this Agreement, or if no such time is specified, within thirty (30) days after the date of written demand by Developer to Port to perform such obligation and duty, or, in the case of a default not susceptible of cure within thirty (30) days, Port fails promptly to commence to cure such default and thereafter to prosecute diligently such cure to completion within a reasonable time, but in no event more than sixty (60) days.

17.4. Remedies of Developer. Upon the occurrence of a Port Event of Default, Developer has the exclusive remedies set forth below following the expiration of applicable cure periods:

(a) Termination. Developer may terminate this Agreement upon thirty (30) days' written notice to Port only if the Port Event of Default would make impossible Completion of the Improvements substantially in accordance with the Schedule of Performance and the provisions of this Agreement.

(b) Damages. Port will not be liable to Developer for monetary damages caused by any Port Event of Default; provided, however, that if Port fails to contribute the Port Loan following Developer's compliance with all the terms and conditions for disbursement of the Port Loan within any notice and cure period following Developer's notice to Port of such failure, then Port shall be liable to Developer for payment of the Port Loan.

(c) Nonliability of City and Port Members, Directors, Officers, Officials and Employees. No member, director, officer, official, agent or employee of the City, including its Port, will be personally liable to Developer, or any successor in interest, for a Port Event of Default or for any amount which may become due to Developer or successor or for any obligations under the terms of this Agreement.

17.5. General.

(a) Institution of Legal Actions. Subject to the limitations set forth in this Agreement, either Party may institute legal action to cure, correct or remedy any default, to recover damages for any default or to obtain any other remedy consistent with the terms of this Agreement. Such legal actions shall be instituted in the Superior Court of the City and County of San Francisco, State of California, in any other appropriate court in the City or, if appropriate, in the Federal District Court in San Francisco, California.

(b) Acceptance of Service of Process. In the event that any legal action is commenced by Developer against Port, service of process on Port shall be made by personal service upon the Executive Director of Port, or in such other manner as may be provided by Law. In the event that any legal action is commenced by Port against Developer, service of process on Developer shall be made by personal service upon Developer at the address provided for notices or such other address as shall have been given to Port by Developer under Section 20.1, or in such other manner as may be provided by Law, and will be valid whether made within or outside of the State.

(c) Rights and Remedies are Cumulative. Except with respect to any rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the Parties to this Agreement, whether provided by Law, in equity or by this Agreement, are cumulative, and not in derogation of other rights and remedies found in this Agreement and, after the Initial Close of Escrow, in the Lease. The exercise by either Party of any one or more of such remedies will not preclude the exercise by it, at the same or a different time, of any other such remedies for the same default or breach or of any of its remedies for any other default or breach by the other Party. No waiver made by either Party with respect to the performance, or manner or time of performance, or any obligation of the other Party or any condition to its own obligation under this Agreement will be considered a waiver with respect to the particular obligation of the other Party or condition to its own obligation beyond those expressly waived to the extent of such waiver, or a waiver in any respect in regard to any other rights of the Party making the waiver or any other obligations of the other Party.

(d) No Waiver. No waiver made by either Party with respect to the performance, or manner or time of performance, or any obligation of the other Party or any condition to its own obligation under this Agreement will be considered a waiver with respect to the particular obligation of the other Party or condition to its own obligation beyond those expressly waived to the extent of such waiver, or a waiver in any respect in regard to any other rights of the Party making the waiver or any other obligations of the other Party.

17.6. *Project Materials.* If this Agreement terminates for any reason (other than a Port Event of Default) before Completion of the Improvements, Developer will within thirty (30) days after written demand from Port and without cost to Port, (i) deliver to Port any and all copies of studies, applications, reports, permits, plans, architectural drawings, test results, and similar work product regarding the physical condition of the Historic Core, and any existing Construction Documents in the possession of Developer, or Developer's Agents, architects, engineers, or consultants (or if not in the foregoing parties' possession, reasonably obtainable by Developer), or prepared for Developer, including electronic and AutoCAD files (collectively, the "**Project Materials**"), and (ii) provided Developer is authorized to do so, assign to Port (x) all of Developer's existing rights and interest in the Project Materials, and (y) all of Developer's rights under any Regulatory Approval; provided, however, in each case without any representation or warranty, express or implied, by Developer, as to the sufficiency, accuracy, completeness or compliance with Laws or any other matter whatsoever. Port may use the Project Materials for any purpose whatsoever relating to the Historic Core, without cost or liability therefor to Port or any other Person; provided, however, that, Port will release Developer and Developer's Agents, contractor, architect, engineer and other consultants from any Losses arising out of Port's use of such Project Materials and Construction Documents except to the extent such contractor, architect, engineer or other consultant is retained by Port to complete construction and they agree to such continued liability. Developer will use commercially reasonable efforts to include in all contracts and authorizations for services pertaining to the planning and design of the Improvements, an express agreement by the Person performing such services that Port may use such Project Materials as provided in this Section 17.6 without compensation or payment from Port in the event such Project Materials are delivered to Port under the provisions of this Section 17.6, provided that Port agrees (i) not to remove the name of the preparer of such Project Materials without the preparer's written permission, or (ii) to remove the name of the preparer of such Project Materials at the preparer's written request. The provisions of this Section will survive the expiration or earlier termination of this Agreement.

17.7. *Return of Site.* If this Agreement terminates after the Closing Date but before Completion of the Improvements due to a Developer Event of Default, Developer will, at its sole expense, return the Site to Port in a safe condition, and unless otherwise requested by Port, shall remove all loose building materials, debris, supplies, equipment, personal property, and other materials present at the Site resulting from Developer's Construction activities. In addition, Developer shall restore the Site to a condition that is no worse than the condition of the Site as of

the Closing Date, provided that if requested by Port, and as approved by SHPO, Developer will remove any new construction or installation necessary to comply with the Secretary's Standards. Developer's obligations set forth in this Section 17.7 shall survive the earlier termination of this Agreement. [To be further discussed]

18. SPECIAL PROVISIONS.

Developer has reviewed, understands, and is ready, willing, and able to comply with the terms of this Article 16, which summarizes additional City and Port requirements as of the Effective Date, each of which is incorporated by reference as if fully stated. Developer 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 Developer parties, as applicable. The following summary is for Developer's convenience only; Developer is obligated to become familiar with all applicable requirements and to comply with them fully as they are amended from time to time. City ordinances are currently available on the web at www.sfgov.org. References to specific laws in this Article 16 refer to San Francisco municipal codes unless specified otherwise. Capitalized or other terms used in this Article 16 and not defined in this Agreement shall have the meanings ascribed to them in the cited ordinance.

18.1. *Non-Discrimination in City Contracts and Benefits Ordinance.*

(a) Covenant Not to Discriminate. In the performance of this Agreement, Developer covenants and agrees not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), weight, height, association with members of classes protected under this chapter or in retaliation for opposition to any practices forbidden under Chapter 12 of the San Francisco Administrative Code against any employee of Developer or any City and County employee working with Developer, any applicant for employment with Developer, or any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by Developer in the City and County of San Francisco.

(b) Subleases and Other Contracts. Developer shall include in all Subleases and other contracts relating to the Site to which Developer is a signing party a non-discrimination clause applicable to such Subtenant or other contractor in substantially the form of Section 18.1(a). In addition, Developer shall incorporate by reference in all Subleases and other contracts the provisions of Sections 12B.2 (a), 12B.2 (c)-(k) and 12C.3 of the San Francisco Administrative Code and shall require all subtenants and other subcontractors to comply with such provisions. Developer's failure to comply with the obligations in this 18.1(b) shall constitute a material breach of this Agreement.

(c) Non-Discrimination in Benefits. Developer represents that it does not as of the date of this Agreement and will not during the LDDA Term or Lease 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 San Francisco Administrative Code.

(d) HRC Form. On or prior to the Effective Date, Developer shall execute and deliver to Port the "Nondiscrimination in Contracts and Benefits" form approved by the San Francisco Human Rights Commission, attached hereto as **Exhibit XX**.

(e) **Penalties.** Developer understands that pursuant to Section 12B.2(h) of the San Francisco Administrative Code, a penalty of \$50 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Agreement may be assessed against Developer and/or deducted from any payments due Developer.

18.2. First Source Hiring. The City has adopted a First Source Hiring Program (San Francisco Administrative Code Sections 83.1 et seq.) which establishes specific requirements, procedures and monitoring for first source hiring of qualified economically disadvantaged individuals for entry-level positions as those terms are defined by the ordinance. Developer acknowledges receiving and reviewing the First Source Hiring Program materials and requirements. Developer agrees to comply with the ordinance through compliance with the following:

(a) No later than thirty (30) days after full execution of this Agreement, Developer shall notify the City and County of San Francisco's Workforce Development System, Department of Human Services of all projected Entry Level Positions and the approximate date such positions will be available, by using the Job Survey Form provided by Port.

(b) Developer shall follow all requirements of the San Francisco Workforce Development System, including without limitation, notification of vacancies throughout the Term and entering into a First Source Hiring Agreement, if applicable.

(c) Developer shall interview qualified applicants and use good faith in hiring applicants. Developer shall maintain good records of recruitment and hiring process, and shall permit Port or City to audit such records upon request.

(d) Pursuant to the ordinance, Developer may be subject to monetary penalties for failure to comply with the ordinance.

18.3. Card Check Agreement. Article 6 of Chapter 23 of the San Francisco 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 union regarding the preference of employees to be represented by a labor union to act as their exclusive bargaining representative. The Lease will require Developer and Developer's subtenants to comply with these requirements to the extent applicable to restaurant operations within the Site.

18.4. Workforce Hiring Program. In furtherance of its covenant not to discriminate in Section 18.1, Developer is committed to affording opportunities for economically disadvantaged local businesses to participate in the architecture, design, engineering, and construction of the Improvements, and in the operation of the Project, and agrees as of the date of this Agreement to implement the First Source Hiring MOU attached as *Exhibit XX* as to the construction of the Improvements. [Query: Same as the Community Benefits?]

18.5. Wages and Working Conditions. Developer agrees that any person performing labor in the Construction of the Improvements, shall be paid not less than the highest prevailing rate of wages as required by Section 6.22(E) of the San Francisco Administrative Code, shall be subject to the same hours and working conditions, and shall receive the same benefits as in each case are provided for similar work performed in San Francisco, California. Developer shall include in any contract for Construction a requirement that all persons performing labor under such contract shall be paid not less than the highest prevailing rate of wages for the labor so performed. Developer shall require any contractor to provide, and shall deliver to City upon request, certified payroll reports with respect to all persons performing labor in connection with the Construction.

18.6. Requiring Health Benefits for Covered Employees. Unless exempt, Developer agrees to comply fully with and be bound by all of the provisions of the Health Care

Accountability Ordinance (HCAO), as set forth in San Francisco Administrative Code Chapter 12Q (Chapter 12Q).

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

(b) Notwithstanding the above, if Developer meets the requirements of a “small business” by the City pursuant to Section 12Q.3(d) of the HCAO, it shall have no obligation to comply with Section 18.6(a).

(c) If, within 30 days after receiving written notice of a breach of this Agreement for violating the HCAO, Developer fails to cure such breach or, if such breach cannot reasonably be cured within such 30-day period, Developer fails to commence efforts to cure within such period, or thereafter fails to diligently pursue such cure to completion, the City shall have the remedies set forth in Section 12Q.5(f)(1-5). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the City.

(d) Any Sublease or Contract regarding services to be performed on the Site entered into by Developer shall require the Subtenant or Contractor and Subcontractors, as applicable, to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in Chapter 12Q of the Administrative Code. Developer shall notify the Purchasing Department when it enters into such a Sublease or Contract and shall certify to the Purchasing Department 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. Developer shall be responsible for ensuring compliance with the HCAO for each Subtenant, Contractor and Subcontractor performing services on the Site. 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 Developer based on the Subtenant’s, Contractor’s, or Subcontractor’s failure to comply, provided that the Contracting Department has first provided Developer with notice and an opportunity to cure the violation.

(e) Developer shall not discharge, reprimand, penalize, reduce the compensation of, or otherwise discriminate against, any employee for notifying the City of any issue relating to the HCAO, for opposing any practice proscribed by the HCAO, for participating in any proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.

(f) Developer represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the requirements of the HCAO.

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

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

(i) Within ten (10) business days after City’s request, Developer shall provide City with access to pertinent payroll records relating to the number of Developer’s employees and the terms of such employees’ medical coverage. In addition, City and its Agents may conduct audits of Developer’s records pertinent to compliance with the HCAO at a time and location mutually agreed upon by City and Developer, but only after City provides Developer with ten (10) days written notice of its intent to perform such audit. Developer agrees to cooperate with City in connection with any such audit.

(j) If a Contractor or Subcontractor is exempt from the HCAO because the amount payable to such Contractor or Subcontractor under all of its contracts with the City or relating to City-owned property is less than \$25,000.00 (or \$50,000.00 for nonprofits) in that

fiscal year, but such Contractor or Subcontractor later enters into one or more agreements with the City or relating to City-owned property that cause the payments to such Contractor or Subcontractor to equal or exceed \$75,000.00 in that fiscal year, then all of the Contractor's or Subcontractor's contracts with the City and relating to City-owned property shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements to equal or exceed \$75,000.00 in the fiscal year.

18.7. *Developer Conflicts of Interest.* Through its execution of this Agreement, Developer acknowledges that it is familiar with the provisions of Section 15.103 of the San Francisco Charter, Article III, Chapter 2 of the City's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, certifies that it knows of no facts which would constitute a violation of such provisions and agrees that if Developer becomes aware of any such fact during the LDDA Term Developer shall immediately notify the City. Developer further certifies that to the best of its knowledge, it has made a complete disclosure to Port of all facts bearing on any possible interests, direct or indirect, which Developer believes any officer or employee of the City or Port presently has or will have in this Agreement or in the performance thereof or in any portion of the profits thereof. Willful failure by Developer to make such disclosure, if any, shall constitute grounds for Port's termination and cancellation of this Agreement.

18.8. *Prohibition of Political Activity with City Funds.* In accordance with S. F. Administrative Code Chapter 12.G, no funds appropriated by Port for this Agreement 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 (collectively, "**Political Activity**"). Accordingly, an employee working in any position funded under this Agreement shall not engage in any Political Activity during the work hours funded hereunder, nor shall any equipment or resource funded by this Agreement be used for any Political Activity. In the event Developer, or any staff member in association with Developer, engages in any Political Activity, then (i) Developer shall keep and maintain appropriate records to evidence compliance with this section, and (ii) Developer shall have the burden to prove that no funding from this Agreement has been used for such Political Activity. Developer agrees to cooperate with any audit by the City or its designee in order to ensure compliance with this section. In the event Developer violates the provisions of this section, the City or Port may, in addition to any other rights or remedies available hereunder, (i) terminate this Agreement and any other agreements between Developer and Port, (ii) prohibit Developer from bidding on or receiving any new City or Port contract for a period of two (2) years, and (iii) obtain reimbursement of all funds previously disbursed to Developer under this Agreement.

18.9. *Notification of Limitations on Contributions.* Through its execution of this Agreement, Developer acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign and Governmental Conduct Code (the "**Conduct Code**") which prohibits any person who contracts with the City for the selling or leasing any land or building to or from the City whenever such transaction would require the approval by a City elective officer or the board on which that City elective officer serves, from making a contribution to such an officer, or candidate for such an office, or committee controlled by such officer or candidate at any time from the commencement of negotiations for such contract until the termination of negotiations for such contract or six (6) months has elapsed from the date the contract is approved by the City elective officer, or the board on which that City elective officer serves.

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.

18.10. *Sunshine Ordinance.* In accordance with Section 67.24(e) of the San Francisco 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.

18.11. *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 San Francisco 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. Developer acknowledges that it has read and understands the above statement of the City and County of San Francisco concerning doing business in Northern Ireland.

18.12. *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. Developer agrees that, except as permitted by the application of Sections 802(b) and 803(b) of the San Francisco Environment Code, Developer shall not use or incorporate any tropical hardwood or virgin redwood in the Construction of the Improvements. Developer shall not provide any items to the construction of the Improvements, or otherwise in the performance of this Agreement which are tropical hardwoods, tropical hardwood wood products, virgin redwood, or virgin redwood wood products. In the event Developer fails to comply in good faith with any of the provisions of Chapter 8 of the San Francisco Environment Code, Developer shall be liable for liquidated damages for each violation in any amount equal to the contractor's net profit on the contract, or five percent (5%) of the total amount of the contract dollars, whichever is greater.

18.13. *Resource-Efficient Facilities and Green Building Requirements.* The Improvements will be subject to Chapters 7 and 13C of the San Francisco Environment Code. Accordingly, the Improvements must meet certain resource efficient requirements. Developer agrees that it will design the Improvements to comply with Chapters 7 and 13C of the San Francisco Environment Code, as may be amended from time to time, or any similar law.

18.14. *Prohibition of Tobacco Sales and Advertising.* Developer acknowledges and agrees that no advertising of cigarettes or tobacco products is allowed on any real property owned by or under the control of the City, including the Site. This prohibition includes the placement of the name of a company producing, selling or distributing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product, or on any Sign. The foregoing prohibition shall not apply to any advertisement sponsored by a state, local or nonprofit entity designed to communicate the health hazards of cigarettes and tobacco products or to encourage people not to smoke or to stop smoking.

18.15. *Prohibition of Alcoholic Beverages Advertising.* Developer acknowledges and agrees that no advertising of alcoholic beverages is allowed on the Site. For purposes of this section, "**alcoholic beverage**" shall be defined as set forth in California Business and Professions Code Section 23004, and shall not include cleaning solutions, medical supplies and other products and substances not intended for drinking. This advertising prohibition includes the placement of the name of a company producing, selling or distributing alcoholic beverages or the name of any alcoholic beverage in any promotion of any event or product. This advertising prohibition does not apply to any advertisement sponsored by a state, local, nonprofit or other entity designed to (i) communicate the health hazards of alcoholic beverages, (ii) encourage

people not to drink alcohol or to stop drinking alcohol, or (iii) provide or publicize drug or alcohol treatment or rehabilitation services. Additionally, this advertising prohibition does not apply to any restaurant within the Premises or to Developer 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. [Note: Discuss further between the Parties temporary advertising by sponsors of or participants in any special events conducted on the Premises]

18.16. *Drug-Free Workplace.* Developer acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1988 (41 U.S.C. Sections 701 et seq.), the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City property (including the Site). Developer and its Agents or assigns shall comply with all terms and provisions of such Act and the rules and regulations promulgated thereunder. Developer agrees that any violation of this prohibition by Developer, its Agents or assigns shall be deemed a material breach of this Agreement.

18.17. *Pesticide Ordinance.* Developer shall comply with the provisions of Section 308 of Chapter 3 of the San Francisco Environment Code (the “**Pesticide Ordinance**”) which (i) prohibit the use of certain pesticides on City property (including the Site), (ii) require the posting of certain notices and the maintenance of certain records regarding pesticide usage, and (iii) require Developer to submit to Port an integrated pest management (“**IPM**”) plan that (a) lists, to the extent reasonably possible, the types and estimated quantities of pesticides that Developer may need to apply to the Site during the LDDA Term, (b) describes the steps Developer will take to meet the City’s IPM Policy described in Section 300 of the Pesticide Ordinance, and (c) identifies, by name, title, address and telephone number, an individual to act as Developer’s primary IPM contact person with the City. In addition, Developer shall comply with the requirements of Sections 303(a) and 303(b) of the Pesticide Ordinance. Through Port, Developer may seek a determination from the City’s Commission on the Environment that Developer is exempt from complying with certain portions of the Pesticide Ordinance with respect to this Agreement, as provided in Section 307 of the Pesticide Ordinance. Port shall reasonably cooperate with Developer, at Developer’s sole cost and expense, if Developer seeks in good faith an exemption under the Pesticide Ordinance.

18.18. *Preservative Treated Wood Containing Arsenic.* Developer may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the San Francisco Department of the Environment under Section 1304 of the 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. Developer 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 Developer from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term “**saltwater immersion**” means a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

18.19. *Compliance with Disabled Access Laws.* Developer 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 Developer or contractor, must be accessible to the disabled public. Developer shall not discriminate against any person protected under the Disabled Access Laws in connection with the use of all or any portion of the Property and shall comply at all times with the provisions of the Disabled Access Laws.

18.20. *Protection of Private Information.* Developer agrees to comply fully with and be bound by all of the provisions of Chapter 12M of the San Francisco Administrative Code (the

“**Protection of Information Ordinance**”), including the remedies provided therein. Consistent with the requirements of the Protection of Information Ordinance, Developer agrees to all of the following:

(a) Neither Developer 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 Agreement;
- (ii) Developer 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 Agreement shall be in accordance with any conditions or restrictions stated in this Agreement or the Contracting Department’s approval and shall 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 shall be in accordance with any conditions or restrictions stated in the approval.

(c) “**Private Information**” shall mean any information that (1) could be used to identify an individual, including 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 Developer to comply with the Protection of Information Ordinance shall be a material breach of this Agreement. In such an event, in addition to any other remedies available to it under equity or at law, Port may terminate this Agreement, debar Developer, or bring a false claim action against Developer.

18.21. 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 Port’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 County and its residents, and to prevent the further spread of graffiti.

Developer shall remove all graffiti from the Site (including any construction fencing, barriers and Signs) within forty-eight (48) hours of the earlier of Developer’s (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the Department of Public Works or Port. This Section 18.21 is not intended to require Developer to breach any lease or other agreement that it may have concerning its use of the Site. 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 by way of example only any of the Exterior Improvements, whether public or private, without the consent of the owner of the property or the owner’s authorized Agent, and which is visible from the public right-of-way. “**Graffiti**” shall not include: (1) any Sign that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code, the Port Building Code, the Port’s Sign Guidelines, or the San Francisco Building Code; or (2) any mural or other painting or marking on the Site that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 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.).

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

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

18.24. Charter Provisions. This Agreement is governed by and subject to the provisions of the Charter of the City and County of San Francisco.

19. FORCE MAJEURE - EXTENSION OF TIME OF PERFORMANCE.

(a) Effect of Force Majeure. For the purpose of this Agreement, neither Developer, Port, nor any successor in interest (the "**Delayed Party,**" as applicable) will be considered in breach of or default in any obligation or satisfaction of a condition to an obligation of the other Party in the event of Force Majeure, and the time fixed for performance of any such obligation or satisfaction of conditions shall be extended by a period of time equal to the duration of the Force Majeure event; provided, however, within thirty (30) days after the beginning of any such Force Majeure event, the Delayed Party shall have first notified the other Party of the cause or causes of such delay and claimed an extension for the reasonably estimated period of the enforced delay.

(b) Definition of Force Majeure. "**Force Majeure**" means events that cause delays in the Delayed Party's performance of its obligations under this Agreement, or in the satisfaction of a condition to the other Party's performance under this Agreement, due to causes beyond the Delayed Party's control and not caused by the acts or omissions of the Delayed Party (excluding, in any case, a Delayed Party's performance of the payment of money required under the terms of this Agreement), 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 Site or the Improvements (but in the absence of such a moratorium, acts of the government relating to issuance of building permits or other Regulatory Approvals are governed by Section 19(d)); fires; floods; tidal waves; epidemics; quarantine restrictions; freight

embargoes; earthquakes; unusually severe weather (but only if such unusually severe weather causes actual delays); delays of contractors or subcontractors due to any of the foregoing causes; the unanticipated presence of Hazardous Materials or other concealed conditions on the Site that would not have reasonably been discovered through due diligence and that would actually delay or materially and adversely impair or delay Developer's ability to Construct the Improvements; archeological finds on the Site; strikes and substantial interruption of work because of labor disputes (excluding strikes and labor disputes directly related to any contracts between Developer and its contractors or work performed on behalf of Developer); inability to obtain materials or reasonably acceptable substitute materials (provided that Developer has ordered such materials on a timely basis and Developer is not otherwise at fault for such inability to obtain materials); or any Litigation Force Majeure (provided that the Delayed Party proceeds with due diligence to defend or commence, as applicable, such action or proceeding or take other appropriate measures to resolve any dispute that is the subject of such action or proceeding). The following are excluded from the definition of Force Majeure: (1) Developer's failure to secure anticipated financing for the Improvements unless caused by a direct result of some other event of Force Majeure; (2) sea level rise; and (3) any event that does not cause an actual delay.

(c) Definition of Litigation Force Majeure. "**Litigation Force Majeure**" means any action or proceeding before any court, tribunal, or other judicial, adjudicative or legislative decision-making body, including any administrative appeal, brought by a third party that challenges, (a) the validity of any action taken by the City in connection with the Construction of the Improvements or any findings upon which any action is predicated, or (b) the failure of any Regulatory Agency to impose conditions to a Regulatory Approval or the validity of any other Regulatory Approval required in connection with Construction of the Improvements. With respect to an event of Litigation Force Majeure occurring after the Initial Close of Escrow, such event will not be considered Litigation Force Majeure unless such event would enjoin construction or other work on the Site or any portion thereof, cause a lender to refuse to commit, close, fund, disburse or cause an acceleration of payment on a loan, or prevent or suspend construction work on the Site except to the extent caused by the Party claiming an extension.

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

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

(d) Permit Force Majeure. If Developer is diligently proceeding to obtain necessary Building Permits or the Initial Building Permits and addenda as required by Section 9.10 or Port or Developer are diligently proceeding to obtain other necessary Regulatory Approvals for the Improvements as required hereunder, Force Majeure includes such party's inability to obtain in a timely manner Building Permits or Initial Building Permits and addenda thereto, or other Regulatory Approvals.

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

20. GENERAL PROVISIONS.

20.1. Notices.

(a) Manner of Delivery. Except as otherwise expressly provided in this Agreement, all notices, demands, approvals, consents and other formal communications between Port and Developer required or permitted under this Agreement shall be in writing and shall be deemed given and effective (i) upon the date of receipt if given by personal delivery on a business day (or the next business day if delivered personally on a day that is not a business day) or (ii) if mailed by (x) the U.S. Postal Service, two (2) business days after deposit with the U.S. Postal Service for delivery by United States mail, first class postage prepaid, or (y) a nationally recognized overnight courier, one (1) business day after deposit with such nationally recognized overnight courier, to Port or Developer at their respective addresses for notice designated below. For convenience of the Parties, copies of notices may also be given by telefacsimile (“FAX”) or electronic mail, if such number or electronic mail address is set forth below or such other number or electronic mail address as may be provided from time to time by notice given in the manner required under this Agreement; however, neither Party may give official or binding notice by FAX or electronic mail unless a copy of such FAX or electronic mail notice is confirmed within twenty-four (24) hours by a letter mailed or delivered in accordance with the foregoing.

(b) Request for Approval. In order for a request for any approval required under the terms of this Agreement to be effective, it shall be clearly marked “**Request for Approval**” and state (or be accompanied by a cover letter stating) substantially the following:

(i) the section of this Agreement under which the request is made and the action or response required;

(ii) if applicable, the period of time as stated in this Agreement within which the recipient of the notice shall respond; and

(iii) if applicable, that the failure to object to the notice within the stated time period will be deemed to be the equivalent of the recipient’s approval of or consent to the request for approval which is the subject matter of the notice.

In the event that a request for approval states a period of time for approval that is less than the time period provided for in this Agreement for such approval, the time period stated in this Agreement shall be the controlling time period.

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

(c) Addresses for Notices. All notices shall be properly addressed and delivered to the Parties at the addresses set forth below or at such other addresses as either Party may designate by written notice given in the manner provided in this Section:

<i>To Port:</i>	San Francisco Port Commission Pier 1 San Francisco, California 94111 Attention: Director of Planning & Development (Reference: 20th Street Historic Buildings) Telephone: (415) 274-0400 FAX: (415) 274-0495
<i>With a Copy to:</i>	Port General Counsel Pier 1 San Francisco, California 94111 Telephone: (415) 274-0486

	FAX: (415) 274-0494
<i>To Developer: Prior to issuance of certificate of occupancy</i>	Historic Pier 70, LLC c/o Orton Development, Inc. 1475 Powell Street, Suite 101 Emeryville, CA 94608 Attention: J.R. Orton III and James Madsen Telephone: (510) 428-0800 Email: eorton@ortondevelopment.com and jmadsen@ortondevelopment.com
<i>With a Copy to:</i>	Historic Pier 70, LLC c/o Orton Development, Inc. 3049 Research Drive Richmond, CA 94806 Attention: Michelle Heredia Telephone: (510) 758-7690 Email: mheredia@ortondevelopment.com
<i>And to:</i>	Stein & Lubin 600 Montgomery St., 14th Floor San Francisco, CA 94111 Attention: Mark D. Lubin, Esq. Telephone: (415) 981-0550 Email: mlubin@steinlubin.com

20.2. Conflict of Interest. No member, official or employee of the City, including its Port, may have any personal interest, direct or indirect, in this Agreement nor shall any such member, official or employee participate in any decision relating to this Agreement which affects her or his personal interest or the interests of any corporation, partnership or association in which she or he is interested directly or indirectly.

20.3. 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) Weekends and Holidays. A performance date that falls on a Saturday, Sunday or City holiday is deemed extended to the next business day.

(c) Days for Performance. All periods for performance specified in this Agreement in terms of days shall be calendar days, and not business days, unless otherwise expressly provided in this Agreement.

(d) Time of the Essence. Time is of the essence with respect to each required completion date in the Schedule of Performance.

20.4. Interpretation of Agreement.

(a) Exhibits. Whenever an “**Exhibit**” is referenced, it means an exhibit or attachment to this Agreement unless otherwise specifically identified. All such Exhibits are incorporated in this Agreement by reference.

(b) Captions. Whenever a section or paragraph is referenced, it refers to this Agreement unless otherwise specifically identified. The captions preceding the sections of this Agreement and in the table of contents have been inserted for convenience of reference only. Such captions shall not define or limit the scope or intent of any provision of this Agreement.

(c) Words of Inclusion. The use of the term “including”, “include”, “such as” or words of similar import when following any general term, statement or matter shall 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 shall 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 Agreement 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 Agreement shall be interpreted to achieve the intents and purposes of the Parties, without any presumption against the Party responsible for drafting any part of this Agreement (including California Civil Code Section 1654).

(e) Costs and Expenses. The Party on which any obligation is imposed in this Agreement shall be solely responsible for paying all costs and expenses incurred in the performance of such obligation, unless the provision imposing such obligation specifically provides to the contrary.

(f) Agreement References. Wherever reference is made to any provision, term or matter “in this Agreement,” “herein” or “hereof” or words of similar import, the reference shall be deemed to refer to any and all provisions of this Agreement reasonably related thereto in the context of such reference, unless such reference refers solely to a specific numbered or lettered section or paragraph of this Agreement or any specific subdivision of this Agreement.

(g) Approvals. Unless this Agreement otherwise expressly provides or unless the City’s Charter otherwise requires, all approvals, consents or determinations to be made by or on behalf of the City or Port under this Agreement shall be made by Port’s Executive Director and shall not be unreasonably withheld or delayed.

20.5. *Successors and Assigns.* This Agreement is binding upon and will inure to the benefit of the successors and assigns of Port and Developer, subject to the limitations on assignment set forth in Section 14. Where the term “Developer,” or “Port” is used in this Agreement, it means and includes their respective successors and assigns. Whenever this Agreement specifies 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 the City (or the State, if applicable) will be deemed to be the successor and assign of Port for purposes of this Agreement.

20.6. *Technical Corrections.* The parties reserve the right, upon mutual agreement of Port’s Executive Director and Developer, to enter into memoranda of technical corrections hereto to reflect any non-material changes in the actual legal description and square footages of the Site and the Improvements, and upon full execution thereof, such memoranda shall be deemed to become a part of this Agreement.

20.7. *No Third Party Beneficiaries.* This Agreement is made and entered into for the sole protection and benefit of Port and Developer and their successors and assigns. No other Person shall have or acquire any right or action based upon any provisions of this Agreement.

20.8. *Real Estate Commissions.* Developer 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, the Party through whom such claim is made agrees to Indemnify the other Party from any Losses arising out of such claim.

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

20.10. *Entire Agreement.* This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement and supersedes all negotiations or

previous agreements between the Parties with respect to all or any part of the terms and conditions mentioned in or incidental to this Agreement (other than as set forth in other Transaction Documents fully executed by the Parties). No parol evidence of any prior draft of this Agreement, or of any other agreement shall be permitted to contradict or vary the terms of this Agreement.

20.11. Amendment. Neither this Agreement nor any of its terms may be terminated, amended or modified except by a written instrument executed by the Parties.

20.12. Governing Law. The Laws of the State of California shall govern the interpretation and enforcement of this Agreement. As part of the consideration for Port's entering into this Agreement, Developer agrees that all actions or proceedings arising directly or indirectly under this Agreement may, at the sole option of Port, be litigated in courts having sites within the State of California.

20.13. Recordation. A memorandum of this Agreement will be recorded by Developer in the Official Records on or after the Effective Date. Developer shall promptly upon request deliver to Port a duly executed and acknowledged quitclaim deed, suitable for recordation in the Official Records and in form and content reasonably satisfactory to Port and the City Attorney, for the purpose of effectuating the termination of Developer's interest under this Agreement upon the termination of this Agreement. Port may record such quitclaim deed at any time on or after the termination of this Agreement, without the need for any approval or further act of Developer.

20.14. Extensions by Port. Upon the request of Developer, Port, acting through its Executive Director, may, by written instrument, extend the time for Developer's performance of any term, covenant or condition of this Agreement or permit the curing of any default upon such terms and conditions as it determines appropriate, including the time within which Developer shall agree to such terms or conditions, provided, however, that any such extension or permissive curing of any particular default will not operate to release any of Developer's obligations nor constitute a waiver of Port's rights with respect to any other term, covenant or condition of this Agreement or any other default in, or breach of, this Agreement or otherwise effect the time of the essence provisions with respect to the extended date or the other dates for performance under this Agreement.

20.15. Extensions by Developer. Upon the request of Port, Developer may, by written instrument, extend the time for Port's performance of any term, covenant or condition of this Agreement or permit the curing of any default upon such terms and conditions as it determines appropriate, including the time within which Port shall agree to such terms or conditions, provided, however, that any such extension or permissive curing of any particular default will not operate to release any of Port's obligations nor constitute a waiver of Developer's rights with respect to any other term, covenant or condition of this Agreement or any other default in, or breach of, this Agreement or otherwise effect the time of the essence provisions with respect to the extended date or the other dates for performance under this Agreement.

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

20.17. Attorneys' Fees. If either Party fails to perform any of its respective obligations

under this Agreement or if any dispute arises between the Parties hereto concerning the meaning or interpretation of any provision of this Agreement, then the defaulting Party or the Party not prevailing in such dispute, as the case may be, shall pay any and all costs and expenses incurred by the other Party on account of such default or in enforcing or establishing its rights under this Agreement, including Attorneys' Fees and Costs. Any such Attorneys' Fees and Costs incurred by either Party in enforcing a judgment in its favor under this Agreement shall be recoverable separately from and in addition to any other amount included in such judgment, and such Attorneys' Fees and Costs obligation is intended to be severable from the other provisions of this Agreement and to survive and not be merged into any such judgment. For purposes of this Agreement, the reasonable fees of attorneys of the Office of the City Attorney shall be based on the fees regularly charged by private attorneys with the equivalent number of years of experience in the subject matter area of the law for which the City Attorney's services were rendered who practice in the City of San Francisco in law firms with approximately the same number of attorneys as employed by the City Attorney's Office.

20.18. *Relationship of Parties.* The subject matter of this Agreement is a private development with neither Party acting as the agent of the other Party in any respect. None of the provisions in this Agreement shall be deemed to render Port a partner in Developer's business, or joint venturer or member in any joint enterprise with Developer.

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

20.20. *Representations and Warranties of Developer.* Developer represents and warrants as follows as of the Effective Date and as of the date of each Close of Escrow:

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

(b) Authority. Developer has all requisite power and authority to execute and deliver the Transaction Documents and to carry out and perform all of the terms and covenants of the Transaction Documents.

(c) No Limitation on Ability to Perform. Neither Developer's articles of incorporation or bylaws, nor any other agreement or Law in any way prohibits, limits or otherwise affects the right or power of Developer to enter into and perform all of the terms and covenants of the Transaction Documents. Developer is not party to or bound by any contract, agreement, indenture, trust agreement, note, obligation or other instrument that could prohibit, limit or otherwise affect the same. Other than the Regulatory Approvals required to Construct the Improvements, no consent, authorization or approval of, or other action by, and no notice to or filing with, any governmental authority, regulatory body or any other Person is required for the due execution, delivery and performance by Developer of the Transaction Documents or any of the terms and covenants contained therein. There are no pending or threatened lawsuits or proceedings or undischarged judgments affecting Developer before any court, governmental agency, or arbitrator that might materially and adversely affect the enforceability of the Transaction Documents or the business, operations, assets or condition of Developer.

(d) Valid Execution. The execution and delivery of the Transaction Documents by Developer has been duly and validly authorized by all necessary action. The Transaction Documents will be a legal, valid and binding obligation of Developer, enforceable

against Developer in accordance with its terms.

(e) Defaults. The execution, delivery and performance of the Transaction Documents (i) do not and will not violate or result in a violation of, contravene or conflict with, or constitute a default under (A) any agreement, document or instrument to which Developer or by which Developer's assets may be bound or affected, (B) any Law, or (C) the articles of incorporation or the bylaws of Developer, and (ii) do not and will not result in the creation or imposition of any lien or other encumbrance upon the assets of Developer.

(f) Meeting Financial Obligations. There is no material adverse change in Developer's financial condition and Developer is meeting its current liabilities as they mature; no federal or state tax liens have been filed against it; and Developer is not in default or claimed default under any agreement for borrowed money.

(g) Survival. The representations and warranties in this Section shall survive any expiration or earlier termination of this Agreement.

20.21. *Effective Date*. This Agreement shall become effective on the date the Parties duly execute and deliver this Agreement following approval by the Port Commission of the Transaction Documents and approval by the Board of Supervisors and the Mayor of the Lease, all in their respective sole and absolute discretion. The Effective Date of this Agreement will be inserted by Port on the cover page and on Page 1 of this Agreement; provided, however, failure by Port to do so shall in no way invalidate this Agreement. Where used in this Agreement or in any of its exhibits, references to "**the date of this Agreement**," the "**reference date of this Agreement**," "**Agreement date**" or "**Effective Date**" shall mean the Effective Date determined as set forth above and shown on Page 1 of this Agreement.

21. DEFINITIONS.

For purposes of this Agreement, initially capitalized terms shall have the meanings ascribed to them in this Section:

"**Access Agreement**" is defined in Section 2.1.

"**Affiliate**" is defined in the Lease.

"**Agents**" means, when used with reference to either Party to this Agreement or any other Person, the members, managers, officers, directors, commissioners, employees, agents and contractors of such Party or other Person, and their respective heirs, legal representatives, successors and assigns.

"**Agreement**" means this Lease Disposition and Development Agreement, including its exhibits, as it may be amended in accordance with its terms.

"**Approved Revised Schematic Drawings**" is defined in Section 9.3.

"**Annual Budget**" means the budget for the estimated Transaction Costs during any given calendar year.

"**Annual Project Cost Statement**" is defined in Section 10.5(b).

"**Anticipated Development Budget**" means the anticipated budget for the Improvements based on the Schematic Drawings and the Anticipated Pro-Forma. The Anticipated Development Budget will include the total development cost for Construction of the Improvements, including line items for Pre-Development Costs, permits, architectural, engineering, Hard Costs, financing for the Project, Permissible Financing Costs, insurance and bonding costs, and other Soft Costs. The Anticipated Development Budget is attached hereto as [Exhibit XX]. [Note: Conform with Development Budget]

"**Anticipated Pro-Forma**" is attached hereto as *Exhibit XX*.

"**Atrium/Plaza Schematic Drawings**" is defined in Section 9.2(a)(i).

“Attorneys’ Fees and Costs” means any and all attorneys’ fees, 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 the costs and fees associated with any other legal, administrative or alternative dispute resolution proceeding, fees and costs associated with execution upon any judgment or order, and costs on appeal.

“Base Building Work” means all work reasonably necessary to bring the Buildings to a stable and weather-tight “cold shell” condition with utilities stubbed to the premises, and seismically upgraded to meet applicable Port building codes, all as more particularly and further described in the Scope of Development.

“Business Day” means any day other than a Saturday, Sunday or other day that banks are required or permitted to be closed in the State of California.

“BCDC” means the Bay Conservation and Development Commission, a State agency established under the McAteer Petris Act.

“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, a governmental agency, a real estate investment trust, a religious, educational or charitable institution, an employees’ welfare, benefit, pension or retirement fund or system, an investment banking, merchant banking or brokerage firm, or any other Person or group of Persons which, at the time a Mortgage in favor of such Person or Persons is recorded, has assets of at least \$500 million in the aggregate (or the equivalent in foreign currency), and in the case of any Person or group of Persons none of whom is a savings bank, a savings and loan association, a commercial bank or trust company, an insurance company, a governmental agency, or a real estate investment trust, is regularly engaged in the financial services business, or (ii) any special account, managed fund, department, or agency of any of the foregoing, or (iii) any person acting in a fiduciary capacity for any of the foregoing. For purposes hereof, (1) acting in a “fiduciary capacity” shall be deemed to include acting as a trustee, agent, or in a similar capacity under a mortgage, loan agreement, indenture or other loan document, and (2) a lender, even if not a Bona Fide Institutional Lender, shall be deemed to be a Bona Fide Institutional Lender if promptly after such loan is consummated the note(s) or other evidence of indebtedness or the collateral securing the same are assigned to one or more persons then qualifying as a Bona Fide Institutional Lender.

“Board” or “Board of Supervisors” means the Board of Supervisors of the City and County of San Francisco.

“Building” or “Buildings” is defined in Section 1.1.

“Building 102 Electrical Work” is defined in Section 2.2(b)(v).

“Building 102 Expansion Date” is defined in Section 2.2(b)(iii).

“Building 102 Option” is defined in Section 2.2(b)(i).

“Building 113 Seismic Work” is defined in Section 12(a).

“Building Permit(s)” means a permit or permits issued by Port, in its regulatory capacity, that will allow Developer to commence Construction of the Improvements described in such permit or permits. “Building Permits” includes the Initial Building Permits.

“Burton Act” means the provisions of Chapter 1333 of the Statutes of 1968 of the California Legislature, as amended, providing for the transfer to the City from the 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.

“**Capital Items**” is defined in the Lease.

“**Certificate of Completion**” is described in Section 14.

“**Certified Total Project Cost**” is defined in Section 10.6(c).

“**Certified Total Project Cost Statement**” is defined in Section 10.6(b).

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

“**City Projects**” is defined in Section 9.13.

“**Close of Escrow**” means (i) the Delivery of the Site by Port to Developer through the Escrow on the Closing Date, or (ii) with respect to any Expansion Site after the Closing Date, the issuance by the Title Company to Port and Developer of a title insurance policy in accordance with **Section 4.7**.

“**Closing Costs**” is defined in Section 4.2(e).

“**Closing Date**” is defined in Section 4.2(b).

“**Completion**” or “**Completed**” is defined in Section 14.1(c).

“**Construction**” means all new construction, replacement, rehabilitation, and demolition occurring on the Site, or where applicable, off-Site, pursuant to this Agreement and the Lease. “**Construct**” will have a correlative meaning.

“**Construction Contract**” is defined in Section 4.3(a)(xii).

“**Construction Documents**” is defined in Section 9.2.

“**Deferred Items**” is defined in Section 14.1(b).

“**Deferred Port Transaction Costs**” is defined in Section 0.

“**Delayed Party**” is defined in Section 19(a).

“**Deliver**” or “**Delivery**” means execution and delivery through Escrow by Port to Developer, of a leasehold estate in the Site.

“**Developer**” means Orton Development, Inc., a California corporation, or any successor permitted under this Agreement.

“**Developer Equity**” is defined in the Lease.

“**Developer Equity Return**” is defined in the Lease.

“**Developer Event of Default**” is defined in Section 17.1.

“**Development Budget**” means the budget for the Improvements based on the Final Construction Documents and the Final Pro-Forma. The Development Budget will include the total development cost for Construction of the Improvements, including line items for Pre-Development Costs, permits, architectural, engineering, Hard Costs, other Soft Costs, financing for the Project, Permissible Financing Costs, and insurance and bonding costs. The Development Budget will be substantially in the form of the Anticipated Development Budget attached hereto as **[Exhibit XX]**. **[Note: Conform with Anticipated Development Budget]**

“**Disabled Access Laws**” means all Laws related to access for persons with disabilities including the Americans with Disabilities Act, 42 U.S.C.S. §§ 12101 et seq. and disabled access laws under Port’s building code.

“**Effective Date**” is defined in Section 20.21.

“**ENA**” is defined in Recital E.

“Environmental Financial Performance Deposit” is defined in the Lease.

“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 Law affecting any portion of the Site. “Environmental Laws” include the City’s Pesticide Ordinance (Chapter 39 of the San Francisco Administrative Code), to the extent the same is as of the date of this Agreement applicable to tenants of City property, Section 20 of the San Francisco Public Works Code (**“Analyzing Soils for Hazardous Waste”**). **“Environmental Laws”** includes the Risk Management Plan and that certain Covenant and Environmental Restrictions on Property made by the City, acting by and through the Port, for the benefit of the California Regional Water Quality Control Board for the San Francisco Bay Region, dated as of [REDACTED], 201XX and recorded in the Official Records.

“Environmental Notice” is defined in Section 8(b).

“Environmental Oversight Deposit” is defined in the Lease.

“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 EPA, OSHA, any California Environmental Protection Agency board, department, or office, including the Department of Toxic Substances Control and the San Francisco Bay Regional Water Quality Control Board, Cal-OSHA, the Bay Area Air Quality Management District, the San Francisco Department of Public Health, the San Francisco Fire Department, SFPUC, Port, or any other Regulatory Agency now or later authorized to regulate Hazardous Materials.

“EPA” means the United States Environmental Protection Agency.

“Escrow” is defined in Section 4.2(a).

“Evidence of Building 113 Seismic Costs” is defined in Section 12(c).

“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 Developer’s operations, Investigations, maintenance, repair, and Construction. “Exacerbation” has a correlating meaning.

“Executive Director” means the Executive Director of Port or his or her designee.

“Existing Site Reports” is defined in Section 6.1(b).

“Expansion Date” is defined in Section 2.2

“Expansion Notice” is defined in Section 2.2.

“Expansion Site” is defined in Section 1.1.

“Exterior Improvements” means any improvements, furnishings, fixtures, or equipment located in the exterior areas of the Site (whether public access or not and including the roof) and/or located in the public access areas of the Buildings, which may include mechanical

equipment, photovoltaic panels, satellite dishes, antennae and other communication equipments, public art, bollards, flower baskets, benches, tables, chairs, umbrellas, heaters, railings, gates, trash receptacles, cleats, Signs, kiosks, flagpoles, canopies, awnings, landscaping, planter boxes, light poles, lighting fixtures, fountains, ticket booths, bicycle racks, plaques, markers, tents, models, other street furniture, and paving or other surface treatments.

“Final Construction Documents” is defined in Section 9.2(a)(v).

“Finally Granted” means that the action is final, binding and non-appealable and all applicable statutes of limitation relating to such action, including with respect to CEQA, shall have expired without the filing or commencement of any judicial or administrative action or proceeding in a court of competent jurisdiction with regard to such action.

“FOG Ordinance” means Sections 140-140.7 of Article 4.1 of the San Francisco Public Works Code, or any subsequent amendment or replacement of the same that sets forth prohibitions, limitations, or requirements for the discharge of fats, oils and grease into the City’s sewer system by food service establishments.

“Force Majeure” is defined in Article 19.

“Forest City Agreements” is defined in Section 9.13(b)(vi).

“Handle” or **“Handling”** 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.

“Hazardous Material” means any substance, waste, or material that is now or in the future designated by any Regulatory Agency to be capable of posing a present or potential risk of injury to human health or safety, the environment, or property. This definition includes anything designated or defined in any Environmental Law as hazardous, hazardous substance, hazardous waste, toxic, pollutant, or contaminant; any asbestos, asbestos containing materials, and PACMs, whether or not part of the structure of any existing improvements, buildings or structures on the Site, any Improvements to be constructed on the Site by or on behalf of Developer, or occurring in nature; and other naturally-occurring substances such as petroleum, including crude oil or any fraction, and natural gas or natural gas liquids and lead containing materials.

“Hazardous Material Claim” means any Environmental Regulatory Action or any Claim made or threatened by any third party against the Indemnified Parties, or the Site, relating to damage, contribution, cost recovery compensation, loss or injury resulting from the presence or 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 Site or other Port property, the loss or restriction of the use or any amenity of the Site or other Port property, and Attorneys’ Fees and Costs, and consultants’ fees and experts’ fees and costs.

“Historic Core” is defined in Recital B and *Section 1.1*.

“Historic District” means the Pier 70 National Register Historic District. [To Be Confirmed]

“Historic Preservation Tax Credits” means the 20% federal income tax credits for historic rehabilitation, pursuant to Internal Revenue Code §§38 and 47, and 16 U.S.C.A. §470 et seq. and applicable regulations.

“HRC” means the City’s Human Rights Commission.

“HREs” means the Historic Resources Evaluation Report for the [_____] dated [_____] and prepared by [_____] [and the drawings accompanying such report].

“Improvements” mean all physical Construction on the Site (and off-Site where so designated in the Scope of Development), the Initial Improvements, and all buildings, structures,

fixtures and other improvements erected, built, renovated, rehabilitated, restored, placed, installed or constructed upon or within the Site on or after the Effective Date, as further described in the Scope of Development and elsewhere in this Agreement.

“Indemnified Parties” means City, including all of its boards, commissions, departments, agencies and other subdivisions, including Port, all of the Agents of the City, and their respective heirs, legal representatives, successors and assigns, and each of them.

“Indemnify” means indemnify, protect, defend and hold harmless. **“Indemnification”** and **“Indemnity”** have correlative meanings.

“Initial Building Permit” means the Building Permits for (i) non-historic demolition and abatement work on the Initial Site only, and (ii) demolition, abatement work, stabilization work, and seismic retrofitting on each of the Expansion Sites as of the applicable Expansion Date or Outside Expansion Date applicable to such Expansion Site. [Note: SOP will include deadline for ODI to submit CDs for the structural and seismic work on the Initial Site and to obtain the building permit for the same]

“Initial Improvements” means the Base Building Work for each of the Buildings within the Premises and the initial work on the Plaza, as further described in the Scope of Development.] [Note: Scope needs to separately describe the Core & Shell Improvements and the Project once completed]

“Interim Certified Total Project Cost Statement” is defined in Section 10.6(a).

“Investigate” or **“Investigation”** when used with reference to Hazardous Materials means any activity undertaken to determine and/or characterize the nature and extent of Hazardous Materials that may be located in, on, under, around, or about the Site or any Improvements thereon, or which have been, are being, or threaten to be Released into the environment. Investigation shall include preparation of site history reports, performing equipment and facility testing such as testing the integrity of secondary containment and above and underground tanks or pipes, and sampling and analysis of environmental conditions in, on, under, around, or about the Site or any Improvements thereon and continuing until the appropriate Regulatory Agency has-issued a no further action letter, lifted a clean-up order, or taken similar action.

“Invitees” when used with respect to Developer means the customers, patrons, invitees, guests, members, licensees, assignees and subtenants of the tenant under the Lease and the customers, patrons, invitees, guests, members, licensees, assignees and sub-tenants of subtenants.

“Joint Escrow Instructions” is defined in Section 4.2(c).

“Laws” means all present and future applicable laws, Environmental Laws, ordinances, rules, regulations, permits, codes, authorizations, orders and requirements, whether or not foreseen or unforeseen, or in the contemplation of the Parties, which may affect or be applicable to the Site or any part of the Site (including use of the Site and the buildings and Improvements on or affixed to the Site), 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 (including the Waterfront Plan) of, all federal, state, county and municipal governments, the departments, bureaus, agencies or commissions thereof, authorities, board of officers, any national or local board of fire underwriters, or any other body or bodies exercising similar functions, having or acquiring jurisdiction of the Site or any part thereof, the use thereof and of the buildings and Improvements thereon; and similarly the phrase “Law” shall be construed to mean the same as the above in the singular as well as the plural.

“LDDA Term” is defined in Section 1.2.

“LDDA Termination Fee” is defined in Section 1.3.

“LDDA Transaction Costs” is defined in Section 3.2.

“Lease” means the Lease No. L-[_____] of the Site to be entered into by the Parties, effective as of the Initial Close of Escrow, substantially in the form of Lease attached hereto as Exhibit [XX].

“LEED” means the Leadership in Energy and Environmental Design Green Building Rating System, developed by the U.S. Green Building Council.

“Litigation Force Majeure” is defined in Section 19(c).

“Loss” or **“Losses”** when used with reference to any Indemnity means any and all claims, demands, losses, liabilities, damages (including foreseeable and unforeseeable 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.

“Master Plan” is defined in Recital B.

“Memorandum of Agreement” means the memorandum of this Agreement, suitable for recordation in the Official Records and in the form of Exhibit [XX].

“Memorandum of Lease” means the memorandum of the Lease, suitable for recordation in the Official Records and in the form of Exhibit XX.

“Mitigation Monitoring and Reporting Program” means the mitigation and improvement measures relating to Construction of the Improvements by Developer, as described in Exhibit XX.

“Mobilization and Staging Plan” means Developer’s plan for construction vehicle routing, parking, and staging during Construction of the Improvements.

“Mortgage” means a mortgage, deed of trust, or similar security instrument of tenant’s leasehold interest under the Lease permitted in accordance with the terms of the Lease and that is recorded in the Official Records.

“Mortgagee” means the holder or holders of a Mortgage and as defined in the Lease.

“Noise Ordinance” means Article 29 of the San Francisco Police Code.

“NPS” means the National Park Service.

“ODI” means Orton Development, Inc., a California corporation.

“Official Records” means, with reference to the recordation of documents, the Official Records of the City and County of San Francisco.

“Option Notice” is defined in Section 2.2(b)(i).

“Option Period” is defined in Section 2.2(b)(i).

“Option Termination Date” is defined in Section 2.2(b)(i).

“Outside Expansion Date” is defined in Section 2.2.

“Party” means Port or Developer, as a party to this Agreement; Parties means both Port and Developer, as parties to this Agreement.

“Performance Bond” means one or more payment and performance bonds issued by a responsible surety company licensed to do business in the State and in form acceptable to Port from Developer’s contractors naming Port as co-obligee, in a principal amount no less than one hundred ten percent (110%) of the estimated cost of the Base Building Work on the Initial Site and Expansion Sites that form a part of the Premises and the tenant improvements, as applicable, to ensure Port against any liability for mechanics’ and materialmen’s liens, stop notices and to ensure completion of such Improvements.

“**Permissible Financing Costs**” is defined in Section 10.1.

“**Permitted Title Exceptions**” is defined in Section 4.6(a) and includes the items set forth in Exhibit XX.

“**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.

“**Pier 70**” is defined in Recital B.

“**Pier 70 Parties**” is defined in Section 9.13(b)(vi).

“**Port**” means the City and County of San Francisco acting by and through the San Francisco Port Commission.

“**Port Benefit Cost**” is defined in Section 11.2(a).

“**Port Benefit Task**” is defined in Section 11.1(a).

“**Port Loan**” is defined in Section 10.1.

“**Port Event of Default**” is defined in Section 17.3.

“**Port’s Sign Guidelines**” is defined in Exhibit XX.

“**Pre-Development Costs**” is defined in Section 10.1.

“**Pre-payment Amount**” is defined in Section 10.2(e).

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

“**Project Costs**” is defined in Section 10.1.

“**Project Cost Cut-Off Date**” is defined in Section 10.1.

“**Project Materials**” is defined in Section 17.6.

“**Project Requirements**” is defined in Section 9.1.

“**Historic Core**” is defined in Section 1.1.

“**Proposed Changes to Schematic Drawings**” is defined in Section 9.3.

“**Public Trust**” means the public trust for commerce, navigation and fisheries, including the statutory trust imposed by the Burton Act.

“**Record Drawings**” is defined in *Section 9.8(a)*.

“**Regulatory Agency**” and “**Regulatory Agencies**” means any local, regional, state or federal governmental agency or political subdivision having jurisdiction over the Site, Construction of the Improvements, including BCDC, EPA, the California Environmental Protection Agency, RWQCB, the Army Corps of Engineers, SFPUC, and Port’s Chief Harbor Engineer.

“**Regulatory Approval**” means any authorization, approval, endorsement, amendment of any existing plans (including the SAP and the Waterfront Plan), or permit required by any Regulatory Agency to Construct the Improvements, or the State Lands Executive Officer Determination.

“**Release**” when used with respect to Hazardous Materials means any actual or imminent introduction, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, Exacerbation, escaping, leaching, dumping, or disposing into or inside any existing improvements, buildings or structures, or any Improvements constructed under this Agreement by or on behalf of Developer, or in, on, under or about the Site or any portion of the Site, other Port property, or the environment.

“**Remedial Action Plan**” means the Feasibility Study and Remedial Action Plan, Pier 70 Master Plan Area, San Francisco, California prepared by Treadwell & Rolo and as approved by the RWQCB on August 9, 2012, as amended and as interpreted by Regulatory Agencies with jurisdiction.

“**Remediate**” or “**Remediation**” when used with reference to Hazardous Materials means any activities undertaken to clean up, remove, contain, treat, stabilize, monitor, abate, remediate, remedy, or otherwise control Hazardous Materials, or to restore the affected area to the standard required by the applicable Environmental Regulatory Agency in accordance with applicable Environmental Laws and any additional Port requirements. “**Remediation**” includes those actions included within the definition of “remedy” or “remedial action” in California Health and Safety Code Section 25322, “remove” or “removal” in California Health and Safety Code Section 25323, and the creation of a remedial work plan to be approved by the appropriate Regulatory Agency when required.

“**Required Elements**” is defined in Section 9.5(a).

“**Risk Management Plan**” means that certain Pier 70 Risk Management Plan, Pier 70 Master Plan Area, prepared for the Port of San Francisco by Treadwell & Rolo, dated July 25, 2013, including all exhibits and appendixes, as may be amended or modified from time to time.

“**RWQCB**” means the State of California Regional Water Quality Control Board.

“**SAP**” means the BCDC San Francisco Waterfront Special Area Plan.

“**Schedule of Performance**” means the Schedule of Performance attached hereto as Exhibit XX, as may be subsequently amended and approved in writing by Port from time to time. [Note: Schedule to include commencement/completion dates/periods for each of the Expansion Sites.]

“**Schematic Drawings**” is defined in Section 9.2(a)(i).

“**Scope of Development**” means the narrative document attached hereto as Exhibit XX. [Note: Scope needs to discuss the improvements to be made to the Expansion Sites, including Building 102]

“**Secretary’s Standards**” means the Secretary of the Interior’s Standards for the Treatment of Historic Properties attached hereto as *Exhibit XX* and the Guidelines for Preserving, Rehabilitating, Restoring and Reconstructing Historic Buildings.

“**Security Deposit**” is defined in the Lease.

“**SFPUC**” means the San Francisco Public Utilities Commission.

“**SHPO**” means the State’s Historic Preservation Officer.

“**SHPO Submittals**” is defined in Section 9.4(a)(iv).

“**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 Developer or the master tenant under the Lease, that results in a change in Control of Developer or the master tenant under the Lease, as applicable, or (ii) at any time prior to the issuance of a Certificate of Completion, J.R. Orton, III no longer provides day-to-day operations management of Developer and the master tenant under the Lease, or is no longer actively involved in the Project.

“**Site**” is defined in Section 1.1.

“**Soft Costs**” is defined in Section 10.1.

“**Special City Requirements**” is defined in Section 17.1(g).

“SSLP Loan” is defined in Section 4.3(a)(xxii).

“State” means the State of California.

“State Lands” means the California State Lands Commission, a State agency.

“State Lands Executive Officer Determination” means for any of the Historic Buildings where non-Public Trust uses are contemplated, the Executive Officer of State Lands has made a written determination that Restoration and preservation of each such Historic Building cannot be feasibly financed with available Public Trust uses, and that the non-Public Trust uses or this Lease are part of an overall program that furthers Public Trust purposes.

“Tenant Event of Default” is defined in the Lease.

“Term Sheet” is defined in Recital F.

“Third Party” means against any Person other than Port, the City, any Indemnified Party, or against any Person other than Developer and its respective Agents, or both, as the context requires.

“Title Company” is defined in Section 4.2(a).

“Title Defect” is defined in Section 4.6(b).

“Title Defect Cure Period” is defined in Section 4.6(b).

“Total Project Cost” is defined in Section 10.1.

“Total Project Cost Cut-Off Date” is defined in Section 10.1.

“Transaction Costs” is defined in Section 3.1.

“Transaction Cost Budget” means Port’s reasonable estimate of the Transaction Costs it will incur during the DDA Term, which Developer has reviewed and agreed to pay in accordance with this Agreement, as evidenced by its countersignature. If Port believes that Transaction Costs will exceed the Transaction Cost Budget, it must obtain Developer’s written agreement, which Developer will not unreasonably withhold, to increase the Transaction Cost Budget before Developer will be obligated to pay for any Transaction Costs exceeding the Transaction Cost Budget. Each Approved Transaction Cost Budget will be considered to be a part of this Agreement.

“Transaction Documents” means this Agreement, the Lease, and any other agreements contemplated by such documents.

“Transfer” is defined in Section 16.1.

“Unforeseen Condition” is defined in Section 2.3(a).

“Unforeseen Condition Notice” is defined in Section 2.3(b).

“Unforeseen Condition Notice Expiration Date” is defined in Section 2.3(b).

“Unmatured Developer Event of Default” means any default that, with the giving of notice or the passage of time, or both, would constitute a Developer Event of Default under this Agreement.

“Unmatured Port Event of Default” means any default that, with the giving of notice or the passage of time, or both, would constitute a Port Event of Default under this Agreement.

“Unmatured Tenant Event of Default” is defined in the Lease.

“Use Agreements” means any leases, memoranda of agreement, licenses, or other occupancy or use agreements affecting the Site entered into by Port.

“WDAC” means the Waterfront Design Advisory Committee authorized under Planning

Code Section 240, whose members are appointed by the City and Port, and that is advisory to the Port Commission and to the City's Planning Commission.

"Waterfront Plan" 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.

"Waterfront Site" is defined in Recital B.

[REMAINDER OF THIS PAGE LEFT INTENTIONALLY BLANK.]

IN WITNESS WHEREOF the Parties have caused this Agreement to be executed by their duly appointed representatives as of the date first above written.

<i>Port</i>	<p>CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation act by and through the SAN FRANCISCO PORT COMMISSION</p> <p>By: _____ Monique Moyer, Executive Director</p> <p>Date Signed: _____</p>
<i>Developer:</i>	<p>HISTORIC PIER 70, LLC, a California limited liability company</p> <p>By: _____ Name: _____ Title: _____ Date Signed: _____</p>

APPROVED AS TO FORM:
DENNIS HERRERA, City Attorney

By: _____
Name: _____
Deputy City Attorney

Port Commission Resolution No.: 14-33 (CEQA & Transaction Documents) (May 13, 2014)

EXHIBIT

Exhibit Test START HERE