

**THIS PRINT COVERS CALENDAR ITEM NO. 11**

**SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY**

**DIVISION:** Finance and Information Technology

**BRIEF DESCRIPTION:**

Authorizing the Director of Transportation to execute a two-year lease (Lease), as tenant, with The Palace at Washington Square (Owner) for the premises at 1731-1741 Powell Street and 601 Columbus Avenue (Property), for an annual rent of \$400,000 plus reimbursement of certain Owner costs, not to exceed \$2,350,000 related to the SFMTA's use of the Property to build the Central Subway Project tunnel; and approving total expenditures resulting from use of the Property to facilitate tunnel construction in an amount not to exceed \$9,150,000, including total Lease costs not to exceed \$3,150,000 and total additional demolition, design, construction and related costs not to exceed \$6,000,000.

**SUMMARY:**

- On August 19, 2008, the SFMTA Board of Directors approved the Project's Alternative 3B, Fourth /Stockton Alignment, which included a variant to extend the tunnel to a North Beach tunnel boring machine (TBM) Retrieval Shaft on Columbus Avenue.
- After some members of the North Beach neighborhood expressed concerns about the construction disruption caused by TBM extraction in Columbus Avenue, the Project evaluated alternative TBM removal options, and on December 4, 2012, the SFMTA Board of Directors adopted a motion directing the Project to pursue "Option 4," which provides for removal of TBMs at the Property, if it was feasible and did not require a supplemental or subsequent environmental impact report.
- On January 31, 2013, the City's Planning Department determined that Option 4 would not require a supplemental or subsequent environmental impact report, and issued an addendum to the 2008 SEIS/SEIR.
- Staff requests approval to enter into a two year lease for the Property, under which the SFMTA will: demolish the existing building, pay Owner annual rent of \$400,000 per year, reimburse the Owner for certain out of pocket costs arising from the SFMTA's use up to \$450,000, reimburse the Owner for actual construction cost increases that result from delaying Owner's future project construction in an amount up to \$1,500,000, and reimburse the Owner for its actual costs to backfill, and remove a portion of the Excavation Shaft, in an amount up to \$400,000 for total Lease related costs not to exceed \$3,150,000.
- Staff also seeks Board approval to make expenditures not to exceed \$6 million for design, demolition, construction and related costs to implement Option 4 to retrieve the TBMs.

**ENCLOSURES:**

1. SFMTAB Resolution
2. Lease and Exhibits

**APPROVALS:**

DIRECTOR \_\_\_\_\_

**DATE**

2/15/13

SECRETARY \_\_\_\_\_

2/15/13

**ASSIGNED SFMTAB CALENDAR DATE:** February 19, 2013

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### **PURPOSE**

Authorizing the Director of Transportation to execute a two-year lease (Lease), as tenant, with The Palace at Washington Square (Owner) for the premises at 1731-1741 Powell Street and 601 Columbus Avenue (Property), for an annual rent of \$400,000 plus reimbursement of certain Owner costs, not to exceed \$2,350,000 related to the SFMTA's use of the Property to build the Central Subway Project tunnel; and approving total expenditures resulting from use of the Property to facilitate tunnel construction in an amount not to exceed \$9,150,000, including total Lease costs not to exceed \$3,150,000 and total additional demolition, design, construction and related costs not to exceed \$6,000,000.

### **GOAL**

This lease will further the following goal and objective of the SFMTA's Strategic Plan

Goal 3 – Improve the environment and quality of life in San Francisco

Objective 3.3 Allocate capital resources effectively

### **BACKGROUND**

The Project is the second phase of the SFMTA's Third Street Light Rail Project. The Central Subway design consists of a short portion of in-street surface light rail from the Caltrain Station to Bryant Street, before transitioning into subway operation for most of the alignment. The subway will consist of twin bore tunnels, with three subway stations serving the Yerba Buena/Moscone, Union Square/Market Street, and Chinatown areas. The running tunnels will be constructed using tunnel boring machines (TBMs).

The Project, as currently approved, would extend the Project tunnels to a retrieval shaft located on Columbus Avenue. Due to recent community concern about the potential disruption that would result from constructing and using the planned Columbus Avenue retrieval shaft, Project staff considered alternative options. "Option 4", which would place the TBM retrieval shaft at the Property, will address the construction concerns of the North Beach community without significantly impeding any future extension of rail service to North Beach/Fisherman's Wharf. Option 4 requires a lease of the Property for the TBM retrieval shaft and the Project's TBM removal activities and uses, which would include demolishing the existing building, constructing an excavation shaft, and removing the two TBMs.

Owner currently has a Conditional Use Permit (Case No. 2007-1117.CV) to rehabilitate the existing building at the Property into a mixed use development (Approved Owner Project). If the existing building at the Property is demolished for the TBM retrieval shaft, Owner wants the right to develop its project with new construction (Revised Owner Project). To allow for the construction of the Revised Owner Project, Owner would need the Board of Supervisors

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to adopt a special use district ordinance, which can be found in Board File No. 130019, submitted on January 8, 2013, with substitute legislation submitted on January 29, 2013 (SUD Ordinance), and for the City's Planning Commission to approve a request for conditional use authorization (Case No. 2013-0050.CTZ), which was approved by the Planning Commission on February 14, 2013 (Modified CUP).

Lease Terms

The proposed Lease has a term of two years. Demolition of the existing building, and the commencement of annual rent payments, would occur only if, by April 1, 2013, the SUD Ordinance and Modified CUP become effective and the Federal Transit Administration determines that extracting the TBMs at the Property does not require supplemental environmental review under 23 CFR Section 771.130(c) of the regulations implementing the National Environmental Policy Act (NEPA). If those conditions are not timely met, either party would have the right to terminate the Lease. SFMTA would also have the right to immediately terminate the Lease if the beneficiary under the deed of trust encumbering the Property does not timely provide a consent and non-disturbance agreement to SFMTA, if SFMTA discovers any condition at the Property during the first six months of the Lease term that would delay completion of an excavation shaft at the Property by more than 30 days, or if any court issues an order interfering with the demolition of the building or the construction of the Excavation Shaft. The SFMTA may also terminate the lease on 120 days prior written notice to Owner for any other reason.

The SFMTA would pay rent to the owner. The annual rental rate would be \$400,000 per year, based on SFMTA's use of the Property and Owner's lost opportunity costs incurred in delaying construction of the Approved Owner Project. SFMTA would also reimburse Owner as follows: (i) up to \$450,000 for its out of pocket costs since December of 2012 to review SFMTA's proposed uses of the Property and to negotiate the Lease, to prepare a new conditional use authorization application for the Modified CUP, to make necessary modifications to its project plans to address the changed property conditions that will be caused by SFMTA's use of the Property, its property taxes for the Property during the term of the Lease, and the installation fee charged by SFMTA for any approved white zone or bulb-out that Owner is required to install as part of the Owner's Modified Project; (ii) up to \$1,500,000 for construction cost increases for delaying the construction of Owner's Modified Project until the termination of the Lease, provided that Owner gets a site permit for the Owner's Modified Project during the time period specified in the Modified CUP; and (iii) up to \$400,000 for removing a portion of the Excavation Shaft walls, and backfilling the Excavation Shaft, to accommodate the timely construction of the Owner's Modified Project. SFMTA would provide a refundable security deposit of \$66,666.00 and, if required by Owner's lender or future construction lender to secure a construction loan for the Owner's Modified Project, a refundable deposit of \$750,000 (Construction Account) to be used only for any Construction Cost Increase. Any funds in the Construction Account in excess of the determined Construction Cost Increase would be returned to SFMTA. SFMTA would pay for its own utilities, as well as any other services required at the Property for SFMTA's uses. SFMTA must install a construction fence around the Property before beginning any demolition of the existing building.

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If SFMTA installs the tunnel bores and the Excavation Shaft at the Property, it must do so in a manner that will support the Owner's Modified Project, as depicted in approved plans dated November 11, 2011. Prior to the termination or expiration of the Lease, SFMTA must install a concrete bulk head where the tunnel bores intersect the property boundary of the Property, install a cap on the Excavation Shaft at the current grade, and backfill any other excavation work by SFMTA (other than the Excavation Shaft). SFMTA will not be required to remove the Excavation Shaft or the tunnel bores.

### Environmental Review

On August 7, 2008, the San Francisco Planning Commission certified in Planning Commission Motion No. 17668 that the Final Supplemental Environmental Impact Statement/Supplemental Environmental Impact Report (2008 SEIS/SEIR) for the Central Subway/Third Street Light Rail Phase 2 was prepared in compliance with the California Environmental Quality Act (California Public Resources Code section 21000, et seq.) (CEQA), the CEQA Guidelines, and Administrative Code Chapter 31. On August 19, 2008, under Resolution No. 08-150, the SFMTA Board of Directors adopted Project Alternative 3B, Fourth / Stockton Alignment with semi-exclusive surface rail operations on Fourth Street and the North Beach Construction Variant, which contemplated the eventual retrieval of TBMs from a retrieval shaft to be constructed on Columbus Avenue, and adopted the findings and conclusions with respect to the SEIS/SEIR certified by the San Francisco Planning Commission and required by CEQA. These findings included a mitigation monitoring and reporting program and a statement of overriding considerations.

On January 31, 2013, in an Addendum to the 2008 SEIS/SEIR, the City's Planning Department determined that removing the TBMs at the Property (Option 4), and allowing the construction of the Revised Owner Project, would not require a supplemental or subsequent EIR.

### Construction and Demolition costs to access the Property

The SFMTA expects the construction methods at the new site to be the same as those planned, designed, vetted, and approved for the retrieval shaft on Columbus Avenue. Additional design, demolition, construction and related costs for implementing Option 4 are estimated to not exceed \$6 million.

## **ALTERNATIVES CONSIDERED**

The principal alternatives considered include leaving the TBM under Stockton Street or Columbus Avenue and the previously approved plan to remove the TBMs through an excavation shaft on Columbus Avenue.

## **FUNDING IMPACT**

The lease will allow the SFMTA to demolish the building and use the site for retrieval of the TBMs. Key financial lease terms are as follows:

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- The SFMTA will pay the landlord \$400,000 per year in rent.
- The SFMTA will reimburse the landlord up to \$450,000 for certain out-of-pocket costs.
- The SFMTA will reimburse the landlord up to \$1,500,000 for inflationary construction cost increases (if any) due to delaying its project.
- The SFMTA will reimburse the landlord up to \$400,000 for partially removing and backfilling the SFMTA excavation shaft when the landlord builds its project.

The additional design, demolition, construction and related costs for implementing Option 4 are estimated to not exceed \$6 million. The funding will come from various local sources, including SFMTA reserve funds, fund balance, and operating savings. Subject to FTA concurrence, the SFMTA proposes to seek reimbursement of these funds from any available Central Subway Project contingency funding at the completion of the Central Subway Project.

**OTHER APPROVALS RECEIVED OR STILL REQUIRED**

The City Attorney's Office has reviewed this Calendar Item. The Lease does not require approval from any other City agency or body.

**RECOMMENDATION**

Staff recommends that the SFMTA Board of Directors authorize the Director of Transportation to execute the Lease in substantially the form enclosed with this calendar item and to make any modifications to the Lease necessary or advisable to consummate the purposes and intent of the resolution that are consistent with all applicable laws and SFMTA Board policies and approve total expenditures resulting from use of the Property to facilitate tunnel construction in an amount not to exceed \$9,150,000, including total Lease costs not to exceed \$3,150,000 and total additional demolition, design, construction and related costs not to exceed \$6,000,000.

SAN FRANCISCO  
MUNICIPAL TRANSPORTATION AGENCY  
BOARD OF DIRECTORS

RESOLUTION No. \_\_\_\_\_

WHEREAS, On August 7, 2008, the San Francisco Planning Commission certified in Planning Commission Motion No. 17668 that the Final Supplemental Environmental Impact Statement/Supplemental Environmental Impact Report (SEIS/SEIR) for the Central Subway/Third Street Light Rail Phase 2 (Project) was in compliance with the California Environmental Quality Act (California Public Resources Code section 21000, et seq.) (CEQA), the CEQA Guidelines, and Administrative Code Chapter 31; and,

WHEREAS, On August 19, 2008, under Resolution No. 08-150, the Board of Directors of the San Francisco Municipal Transportation Agency (SFMTA) adopted Project Alternative 3B, Fourth / Stockton Alignment with semi-exclusive surface rail operations on Fourth Street and the North Beach Construction Variant, which contemplated the eventual retrieval of tunnel boring machines (TBMs) from a retrieval shaft to be constructed on Columbus Avenue, and adopted the findings and conclusions with respect to SEIS/SEIR certified by the San Francisco Planning Commission as required under CEQA, including a mitigation monitoring and reporting program and a statement of overriding considerations; and,

WHEREAS, Certain members of the North Beach community are concerned that the approved TBM retrieval shaft location will impede traffic on Columbus Avenue and disrupt businesses, and requested that the SFMTA evaluate options to removing the TBMs from the Columbus Avenue retrieval shaft location; and,

WHEREAS, One of the options evaluated, Option 4, removal of the TBMs at the property at 1731-1741 Powell Street and 601 Columbus Avenue (Property), will address the disruption on the North Beach community caused by the TBM removal shaft construction and operation, without impeding any future, but unplanned, extension of the T-Third to North Beach/Fisherman's Wharf; and,

WHEREAS, In order to not impact the Project construction schedule, implementation of Option 4 would require that additional local funds be appropriated, and that all review (including environmental review) and approvals be obtained by April 1, 2013; and,

WHEREAS, The SFMTA Board of Directors adopted a motion on December 4, 2012, directing SFMTA staff to pursue Option 4 if it was feasible; and,

WHEREAS, On January 31, 2013, in an Addendum to the 2008 Phase 2 Central Subway Supplemental Environmental Impact Report/Environmental Impact Statement for the SFMTA Third Street Light Rail Program, the City's Planning Department determined that Option 4, would not require a subsequent environmental impact report because none of the circumstances calling for a subsequent environmental impact report found in California Public Resources Code section 21166 have occurred; and,

WHEREAS, SFMTA staff anticipate that the increased construction costs for performing Option 4 rather than retrieving the TBMs at the approved retrieval shaft in Columbus Avenue will not exceed \$6 million ; and,

WHEREAS, The Property owner, The Palace at Washington Square LLC (Owner), has a conditional use permit that allows the rehabilitation of the existing building at the Property into a mixed-use development (Owner's Approved Project), but SFMTA's construction of the TBM retrieval shaft at the Property (Excavation Shaft) would require full demolition of that building; and,

WHEREAS, The Owner submitted an application for a conditional use authorization to allow for the construction of Owner's Approved Project with new construction (Owner's Modified Project); and an ordinance amending the Planning Code to create a special use district and modify certain maps in the Planning Code (SUD/Map Ordinance), which would allow for the construction of Owner's Modified Project was submitted to the City's Board of Supervisors in Board File No. 130019 on January 8, 2013, and modified by substitute legislation submitted on January 29, 2013 (SUD Ordinance); and City's Planning Commission approved a conditional use authorization (Case No. 2013-0050.CTZ) for Owner's Modified Project (Modified CUP) and recommended that the Board of Supervisors adopt the SUD/Map Ordinance, on February 14, 2013; and,

WHEREAS, SFMTA staff and Owner negotiated a lease (Lease) that would allow SFMTA to construct the Excavation Shaft and extract the TBMs at the Property; and,

WHEREAS, The Lease has a term of two years, with annual rent commencing only if, by April 1, 2013, the SUD/Map Ordinance and the Modified CUP become effective and the Federal Transit Administration makes a written determination that extracting the TBMs from the Property requires no supplemental environmental review under 23 CFR Section 771.130(c) of the regulations implementing the National Environmental Policy Act (NEPA Finding); and,

WHEREAS, SFMTA would have the right to immediately terminate the Lease if the SUD/Map Ordinance and the Modified CUP do not become effective, and the NEPA Finding is not made, by April 1, 2013, if Owner's lender does not timely provide SFMTA with a consent and non-disturbance agreement, if a court of competent jurisdiction issues an injunction with regard to the demolition of the building or the construction of the Excavation Shaft, or if SFMTA learns of any adverse conditions at the Property during the first six months of the Lease term that would delay completion of the Excavation Shaft by more than 30 days, and SFMTA would further have the right to terminate the Lease for any other reason after first delivering no less than 120 days prior notice to Owner; and,

WHEREAS, The total annual rent for the Lease would be \$400,000 per year, and SFMTA would reimburse Owner (i) up to \$450,000 for its costs to review SFMTA's proposed uses of the Property and to negotiate the Lease, to prepare a new conditional use permit application for the Owner's Modified Project, to make necessary modifications to its project plans to address the changed property conditions that will be caused by SFMTA's use of the Property, to pay property taxes for the Property during the term of the Lease, and to pay the installation fee charged by SFMTA for any approved white zone or bulb out that Owner is required to install as part of the Owner's Modified Project; (ii) up to \$1,500,000 for any

construction cost increases (Construction Cost Increase) caused by delaying the construction of Owner's Approved Project for the Lease, provided that Owner gets a site permit for the Owner's Modified Project during the time period specified in the Modified CUP; and (iii) up to \$400,000 for removing a portion of the Excavation Shaft walls, and backfilling the Excavation Shaft, to accommodate the construction of the Owner's Modified Project; and,

WHEREAS, SFMTA would provide a refundable security deposit of \$66,666 and a refundable deposit of \$750,000 (Construction Account) to be used for the Construction Cost Increase if the Construction Account is required by Owner's lender or future construction lender to secure a construction loan for the Owner's Modified Project, with any funds in the Construction Account in excess of the determined Construction Cost Increase to be returned to SFMTA; and,

WHEREAS, The Lease has been placed with the Secretary to the SFMTA Board of Directors and has been available for public review since February 15, 2013, and the SFMTA Board of Directors has determined that delaying approval of the Lease until it has been available for public review for ten days would delay the commencement of retrieval shaft activities at the Property and cause Central Subway Project construction delays; now therefore be it

RESOLVED, That based on its review of the SEIS/SEIR and the Addendum dated January 31, 2013, the SFMTA Board of Directors finds that (1) modifications incorporated into the project will not require important revisions to the SEIS/SEIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects, (2) no substantial changes have occurred with respect to the circumstances under which the project will be undertaken which would require major revisions to the SEIS/SEIR due to the involvement of new environmental effects, or a substantial increase in the severity of effects identified in the SEIS/SEIR, and (3) no new information of substantial importance to the project has become available which would indicate (a) the project has significant effects not discussed in the SEIS/SEIR, (b) significant environmental effects will be substantially more severe, (c) mitigation measures or alternatives found not feasible which would reduce one or more significant effects have become feasible, or (d) mitigation measures or alternatives which are considerably different from those in the SEIS/SEIR would substantially reduce one or more significant effects on the environment; and adopts and incorporates by reference the findings adopted in SFMTA Board Resolution 08-150; and be it further

RESOLVED, That the SFMTA Board of Directors authorizes the Director of Transportation to execute a two-year lease (Lease), as tenant, with The Palace at Washington Square (Owner) for the premises at 1731-1741 Powell Street and 601 Columbus Avenue (Property), for an annual rent of \$400,000 plus reimbursement of certain Owner costs, not to exceed \$2,350,000 related to the SFMTA's use of the Property to build the Central Subway Project tunnel and to make any modifications to the Lease necessary or advisable to consummate the purposes and intent of this resolution that are consistent with all applicable laws and SFMTA Board policies; and be it further

RESOLVED, That the SFMTA Board of Directors approves total expenditures resulting from use of the Property to facilitate tunnel construction in an amount not to exceed \$9,150,000, including total Lease costs not to exceed \$3,150,000 and total additional demolition, design, construction and related costs not to exceed \$6,000,000 to be funded from SFMTA reserves,



fund balance and operating savings; and authorizes SFMTA staff to, with FTA concurrence, seek reimbursement of all authorized costs associated with implementing "Option 4" from Central Subway Project contingency funding at the completion of the Central Subway Project.

I certify that the foregoing resolution was adopted by the San Francisco Municipal Transportation Agency Board of Directors at its meeting of February 19, 2013.

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Secretary to the Board of Directors  
San Francisco Municipal Transportation Agency

**Enclosure 2**  
**Lease and Exhibits**

LEASE

between

THE PALACE AT WASHINGTON SQUARE LLC (in formation),

as Landlord

and

CITY AND COUNTY OF SAN FRANCISCO,  
as Tenant

For the lease of  
1731-1741 Powell Street and 601 Columbus Avenue  
San Francisco, California 94133

February 13, 2013

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LIST OF EXHIBITS

- EXHIBIT A – Legal Description of Premises*
- EXHIBIT B – Depiction of Premises and Excavation Area*
- EXHIBIT C – Notice of Lease Dates*
- EXHIBIT D – Form of Lender Consent*
- EXHIBIT E – Intentionally deleted*
- EXHIBIT F – City Project Plans and Specifications*
- EXHIBIT G – Property Reports*
- EXHIBIT H – Form of Memorandum of Lease*

- Schedule 1-- Landlord Consultant Rates, Expenses, and Scope of Work*
- Schedule 2 – Modified CUP and SUD Ordinance*

## LEASE

THIS LEASE (this "Lease"), dated for reference purposes only as of February 13, 2013, is by and between THE PALACE AT WASHINGTON SQUARE LLC, a California limited liability company (in formation) ("Landlord"), and the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation ("City" or "Tenant"), acting by and through the San Francisco Municipal Transportation Agency ("SFMTA").

Landlord and City hereby agree as follows:

### 1. BASIC LEASE INFORMATION

The following is a summary of basic lease information (the "Basic Lease Information"). Each item below shall be deemed to incorporate all of the terms in this Lease pertaining to such item. In the event of any conflict between the information in this Section and any more specific provision of this Lease, the more specific provision shall control.

Lease Reference Date:	February 12, 2013
Landlord:	THE PALACE AT WASHINGTON SQUARE LLC (in formation)
Tenant:	CITY AND COUNTY OF SAN FRANCISCO
Building ( <u>Section 2.1</u> ):	The building ("Building") located at 1731-1741 Powell Street and 601 Columbus Avenue, San Francisco, California
Premises ( <u>Section 2.1</u> ):	The real property which is more particularly described on <u>Exhibit A</u> , together with all improvements located on the real property (including the Building)
Rentable Area of Premises ( <u>Section 2.1</u> ):	Approximately 11,835 rentable square feet
Term ( <u>Section 3</u> ):	Lease Commencement Date: The date this Lease is executed by Landlord and Tenant  Expiration Date: The second anniversary of the Rent Commencement Date (as defined in <u>Section 4.1</u> ), subject to any early termination pursuant to <u>Section 3.3</u>
Annual Base Rent ( <u>Section 4.1</u> ):	\$400,000
Rent Commencement Date ( <u>Section 4.1</u> ):	The date, if any, upon which all of the following have occurred: (i) the special use district ordinance for Board File No. 130019, submitted to the City's Board of Supervisors on January 8, 2013, as modified by substitute legislation submitted on January 29, 2013, in the form attached hereto as <u>Schedule 2</u> (the "SUD Ordinance"), shall have become effective, (ii) City's Planning Commission shall have

approved the conditional use permit motion (Case No. 2013-0050.CTZ), in the form attached hereto as Schedule 2 ("Modified CUP"), (iii) Landlord shall have delivered possession of the Premises to City in the condition required in Section 2, and (iv) the Federal Transit Administration shall have made a written determination that the extraction of subsurface tunnel boring machines ("TBMs") at the Premises requires no supplemental environmental review under 23 CFR Section 771.130(c) of the regulations implementing the National Environmental Policy Act ("NEPA")

Security Deposit (Section 4.4): \$66,666.00

Permitted Uses (Section 5.1): "Permitted Uses" shall mean inspecting the Building and Premises, demolishing the Building, constructing the Excavation Shaft (as defined in Section 7.1), tunneling two TBMs across the Property to the Excavation Shaft, removing the TBMs, construction staging, and parking

Delivery of Premises (Section 2): Landlord shall deliver the Premises vacant and free of any tenancies and free of the personal property of Landlord or any previous tenant or owner

Utilities and Services (Section 9): Obtained by City at City's expense

Notice Address of Landlord (Section 23.1): The Palace at Washington Square LLC  
2731 Mission Street  
San Francisco, California 94110-3103  
Attn: Joel Campos

Landlord Contact Telephone No.: (415) 669-2967

Notice Address for Tenant (Section 23.1): San Francisco Municipal Transportation Agency  
1 South Van Ness Avenue, 8<sup>th</sup> Floor  
San Francisco, CA 94103  
Attn: Real Estate Section  
Re: Pagoda Palace  
Fax No.: (415) 701-4341

ith a copy to: Office of the City Attorney  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4682  
Attn: Real Estate/Finance Team  
Re: Pagoda Palace  
Fax No.: (415) 554-4755

Key Contact for Tenant: Senior Manager



Tenant Contact Telephone No.:	SFMTA Real Estate Section Finance and Information Technology Division 1 South Van Ness, 8 <sup>th</sup> Floor San Francisco, CA 94103 (415) 701-4323
Alternate Contact for Tenant:	Manager SFMTA Real Estate Section Finance and Information Technology Division 1 South Van Ness, 8 <sup>th</sup> Floor San Francisco, CA 94103
Alternate Contact Telephone No.:	(415) 701-4794
Landlord's Broker ( <u>Section 23.8</u> ):	Martin Kirkwood
City Right of First Offer ( <u>Section 22.1</u> ):	City shall have the right of first offer to purchase the Premises on the terms and conditions set forth in <u>Section 22.1</u>
Out of Pocket Costs ( <u>Section 4.2</u> )	City shall reimburse Landlord up to \$450,000 for its Out of Pocket Costs (as defined in <u>Section 4.2</u> ) on the terms and conditions set forth in <u>Section 4.2</u>
Construction Cost Increase ( <u>Section 4.3</u> )	City shall reimburse Landlord up to \$1,500,000 for any Construction Cost Increase (as defined in <u>Section 4.3</u> ) on the terms and conditions set forth in <u>Section 4.3</u>
Reimbursement of Backfill and Removal Costs ( <u>Section 4.4</u> )	City shall reimburse Landlord up to \$400,000 for Removal Work and the Backfill Work (as defined in <u>Section 4.4</u> ) associated with lowering the Excavation Shaft

## 2. PREMISES

In consideration of the other terms, covenants, and conditions hereof, Landlord leases to City and City leases from Landlord, subject to the provisions of this Lease, the premises identified in the Basic Lease Information, which includes the real property described in the attached Exhibit A and depicted in the attached Exhibit B, and all other improvements on or appurtenances thereon, including the Building (the "Premises"). On the Lease Commencement Date, Landlord shall, at its sole cost, deliver the Premises to City vacant and free of any tenancies and any personal property of Landlord any previous tenant or owner.

### **3. TERM**

#### **Term of Lease**

The Premises are leased for a term (the "Term") commencing on the Rent Commencement Date and ending on the Expiration Date specified in the Basic Lease Information, or such earlier date on which this Lease terminates pursuant to the provisions of this Lease. Notwithstanding the foregoing, in no event shall the Term commence prior to the Effective Date, as defined in Section 23.30 below.

The dates on which the Term commences and terminates pursuant hereto are referred to respectively as the "Lease Commencement Date" and the "Expiration Date". The "Rent Commencement Date" shall be the date, if any, upon which all of the following have occurred: (i) the SUD Ordinance shall have become effective, (ii) the Modified CUP shall have been issued, (iii) Landlord shall have delivered possession of the Premises to City in the condition required in Section 2, and (iv) the Federal Transit Administration shall have determined that extraction of the TBMs at the Premises requires no supplemental environmental review under 23 CFR Section 771.130(c) of the regulations implementing NEPA. Promptly after the Rent Commencement Date, Landlord and Tenant shall execute a letter substantially in the form of Exhibit C attached hereto, confirming the Lease Commencement Date, the Rent Commencement Date, and the Expiration Date, but either party's failure to do so shall not affect the commencement of the Term.

If the SUD Ordinance approved by the City's Board of Supervisors materially differs from the form attached as Schedule 2 to this Lease, Landlord may, in its sole discretion, revoke Landlord's agreement to (and signature of) this Lease by delivering written notice of such revocation to SFMTA within the three (3) day period immediately following the adoption of such modified SUD Ordinance by the City's Board of Supervisors. If the Modified CUP approved by the City's Planning Commission materially differs from the form attached as Schedule 2 to this Lease, Landlord may, in its sole discretion, revoke Landlord's agreement to (and signature of) this Lease by delivering written notice of such revocation within the three (3) day period the City's Planning Commission approves the Modified CUP. If SFMTA unilaterally modifies this Lease between the period that Landlord signs the Lease and SFMTA signs this Lease, Landlord may, in its sole discretion, revoke Landlord's agreement to (and signature of) this Lease by delivering written notice of such revocation to City within three (3) business days of receiving a fully executed copy of this Lease with such City changes. If Landlord timely revokes its agreement to (and signature of) this Lease, this Lease shall immediately cease to be of any force or effect.

#### **Delivery of Possession**

Landlord shall use its best efforts to deliver possession of the Premises in the condition required by this Lease on or before the Lease Commencement Date. However, if Landlord is unable to timely deliver possession of the Premises as provided above, then the validity of this Lease shall not be affected by such inability to timely deliver possession.

#### **Early Termination**

(a) If the Rent Commencement Date does not occur on or before April 1, 2013, either party shall have the right to immediately terminate this Lease by delivering written notice of such termination to the other party on or before April 15, 2013.

(b) If the beneficiary of any deed of trust encumbering record title of the Property as of the Lease Commencement Date fails to duly execute and deliver a Consent and Nondisturbance Agreement in substantially the form attached hereto as Exhibit D (the "Lender Consent") on or before the Rent Commencement Date, either party shall have the right to

immediately terminate this Lease by delivering written notice of such termination to the other party on or before tenth (10<sup>th</sup>) business day immediately following the Rent Commencement Date.

(c) If, at any time during the six (6) month period immediately following the Rent Commencement Date (the "Construction Period"), City discovers any condition at the Property (including, but not limited to, the discovery of archeological artifacts, hazardous materials, or other adverse conditions) that would, in City's reasonable judgment, delay City's completion of the Excavation Shaft by more than thirty (30) days, City shall have the right to immediately terminate this Lease by delivering written notice of such termination to Landlord prior to the expiration of the Construction Period.

(d) If, at any time during the Construction Period, a court of competent jurisdiction issues an injunction that enjoins (permanently or temporarily) all or any portion of City's demolition of the Building or construction of the Excavation Shaft, or extends the initial period of time set forth in such an injunction (each, an "Injunction Event"), City shall have the right to immediately terminate this Lease by delivering written notice of such termination to Landlord on or before the fifth (5<sup>th</sup>) day immediately following the date of such Injunction Event.

(e) City shall have the right to terminate this Lease for any other reason not specified in the foregoing subsections (a)-(d) by delivering not less than one hundred fifty (150) days' prior written notice of such termination to Landlord.

#### **4. RENT AND PAYMENT OF ADDITIONAL COSTS**

##### **Base Rent**

Prior to entering into negotiations with City for this Lease, Landlord's principal intended to construct commence construction of the project described in a Conditional Use Permit (Case No. 2007-1117.CV) ("Approved Landlord Project") at the Premises in 2013. As partial consideration for Landlord's agreement to delay such construction and lease the Premises to City pursuant to this Lease, and Landlord's lost opportunity costs with respect to such delay, City agrees to pay the annual Base Rent specified in the Basic Lease Information (the "Base Rent") and to provide all other consideration to Landlord, whether characterized as "Rent" or otherwise, provided under this Lease.

Beginning on the Rent Commencement Date, City shall pay the Base Rent to Landlord during the Term. The Base Rent shall be payable in equal consecutive monthly payments on or before the first day of each month, in advance, at the address specified for Landlord in the Basic Lease Information, or such other place as Landlord may designate in writing upon not less than thirty (30) days' advance notice. City shall pay the Base Rent without any prior demand and without any deductions or setoff except as otherwise provided in this Lease. If the Rent Commencement Date occurs on a day other than the first day of a calendar month or the Expiration Date occurs on a day other than the last day of a calendar month, then the monthly payment of the Base Rent for such fractional month shall be prorated based on a thirty (30)-day month.

If City fails to make any monthly installment of Base Rent by the tenth (10<sup>th</sup>) day of such month, or (with respect to the first installment of Base Rent, by the tenth (10<sup>th</sup>) day after the Rent Commencement Date), or fails to pay any other amount owed by City to Landlord under this Lease when the same is due, City shall pay to Landlord on demand a late charge equal to five percent (5%) of such delinquent monthly installment of Base Rent or such other amount owed by City to Landlord, as applicable. The Base Rent and all other amounts to be paid by City to Landlord pursuant to this Lease shall be sometimes collectively referred to in this Lease as "Rent."

The parties acknowledge and agree that the Base Rent has been arrived at by way of compromise. Therefore, the Base Rent shall not be used by Landlord or Tenant for the purposes of attempting to value the Premises.

### **Reimbursement of Out of Pocket Costs**

The Approved Landlord Project contemplated the rehabilitation of the Building, and Landlord submitted a site permit application for the Approved Landlord Project to City's Department of Building Inspection in 2012. Landlord will need to submit a new site permit application for the project described in the Modified CUP (the "Modified Landlord Project") and may need to alter the Modified Landlord Project designs and drawings to reflect changed Property conditions resulting from City's demolition of the Building or construction of the Excavation Shaft. Subject to the requirements of this Section, City shall reimburse to Landlord up to a maximum amount of \$450,000 for (a) the costs, fees, and brokerage commissions (collectively, "Out of Pocket Costs") incurred by Landlord since and including December of 2012 in having its building contractors, attorneys, brokers, architects, structural engineers, construction managers, accountants, financial advisors, and other consultants (each of whom shall be duly licensed for such occupation by the State of California, to the extent such licensing is required for such profession) (each, a "Landlord Consultant") negotiate and evaluate the Lease (including without limitation its proposed terms, conditions, value, construction scope, allowances, and potential impact on the Modified Landlord Project), review all materials provided by City in connection with this Lease and City's proposed improvements at the Premises, prepare a new conditional use permit application for the construction of the Modified Landlord Project through new construction rather than through a rehabilitation of the Building, review and comment upon the SUD Ordinance, construction management and oversight on behalf of Landlord of the City's work at the Premises pursuant to this Lease (the "City Work"), and re-design the Modified Landlord Project to address any modifications reasonably required as a result of the City Work after the Modified CUP is approved, provided that the fees charged by a Landlord Consultant shall not exceed the applicable hourly rates in the attached Schedule 1 (to the extent such Landlord Consultant is named in Schedule 1), and shall be for the scope of work and expenses specified above, (b) to the extent that any costs, fees, and expenses incurred by Landlord to submit a complete site permit application to the City for the Modified Landlord Project upon the termination of this Lease exceed, or are in addition to, the costs, fees, and expenses Landlord incurred in submitting a complete site permit application to the City for the Approved Landlord Project, including without limitation, any additional materials required for complete site permit applications as of the termination of this Lease that were not required for a complete site permit application as of December 4, 2012, (c) any increase in fees or exactions (including transportation improvement fees, transit fees, child care requirements or in-lieu fees, housing (including affordable housing) requirements or fees, residential hotel and residential unit replacement requirements or in lieu fees, dedication or reservation requirements, water and sewer capacity charges, and obligations for on-or off-site improvements, or school district fees, and any fees, taxes, assessments impositions imposed by non-City agencies) assessed or payable at the time a site permit for the Modified Landlord Project is issued, as compared to the fees or exactions assessed or payable if the site permit application or other application for the Approved Landlord Project had been issued on December 4, 2012, (d) the initial fee charged by City to install a white zone at the Powell Street frontage for the Property and a bulb out at the corner of Powell Street and Columbus Avenue that abuts the Premises, subject to receipt of all regulatory approvals required for such white zone and bulb out, and (e) Landlord's payment of Real Property Taxes (as defined in Section 6) during the Term.

City acknowledges that Landlord may from time to time elect to retain Landlord Consultants in addition to, or different from, the Landlord Consultants named in Schedule 1, but such additional or different Landlord Consultants shall be paid at no more than the appropriate hourly rate established for a named Landlord Consultant performing a comparable role. If there is an additional or different Landlord Consultant that does not have such a comparable role to the named Landlord Consultant, the fee charged by such additional or different Landlord Consultant

shall be commercially reasonable. All reimbursements made by City pursuant to this Section 4.2 shall be in lawful money of the United States of America, in immediately-available funds, and without offset or deduction.

Prior to any such reimbursement, Landlord shall submit to City a copy of each invoice Landlord receives for such costs, together with reasonable backup information regarding the services provided or amount charged and Landlord's payment of such costs. City shall have ten (10) business days following the receipt of each invoice to object to such invoice by written notice to Landlord, in which case Landlord, the Landlord Consultant and City shall meet and confer within five (5) business days following the end of such ten (10) business day period to discuss such invoice and, either approve such invoice or, if City and Landlord mutually agree, adjust the amount to be paid by City, which amount shall be based on the applicable rates set forth in the attached Schedule 1, or if there are no such applicable rates thereon, then on commercially-reasonable rates. If City does not object to an invoice within such ten (10) business day period, City shall pay Landlord the entire amount due on or before the twenty-fourth (24<sup>th</sup>) day following the City's receipt of the original invoice. If City does object to an invoice within such ten (10) business day period, City shall pay Landlord the amount due that is not in dispute on or before the twenty-fourth (24<sup>th</sup>) day following the City's receipt of the original invoice. City shall pay Landlord the amount due that is in dispute on or before the twenty-fourth (24<sup>th</sup>) day following City's later approval thereto or the parties' mutual agreement to modify the disputed portion of such invoice.

City shall not unreasonably withhold, condition, or delay its approval of any such invoice. The parties shall meet within the ten (10) business day period immediately following City's notification to Landlord of its disagreement to an invoice. If the parties do not agree on the amount of the invoice that is in dispute on or before the thirty-fifth (35<sup>th</sup>) day following the City's receipt of the original invoice, then either party may elect to submit such dispute to binding arbitration at anytime thereafter by mutually selecting an arbitrator from a then-existing arbitrator list of JAMS, Inc., in San Francisco, California, to resolve such dispute in accordance with the laws of the State of California pursuant to the JAMS Streamlined Arbitration Rules and Procedures. The parties shall each pay one-half (1/2) of the mutually-selected arbitrator's fee for such service. If the parties are unable to mutually agree to an arbitrator, each party shall select an arbitrator from the existing JAMS list, and those two arbitrators will then select a third arbitrator from the JAMS list. The third arbitrator selected shall resolve such dispute in accordance with the laws of the State of California pursuant to the JAMS Streamlined Arbitration Rules and Procedures. In such event, the parties shall each pay the fee charged by its selected arbitrator for such service, together with one-half (1/2) of the third arbitrator's fee for such service.

### **Reimbursement of Construction Cost Increases**

(a) An "Approved Construction Company" shall mean a construction company that holds a Class A license and has experience constructing mixed use developments in the San Francisco Bay Area. Subject to the requirements of this Section, and provided (i) this Lease is not revoked or terminated pursuant to Section 3.1, Section 3.3(a) or Section 3.3(b) or with respect to an Injunction Event for the demolition of the Building pursuant to Section 3.3(d), and (ii) Landlord receives a site permit to construct the Modified Landlord Project within the time period for such receipt specified in the Modified CUP (as such time period may be extended from time to time, and SFMTA agrees that it will not oppose any such extension due to any holdover at the Premises by City beyond the Expiration Date) (the "Application Period"), City shall reimburse Landlord, as additional consideration for this Lease, up to a maximum amount of \$1,500,000, for any Construction Cost Increase (as defined below). All reimbursements made by City pursuant to this Section 4.3 shall be in lawful money of the United States of America, in immediately-available funds, and without offset or deduction. If Landlord does not timely receive such site permit, Landlord shall return the entire Construction Cost Increase

reimbursement amount previously paid by SFMTA to SFMTA within the thirty (30) day period immediately following the expiration of the Application Period.

The "Construction Cost Increase" shall mean the lower amount of (i) the Future Construction Amount (defined as follows) less the Base Construction Amount (defined as follows), and (ii) \$1,500,000. The "Future Construction Amount" shall mean the projected cost to construct the Modified Landlord Project during the one (1) year period following the termination of this Lease, as established by a commercially reasonable construction bid (the "Future Bid") for the Project Scope of Work and construction drawings for the Modified Landlord Project that is prepared by an Approved Construction Company during the final sixty (60) days of the Term (as may be revised pursuant to this Lease, including but not limited to Section 3.3(c) and, with respect to an Injunction Event as to the construction of the Excavation Shaft, Section 3.3(d)). Landlord shall obtain the Future Bid at its sole cost, and shall deliver a copy of Future Bid to City prior to the termination of this Lease. The "Base Construction Amount" shall be the Future Construction Amount reduced proportionately to reflect the reduction (if any) in general construction cost increases for the San Francisco Bay Area between the date of the Future Bid and the Lease Commencement Date, as reflected in the Construction Cost Index for San Francisco published in the Engineering News-Record for February of 2013 and for the month in which the termination of this Lease occurs.

City shall not unreasonably withhold, condition, or delay its approval of the Future Bid. If City believes Landlord's submitted Future Bid is not commercially reasonable, then within fourteen (14) days of receiving the Future Bid, City shall notify Landlord of such matter in writing, and specifically state in such written notice the scope and cost of the portion of the Future Bid City believes is not commercially reasonable. In the event the City provides such notice of its contention that the Future Bid is not commercially reasonable, then within seven (7) days of delivering written notice thereof to Landlord, the parties and their appropriate consultants shall meet to discuss such matter. If the parties are unable to reach agreement on such matter within thirty (30) days of City's delivery of such notice, then the parties shall retain a mutually-selected Approved Reviewer (as defined below) to review the submitted Future Bid, and instruct such mutually-selected Approved Reviewer to provide, within thirty (30) days of receiving such submitted Future Bid, its determination as to whether the Future Bid as a whole is commercially reasonable; and if the Approved Reviewer determines that the Future Bid is not commercially reasonable, then the Approved Reviewer is authorized to provide suggested modifications with respect to the scope and cost of the portion of the Future Bid that City believes is not commercially reasonable, for the parties' consideration. Each party shall pay fifty percent (50%) of the fee charged by the mutually-selected Approved Reviewer to review the submitted Future Bid and provide its suggested modifications (if any) thereto. An "Approved Reviewer" shall mean Webcor Builders, Inc., Cahill Construction, Inc., or any other licensed construction company mutually selected by the parties.

If the parties do not mutually agree on the selection of an Approved Reviewer within thirty-five (35) days of City's receipt of the Future Bid, then the parties agree to submit such dispute to binding arbitration by mutually selecting an arbitrator from a then-existing arbitrator list of JAMS, Inc., in San Francisco, California, to resolve such dispute in accordance with the laws of the State of California pursuant to the JAMS Streamlined Arbitration Rules and Procedures. The parties shall each pay one-half (1/2) of the mutually-selected arbitrator's fee for such service. If the parties are unable to mutually agree to an arbitrator, each party shall select an arbitrator from the existing JAMS list, and those two arbitrators will then select a third arbitrator from the JAMS list. The third arbitrator selected shall resolve such dispute in accordance with the laws of the State of California pursuant to the JAMS Streamlined Arbitration Rules and Procedures. In such event, the parties shall each pay the fee charged by its selected arbitrator for such service, together with one-half (1/2) of the third arbitrator's fee for such service.

Landlord represents that its principal made preparations to immediately develop the Landlord Approved Project in 2013 and agreed to delay construction of the Landlord Approved Project on the express condition and assumption that City, at its sole cost and expense, will demolish the Building (provided this Lease is not revoked or terminated pursuant to Section 3.1, Section 3.2(a), or Section 3.2(b)) or with respect to an Injunction Event for the demolition of the Building pursuant to Section 3.2(d)) and perform its other obligations under this Lease. Landlord intends to commence construction of the Modified Landlord Project immediately upon the expiration of this Lease. For these reasons, Landlord believes it will suffer significant damage if City fails to perform its material obligations under this Lease.

**(b)** Provided that (i) Landlord delivers written evidence that the Modified Landlord Project's potential or actual construction lender, or the lender that currently is the beneficiary under the deed of trust encumbering the Premises and recorded in the Official Records of San Francisco County on June 25, 2004, as Instrument No. 2004-H752043 -00 (collectively, "Landlord's Lender") requires a deposit of up to \$750,000 as a condition to extending such construction loan to Lender, (ii) such deposit will be held by Landlord's Lender in a segregated, interest-bearing account ("Construction Account") that will only be used to pay for the Modified Landlord Project construction costs, unless otherwise disbursed to City pursuant to a written agreement between City and Landlord's Lender (and if required by Landlord's lender, Landlord shall also be a party) that governs the use and disbursement of the Construction Account (the "Account Agreement"). The Account Agreement shall require the delivery of monthly statements to City summarizing the balance of the Construction Account as of the date of such statement. The Account Agreement shall provide for the automatic disbursement of the total amount deposited in the Construction Account by City, together with all interest earned thereon, to City within the thirty (30) day period immediately following the termination of this Lease under subsections (a) or (b) of Section 3.3 or under Section 3.3(d) with respect to an Injunction Event for the demolition of the Building and, if such Account Agreement is with a Landlord's potential construction lender for the Modified Landlord Project, such Account Agreement shall further specify that the total amount deposited in the Construction Account by City, together with all interest earned thereon, is immediately and automatically disbursed to City if such potential construction lender does not timely issue a written commitment to make such construction loan to Landlord. To the extent that Landlord is unable to secure such a commitment from its lender, then Landlord will have 120 days to secure a commitment from another lender and have the Construction Account transferred to such other lender. Notwithstanding the foregoing provisions of this Section 4.3(b), Landlord and Tenant may mutually agree to have the Construction Account held and maintained by a third party escrow holder (as opposed to Landlord's Lender) under essentially the same terms and conditions as set forth in this Section 4.3.

**(c)** If City approves the Future Bid as delivered by Landlord, and the Construction Cost Increase is more than the total funds in the Construction Account as of the date the Future Bid is delivered to City, City shall pay the balance of the amount of such difference (such that the total of the funds in the Construction Account as of the date the Future Bid is delivered to City, plus the balance of the Construction Cost Increase paid to Landlord pursuant to this grammatical paragraph, equals the Construction Cost Increase) to Landlord as additional consideration under this Lease within thirty (30) days after the Future Bid is delivered to City.

If City approves the Future Bid as delivered by Landlord, and the Construction Cost Increase is less than the total funds in the Construction Account as of the date the Future Bid is delivered to City, such excess balance of the Construction Account shall be returned to City within thirty (30) days after the Future Bid is delivered to City.

If City does not approve of a portion of the Future Bid pursuant to Section 4.3(a), but approves a portion of the Future Bid that establishes a Construction Cost Increase, and such mutually approved portion of the Construction Cost Increase equals or exceeds the total funds in

the Construction Account as of the date the Future Bid is delivered to City, City shall pay the balance of the amount of such undisputed difference, if any (such that the total of the funds in the Construction Account as of the date the Future Bid is delivered to City, plus the balance of the Construction Cost Increase paid to Landlord pursuant to this grammatical paragraph, equals the mutually approved Construction Cost Increase) to Landlord as additional consideration under this Lease within thirty (30) days after the Future Bid is delivered to City; and City shall immediately authorize Landlord's Lender to disburse the entire amount of the Construction Account to pay for the Modified Landlord Project construction costs. If any amount of such disputed portion of any proposed Construction Cost Increase is later agreed to by the parties or decided by arbitration under Section 4.3(a) in favor of Landlord, City shall deliver such additional amount to Landlord within thirty (30) days of the resolution of such disputed portion.

If City does not approve of an entire Future Bid pursuant to Section 4.3(a), but approves a portion of the Future Bid that establishes a Construction Cost Increase, and such mutually approved portion of the Construction Cost Increase is less than the total funds in the Construction Account as of the date the Future Bid is delivered to City, but the Future Bid establishes a Construction Cost Increase that equals or exceeds the total funds in the Construction Account as of the date the Future Bid is delivered to City, City shall authorize Landlord's Lender to disburse the undisputed amount of the Construction Account to pay for the Modified Landlord Project construction costs. If any amount of such disputed portion of any proposed Construction Cost Increase is later agreed to by the parties or decided by arbitration under Section 4.3(a) in favor of Landlord, City shall authorize Landlord's Lender to disburse out of the Construction Account an amount equal to the lesser of such additional amount or the remaining balance of the Construction Account, to pay for the Modified Landlord Project construction costs, within ten (10) days of the resolution of such disputed portion; and to the extent such disbursement is less than the additional amount of the Construction Cost Increase, City shall deliver the remaining portion of such additional amount to Landlord within thirty (30) days of the resolution of such disputed portion.

If City does not approve of a portion of the Future Bid pursuant to Section 4.3(a), and the Future Bid establishes a Construction Cost Increase that is less than the total funds in the Construction Account as of the date the Future Bid is delivered to City, such excess balance of the Construction Account shall be returned to City within thirty (30) days after the Future Bid is delivered to City; and City shall immediately authorize Landlord's Lender to disburse the undisputed amount of the Construction Account to pay for the Modified Landlord Project construction costs. If any amount of such disputed portion of any proposed Construction Cost Increase is later agreed to by the parties or decided by arbitration under Section 4.3(a) in favor of City, an equivalent amount of such portion shall be returned to City within thirty (30) days of the resolution of such disputed portion. If any amount of such disputed portion of any proposed Construction Cost Increase is later agreed to by the parties or decided by arbitration under Section 4.3(a) in favor of Landlord, City shall authorize Landlord's Lender to disburse such amount out of the Construction Account to pay for the Modified Landlord Project construction costs, within ten (10) days of the resolution of such disputed portion.

**(d)** The parties acknowledge and agree that the amounts to be paid by City to Landlord under this Section 4.3 are additional consideration for the delay created by this Lease in developing the Modified Landlord Project, and that such amounts are not assisting or subsidizing the construction of the Modified Landlord Project. The parties agree that the payment of such amounts shall not be deemed to make the Modified Landlord Project a public improvement that is subject to any prevailing wage (or any similar public improvement construction) requirements. If in fact such agreement is incorrect and payments made by City pursuant to this Lease, or City's performance of the City Work, does subject the Modified Landlord Project to any prevailing wage (or any similar public improvement) requirements, City agrees that any and all increased costs due to the imposition of prevailing wage (or other similar public improvement) requirements shall be includible in the Future Bid and reimbursable to Landlord pursuant to the foregoing provisions of this Section 4.3.



## **Reimbursement of Backfill and Removal Costs**

Landlord and City acknowledge that it is necessary to lower the Excavation Shaft in order to accommodate the construction of the Modified Landlord Project.. Landlord accordingly intends to excavate around the Excavation Shaft to expose the walls of the Excavation Shaft, to cut and remove the secant piles that comprise the walls of the Excavation Shaft down to a level that will be seven feet (7') below the bottom of the building slab for the Modified Landlord Project (the "Removal Work"), and backfill the portion of the Excavation Shaft to a depth of approximately twelve feet (12') below ground surface (bgs) (the "Backfill Work"), to accommodate the construction of the Modified Landlord Project. If Landlord elects to perform the Removal Work and the Backfill Work, or any portion thereof, during the Application Period (under Section 4.3) and following the termination of this Lease (as may be revised pursuant to this Lease, including but not limited to Section 3.3(c) and, with respect to an Injunction Event as to the construction of the Excavation Shaft, Section 3.3(d)), City shall reimburse to Landlord up to the Backfill and Removal Amount (defined as follows) for the costs and fees (collectively, "Backfill and Removal Costs") incurred by Landlord in having its building contractor (whom shall be duly licensed by the State of California) (each, a "Landlord Building Contractor") perform the Removal Work and the Backfill Work, provided that the fees charged by a Landlord Building Contractor shall not exceed the applicable hourly rates in the attached Schedule 1 and shall be for the scope of work and expenses specified above. The Backfill and Removal Costs may include (1) the cost of excavating around the Excavation Shaft an additional seven (7) feet below the bottom of the designed Modified Landlord Project slab in order to expose the walls of the Excavation Shaft to cutting and removal; (2) the cost to cut and remove the secant piles of the Excavation Shaft such that the remaining top of the Excavation Shaft is situated seven (7) feet below the bottom of the designed slab for the Modified Landlord Project; (3) the cost of backfilling and compacting this additional seven (7) foot excavated area to the level of the bottom of the designed Modified Landlord Project slab; and (4) all consulting costs incurred by Landlord associated with such work.

The "Backfill and Excavation Amount" shall mean a maximum amount of \$400,000, which is the product of the estimated \$1,500,000 cost to perform the Removal Work and the Backfill Work, less an estimated \$1,100,000 credit that reflects City's costs to demolish the Building and Landlord's saved costs in constructing the Modified Landlord Project without needing to rehabilitate the Building. (This credit is only applicable to calculating costs under this Section 4.4 and does not apply anywhere else in the Lease.) City acknowledges that Landlord may from time to time elect to retain a Landlord Building Contractor in addition to, or different from, the Landlord Building Contractor named in Schedule 1, but such additional or different Landlord Building Contractor shall be paid at no more than the appropriate hourly rate established for the named Landlord Building Contractor in Schedule 1. All reimbursements made by City pursuant to this Section 4.4 shall be in lawful money of the United States of America, in immediately-available funds, and without offset or deduction.

Prior to any such reimbursement pursuant to this Section 4.4, Landlord shall submit to City a copy of each invoice Landlord receives for such costs, together with reasonable backup information regarding the services provided or amount charged and Landlord's payment of such costs. City shall have ten (10) business days following the receipt of each invoice to object to such invoice by written notice to Landlord, in which case Landlord, the Landlord Building Contractor and City shall meet and confer within five (5) business days following the end of such ten (10) business day period to discuss such invoice and, either approve such invoice or, if City and Landlord mutually agree, adjust the amount to be paid by City, which amount shall be based on the applicable rates set forth in the attached Schedule 1, or if there are no such applicable rates thereon, then on commercially-reasonable rates. If City does not object to an invoice within such ten (10) business day period, City shall pay Landlord the entire amount due on or before the twenty-fourth (24<sup>th</sup>) day following the City's receipt of the original invoice. If City does object to an invoice within such ten (10) business day period, City shall pay Landlord the amount due that is not in dispute on or before the twenty-fourth (24<sup>th</sup>) day following the City's receipt of the

original invoice. City shall pay Landlord the amount due that is in dispute on or before the twenty-fourth (24<sup>th</sup>) day following City's later approval thereto or the parties' mutual agreement to modify the disputed portion of such invoice.

City shall not unreasonably withhold, condition, or delay its approval of any such invoice. The parties shall meet within the ten (10) business day period immediately following City's notification to Landlord of its disagreement to an invoice. If the parties do not agree on the amount of the invoice that is in dispute on or before the thirty-fifth (35<sup>th</sup>) day following the City's receipt of the original invoice, then either party may elect to submit such dispute to binding arbitration at anytime thereafter by mutually selecting an arbitrator from a then-existing arbitrator list of JAMS, Inc., in San Francisco, California, to resolve such dispute in accordance with the laws of the State of California pursuant to the JAMS Streamlined Arbitration Rules and Procedures. The parties shall each pay one-half (1/2) of the mutually-selected arbitrator's fee for such service. If the parties are unable to mutually agree to an arbitrator, each party shall select an arbitrator from the existing JAMS list, and those two arbitrators will then select a third arbitrator from the JAMS list. The third arbitrator selected shall resolve such dispute in accordance with the laws of the State of California pursuant to the JAMS Streamlined Arbitration Rules and Procedures. In such event, the parties shall each pay the fee charged by its selected arbitrator for such service, together with one-half (1/2) of the third arbitrator's fee for such service.

### **Security Deposit**

On or before the fifth (5<sup>th</sup>) day immediately following the Rent Commencement Date, City shall deposit with Landlord the sum specified as the security deposit in the Basic Lease Information (the "Security Deposit"), in cash, to secure City's faithful performance of all terms, covenants and conditions of this Lease. Landlord shall comply with all applicable laws with respect to its retention, use and return of the Security Deposit, and for any damages that Landlord may incur as a consequence of any default by City under this Lease, and City shall not be entitled to interest thereon. Landlord shall comply with all applicable laws with respect to its retention, use and return of the Security Deposit. Landlord shall deliver no less than fifteen (15) business days' prior written notice of its determination that it is entitled to use the Security Deposit for an uncured Event of Default (as defined in Section 15.1). If Landlord uses or applies the Security Deposit or any portion thereof, City shall, within ten (10) days after demand deposit cash with Landlord in an amount sufficient to restore the Security Deposit to the full amount, and City's failure to do so shall be deemed a material breach of this Lease. Upon termination of the original Landlord's or any successor owner's interest in the Premises, the original Landlord or such successor owner shall be released from further liability with respect to the Security Deposit upon the original Landlord's or such successor owner's complying with California Civil Code Section 1950.7 and the succeeding owner of the Premises assuming Landlord's obligations under this Lease in writing. Subject to the foregoing, City hereby waives the provisions of Section 1950.7 of the California Civil Code that limit Landlord to using a security deposit only as reasonably necessary to remedy defaults in the payment of rent, to repair damage caused by City, or to clean the Premises, it being agreed that Landlord may, in addition, claim those sums reasonably necessary to compensate Landlord for any other loss or damage caused by the default of City under any City obligation under this Lease that is to be performed on or before the termination of this Lease. If City defaults under any such obligation and Landlord brings an action for such default pursuant to California Civil Code Section 1951.2, the parties agree that Landlord shall have the right to (i) retain the Security Deposit until the time of entry of an award in any action brought by Landlord pursuant to California Civil Code Section 1951.2, and (ii) offset the Security Deposit against any such award. In the event the Security Deposit exceeds the amount of the award, Landlord shall refund to City any remainder within thirty (30) days of the entry of the award.

## **5. USE**

## **Permitted Use**

City and its Agents (as defined in Section 23.5) and Invitees (as defined in Section 23.5) may use the Premises for the Permitted Uses. City shall not use the Premises for any other use without the prior written consent of Landlord, which shall not be unreasonably withheld or delayed.

## **Interference with Access or Use**

Landlord shall not restrict access to the Premises. If City's use of any of the Premises or access thereto is interrupted as a result of the Premises being rendered unsafe for human occupancy due to Landlord's failure to comply with its obligations under this Lease or for any other reason other than an Event of Default hereunder, then Landlord shall immediately undertake all necessary steps to correct such condition; provided, however, that City acknowledges that it accepts the Building in its current "as is" condition, and that Landlord has no obligation under this Lease to correct any existing condition at the Building or the Premises; provided Landlord does have an obligation to deliver the Premises in the condition specified in Section 2. In the event such condition continues for two (2) business days and impairs City's ability to perform any of the Permitted Uses at the Premises, the Rent payable hereunder shall be abated based on the extent to which such default interferes with City's ability to perform any of the Permitted Uses at the Premises. If any such default by Landlord shall continue for thirty (30) days or more after City's use is interrupted and impairs City's ability to perform any of the Permitted Uses at the Premises, then City shall have the right, without limiting any of its other rights under this Lease to terminate this Lease. Nothing in this Section shall limit City's rights with respect to any disruption due to casualty pursuant to Section 12 (Damage and Destruction) hereof.

## **6. TAXES**

Landlord shall pay, at its sole cost, all Real Estate Taxes, subject to any reimbursement pursuant to Section 4.2. "Real Estate Taxes" means all taxes, assessments and charges levied upon or with respect to Building and the Premises. Real Estate Taxes shall include, without limitation, all general real property taxes and general and special assessments, charges, fees, or assessments for transit, housing, police, fire, or other governmental services thereof, service payments in lieu of taxes that are now or hereafter levied or assessed against Landlord by the United States of America, the State of California or any political subdivision thereof, public corporation, district, or any other political or public entity, and shall also include any other tax, fee or other excise, however described, that may be levied or assessed as a substitute for, or as an addition to, in whole or in part, any other Real Estate Taxes.

## **7. ALTERATIONS**

### **Initial Improvements by City**

If the Rent Commencement Date occurs and this Lease is not revoked or terminated pursuant to Section 3.1, Section 3.3(b), or Section 3.3(d), for an Injunction Event related to City's demolition of the Building, City shall, at its sole cost and expense, demolish the Building through conventional demolition methods, with all subsurface Building improvements removed unless such improvements are reasonably necessary to provide subjacent or lateral support to any properties abutting the Premises (together with any improvements on such abutting properties). By way of example, to the extent that the subsurface portion of the Building's back wall provides support to the adjacent property and its improvements, it shall not be removed as part of such demolition work. City shall have no obligation to demolish any portion of adjacent property improvements that encroach on the Premises.

Provided this Lease is not revoked or terminated pursuant to Section 3.1 or subsections (a)-(c) of Section 3.3, City shall have the right to construct an excavation shaft (the "Excavation Shaft") on the portion of the Premises depicted in the attached Exhibit B (the "Excavation Location") in substantial compliance with the shaft specifications and drawings attached hereto as Exhibit F (the "Initial Shaft Plans and Specifications"), and as further modified as set forth in Paragraph 20. City shall deliver to Landlord a copy of the final plans and specifications for the demolition of the Building and the construction of the Excavation Shaft (the "Final Plans") no less than seven (7) days prior to commencing the demolition of the Building or the construction of the Excavation Shaft, but in no event later than March 20, 2013. City shall have the right to construct two tunnel bores (the "Bores") on the Premises in substantial compliance with the tunnel bore specifications and drawings attached hereto as Exhibit F (the "Initial Bore Plans and Specifications"). City shall not demolish any existing improvement on the Premises needed to provide, nor take any action that would remove existing, lateral or subjacent support to property and improvements adjacent to the Premises.

City acknowledges that its agreement pursuant to this Lease to demolish the Building (provided this Lease is not revoked or terminated pursuant to Section 3.1, subsections (a)-(c) of Section 3.3, or Section 3.3(d) with respect to an Injunction Event for such demolition) in the manner specified in Section 7.1 and, if it constructs the Excavation Shaft, its agreement pursuant to this Lease to perform such Excavation Shaft construction in compliance with the Final Plans, and any subsequent modifications, are critical components of the consideration to be provided under this Lease, and that Landlord would not have agreed to this Lease but for the City's agreement to such matters. If City fails to so demolish the Building in compliance with the Final Plans or, if City constructs the Excavation Shaft and fails to perform such construction in compliance with the Final Plans, or fails to modify the Excavation Shaft as stated in the Lease, and City does not cure such matter following its receipt of Landlord's written notice of such failure, Landlord shall have the right to pursue and receive all of its available remedies at law and in equity, including without limitation recovering monetary damages for the cost of performing such work and/or obtaining specific performance, because monetary damages alone may not be sufficient to remedy such a breach of this Lease. In addition, within thirty (30) days after receiving Landlord's written request from time to time during the Term, City shall provide to Landlord (in a commercially reasonable and understandable format) current information pertaining to ground subsidence as it affects the Premises to the extent that City places instrumentation devices in the vicinity of the Premises as part of City's construction of a subsurface tunnel with the TBMs.

Prior to commencing any construction of the Excavation Shaft, City shall install a construction fence completely surrounding the Premises, with such fencing complying with all applicable laws. Landlord acknowledges that City shall remove such construction fence from the Premises on the termination of this Lease, and Landlord shall be solely responsible for making its own arrangements for the installation of a replacement construction fence at the Premises thereafter. In addition, City shall provide to Landlord copies of any and all Department of Building Inspection inspection approvals associated with the City Work, concurrently with City's receipt thereof. City shall provide to Landlord in writing a tentative schedule for the performance of the City Work at least seven (7) days prior to commencing the demolition of the Building, but in no event later than March 20, 2013, and City shall, contemporaneously with the date any modifications to such schedule, provide Landlord with written copies of the modified schedule.

### **Alterations**

Other than the demolition of the Building and any construction and modification of the Excavation Shaft and the Bores pursuant to this Lease, City shall not make or permit any alterations, installations, additions or improvements (collectively, "Alterations") to the Premises without first obtaining Landlord's written consent, which Landlord shall not unreasonably withhold, condition or delay. Landlord acknowledges and agrees that it would be unreasonable

to withhold its written consent to any proposed Alteration that is necessary to enable City to use the Premises to remove the TBMs from the Premises, except that Landlord may withhold its written consent if in Landlord's sole discretion such proposed Alteration would adversely affect Landlord's ability to develop the Modified Landlord Project at the Premises. Any written consent given by Landlord for a proposed Alteration shall specify if the proposed Alteration must be removed from the Premises by City on or before the termination of the Term or shall remain at the Premises. Any Alterations permitted hereunder shall be made at City's cost in compliance with applicable Laws. Landlord shall, without cost to itself, cooperate with City in securing building and other permits and authorizations needed in connection with any permitted Alterations. Landlord shall not be entitled to any construction or other administrative fee in connection with any Alteration. All Alterations shall be constructed in a good and workmanlike manner, with a copy of all plans and specifications for any Alterations provided to Landlord prior to the construction of such Alteration. Landlord may inspect and observe construction of the Alterations. Prior to City's commencement of construction of any Alterations, Landlord may post on and about the Premises notices of non-responsibility thereto pursuant to applicable law. Landlord shall not make any alterations, installations, additions or improvements to the Premises.

### **Title to Improvements**

Except for City's Personal Property (as defined in Section 7.4) and any Alterations that City must remove pursuant to Section 7.1, all appurtenances, fixtures, improvements, equipment, additions and other property permanently installed in the Premises during the Term shall be City's property until the end of the Term. Upon surrender of the Premises, the Excavation Shaft (if constructed by City), Bores (if constructed by City), and all Alterations constructed by City shall remain on the Premises as Landlord's property (subject to the provisions of Section 20), except to the extent Landlord provided written notice to City of its obligation or right to remove such Alteration at the end of the Term pursuant to Section 7.2 or as otherwise agreed to in writing by Landlord and City. City shall repair any damage caused by the removal of such Alterations upon surrender of the Premises.

### **City's Personal Property**

All equipment, trade fixtures and articles of movable personal property installed in the Premises by or for the account of City (collectively, "City's Personal Property") shall be and remain City's property. At any time during the Term or at the expiration thereof, City may remove any of City's Personal Property, provided City shall repair any damage to the Premises resulting therefrom. Upon the expiration or earlier termination of this Lease, City shall remove City's Personal Property from the Premises in accordance with Section 20 (Surrender of Premises).

## **8. REPAIRS AND MAINTENANCE**

Landlord shall have no obligation to make any repairs or perform any maintenance at the Premises, except as specifically set forth herein. City shall be obligated to keep all of its improvements installed or constructed by City at the Premises (including without limitation the Excavation Shaft, the Bores, any shoring walls, any and all means of lateral and subjacent support, and the construction fence) in good condition and repair. City shall keep the Premises free from liens arising out of any work performed, material furnished or obligations incurred by City during the Term. Landlord shall have the right to post on the Premises any notices permitted or required by law or that are needed for the protection of Landlord, the Premises, or the Building, from mechanics' and material suppliers' liens. City shall give Landlord at least ten (10) days' prior written notice of commencement of any repair or construction by City on the Premises.

## **9. UTILITIES AND SERVICES**

City shall be responsible for all utilities and services to the Premises. Landlord shall not be liable for any failure or interruption of any utility service furnished to the Premises, and no such failure or interruption shall entitle City to any abatement in Rent or to terminate this Lease, unless such interruption is due to the negligence or willful misconduct of Landlord. In the event of such Landlord negligence, willful misconduct, City shall be entitled to an abatement of rent hereunder, which abatement shall be based on the extent of City's inability to use the Premises.

#### **10. COMPLIANCE WITH LAWS; PREMISES CONDITION**

City shall use the Premises during the Term in compliance with applicable present or future federal, state, local and administrative laws, rules, regulations, orders and requirements (collectively, "Laws"). Without limiting Section 16.1 (City's Indemnity), City shall Indemnify Landlord against any and all Claims arising out of City's failure to comply with all applicable Laws as provided in this Section. City hereby waives any and all right or ability to make a claim of any kind or nature against Landlord for any and all deficiencies or defects in the characteristics and condition of the Premises (collectively, and as further described below, the "Premises Condition") and City leases the Premises with any and all such deficiencies and defects. City further acknowledges and agrees that neither Landlord nor any of Landlord's employees, agents or representatives, have made any representations, warranties or agreements by or on behalf of Landlord of any kind whatsoever, whether oral or written, express or implied, statutory or otherwise, as to any matters concerning the Premises Condition. City hereby acknowledges, agrees and represents that the Premises is to be leased to or used by, and accepted by, City in its present condition, "AS IS", "WHERE IS" AND WITH ALL FAULTS, and that no patent or latent defect or deficiency in the Premises Condition, whether or not known or discovered, shall affect the rights of either Landlord or City hereunder. Any reports, repairs or work required by City are the sole responsibility of City, and City agrees that there is no obligation on the part of Landlord to make any changes, alterations or repairs to the Premises Condition, to obtain any certificates or permits in connection with the leasing of the Premises, to cure any violations of law, or to comply with the requirements of any insurer.

#### **11. SUBORDINATION**

Prior to the Rent Commencement Date, Landlord shall deliver the Landlord Consent, duly executed (and acknowledged) by the beneficiary of each deed of trust encumbering the Premises as of the Lease Commencement Date. In the event any mortgage or deed of trust to which this Lease is subordinate is foreclosed or a deed in lieu of foreclosure is given to the mortgagee or beneficiary, this Lease shall not be barred, terminated, cut off, or foreclosed nor shall the rights and possession of City hereunder be disturbed if City shall not then be in default in the payment of rental or other sums due hereunder or otherwise be in default under the terms of this Lease beyond any applicable notice and cure period, provided that such lender and the City have executed the Landlord Consent or a comparable Non-Disturbance Agreement. City shall attorn to and become the tenant of the successor-in-interest to Landlord, provided that City has received proper written notice of such succession and the name and address of the successor landlord. The provisions of this Section shall be self-operative and no further instrument shall be required other than as provided in this Section. This Lease shall be subordinate to any ground lease, mortgage, deed of trust, or any other hypothecation for security now or later placed upon the Premises and to any advances made on the security of it or Landlord's interest in it, and to all renewals, modifications, consolidations, replacements, and extensions of it. However, if any mortgagee, trustee or ground lessor elects to have this Lease prior to the lien of its mortgage or deed of trust, or prior to its ground lease, and gives written notice of that to City, this Lease shall be deemed prior to the mortgage, deed of trust or ground lease, whether this Lease is dated prior or subsequent to the date of the mortgage, deed of trust, or ground lease, or the date of recording of it. In the event of termination of any ground lease to which this Lease is subordinate, City shall attorn to the ground lessor. City agrees to execute any documents, in form and substance reasonably acceptable to City, required to effectuate the subordination, to make this Lease prior to the lien of any mortgage or deed of trust, or to any ground lease, or to evidence the attornment.

## **12. DAMAGE AND DESTRUCTION**

If the Premises is damaged by casualty (including, but not limited to, an earthquake or sinkhole that renders the soil of the Premises structurally unsound) that, in City's reasonable judgment, renders the Premises untenable or unsuitable for continued use by City for its intended purposes or otherwise materially adversely affects City's normal operations in the Premises, then City may elect to terminate this Lease upon no less than one hundred twenty days prior written notice to the Landlord, and this Lease shall terminate on the date specified by City in such notice. If the Premises is damaged by casualty (including, but not limited to, fire) and City does not terminate the Lease pursuant to the foregoing sentence, this Lease shall remain in full force and effect. City shall not have the right to terminate this Lease as a result of any damage by fire or other cause to City's property or any damage caused by the negligence or willful misconduct of City or its Agents. Except as provided herein, City waives any right to terminate the Lease by reason of damage or casualty loss. The parties intend that the provisions of this Section govern fully their rights and obligations in the event of damage or destruction, and Landlord and City each hereby waives and releases any right to terminate this Lease in whole or in part under Section 1932, subdivision 2, Section 1933, subdivision 4, and Sections 1941 and 1942 of the Civil Code of California or under any similar law, statute or ordinance now or hereafter in effect, to the extent such rights are inconsistent with the provisions hereof.

## **13. EMINENT DOMAIN**

### **Definitions**

"Taking" means a taking or damaging, including severance damage, by eminent domain, inverse condemnation or for any public or quasi-public use under law, but excluding any eminent domain action by City. A Taking may occur pursuant to the recording of a final order of condemnation, or by voluntary sale or conveyance in lieu of condemnation or in settlement of a condemnation action.

"Date of Taking" means the earlier of **(i)** the date upon which title to the portion of the Premises taken passes to and vests in the condemnor or **(ii)** the date on which Tenant is dispossessed.

"Award" means all compensation, sums or anything of value paid, awarded or received for a Taking, whether pursuant to judgment, agreement, settlement or otherwise.

### **General**

If during the Term or during the period between the execution of this Lease and the Lease Commencement Date, there is any Taking of all or any part of the Premises or any interest in this Lease, the rights and obligations of the parties hereunder shall be determined pursuant to this Section. City and Landlord intend that the provisions hereof govern fully in the event of a Taking and accordingly, the parties each hereby waive any right to terminate this Lease in whole or in part under Sections 1265.110, 1265.120, 1265.130 and 1265.140 of the California Code of Civil Procedure or under any similar law now or hereafter in effect.

### **Total Taking; Automatic Termination**

If there is a total Taking of the Premises, then this Lease shall terminate as of the Date of Taking.

### **Partial Taking; Election to Terminate**

If there is a Taking of any portion (but less than all) of the Premises, then this Lease shall terminate in its entirety if all of the following exist: **(i)** the partial Taking, in City's reasonable judgment, renders the remaining portion of the Premises untenable or unsuitable for continued use by City for its intended purposes, **(ii)** the condition rendering the Premises untenable or unsuitable either is not curable or is curable but Landlord is unwilling or unable to cure such condition, and **(iii)** City elects to terminate.

In the case of a partial taking of the portion of the Premises in which subsection (a) above does not apply, City shall have the right to terminate this Lease by written notice to Landlord within thirty (30) days after the Date of Taking, provided that, as a condition to City's right to terminate, the portion of the Premises taken shall, in City's reasonable judgment, render the Premises unsuitable for continued use by City for its intended purposes or otherwise materially adversely affect City's normal operations in the Premises. If City elects to terminate under the provisions of this subsection, City shall do so by giving written notice to the Landlord before or within thirty (30) days after the Date of Taking, and thereafter this Lease shall terminate upon the later of the thirtieth (30<sup>th</sup>) day after such written notice is given or the Date of Taking.

### **Rent; Award**

Upon termination of this Lease pursuant to an election under Section 13.4 above, then: **(a)** City's obligation to pay Rent shall continue up until the date of termination, and thereafter shall cease, except that Rent shall be reduced as provided in Section 13.6 below for any period during which this Lease continues in effect after the Date of Taking, and **(b)** Landlord shall be entitled to the entire Award in connection therewith, except that City shall receive any Award made specifically for City's relocation expenses or the interruption of or damage to City's business or damage to City's Personal Property.

### **Partial Taking; Continuation of Lease**

If there is a partial Taking of the Premises under circumstances where this Lease is not terminated in its entirety under Section 13.4 above, then this Lease shall terminate as to the portion of the Premises so taken, but shall remain in full force and effect as to the portion not taken, and the rights and obligations of the parties shall be as follows: **(a)** Rent shall be reduced by an amount that is in the same ratio to the Rent as the area of the Premises taken bears to the area of the Premises prior to the Date of Taking, and **(b)** Landlord shall be entitled to the entire Award in connection therewith, provided that City shall receive any Award made specifically for City's relocation expenses or the interruption of or damage to City's use of the Premises or damage to City's Personal Property or the Excavation Shaft.

### **Temporary Taking**

Notwithstanding anything to contrary in this Section, if a Taking occurs with respect to the Premises for a limited period of time not in excess of thirty (30) consecutive days, this Lease shall remain unaffected thereby, and City shall continue to pay Rent and to perform all of the terms, conditions and covenants of this Lease. In the event of such temporary Taking, City shall be entitled to receive that portion of any Award representing compensation for the use or occupancy of the Premises during the Term.

### **13.8 Taking by City**

Notwithstanding anything to the contrary set forth elsewhere in this Lease (including without limitation the foregoing provisions of this Section 13, if at any time during the Term of this Lease the City commences any action for a Taking of, or other eminent domain proceeding involving, all or any portion of the Premises, then Landlord may, in its sole discretion, terminate this Lease at any time upon written notice to Tenant.



## **14. ASSIGNMENT AND SUBLETTING**

Except as provided in this Section below, City shall not directly or indirectly sell, assign, encumber, pledge or otherwise transfer or hypothecate all or any part of its interest in or rights with respect to the Premises or its leasehold estate hereunder or permit all or any portion of the Premises to be occupied by anyone other than itself or sublet all or any portion of the Premises, without Landlord's prior written consent in each instance, which shall not be unreasonably withheld or delayed. City shall have the right from time to time, upon notice to but without the consent of Landlord, to transfer this Lease or use and occupancy of all or any of the Premises to any department of the City and County of San Francisco for uses permitted under this Lease.

Subject to Sections 22 and 23.7 below, Landlord may from time to time, in its sole discretion, sell, convey, or otherwise transfer the Premises, or any portion thereof or interest therein, to one or more third parties; provided such third party(ies) assumes Landlord's obligations under this Lease as of the date of such transfer. It is expressly understood and agreed that the obligations of Landlord under this Lease shall be binding upon Landlord and its successors and assigns and any future owner of the Premises only with respect to events occurring during its and their respective ownership of the Premises; provided, however, if an event of default by Landlord occurred prior to the commencement of such ownership, but such event of default continues after such ownership has commenced, then the successor landlord shall be subject to the obligations of Landlord to cure such continuing event of default. In the event of any sale, conveyance or other transfer of title to the Premises, then the grantor or transferor shall be relieved of all liability with respect to Landlord's obligations to be performed under this Lease after the date of such conveyance.

## **15. DEFAULT; REMEDIES**

### **Events of Default by City**

Any of the following shall constitute an "Event of Default" by City hereunder:

City's failure to make any monthly payment of Base Rent before the tenth (10<sup>th</sup>) day of such month, provided that for the first two (2) monthly payments of Base Rent at the beginning of the Term and for the first monthly payment of Base Rent after the beginning of each new fiscal year for City, City shall have until the twentieth (20) day of such months to make such payment;

City's failure to make any payment of Rent (other than Base Rent) within ten (10) days of the date of receipt of notice from Landlord requesting payment thereof, provided that, with respect to the payments of Rent to be made by Tenant pursuant to Section 4.2 or Section 4.3 above, the parties have agreed to the amount of such payment (or have agreed or consented to the payment of any portion of such payment) pursuant to Section 4.2 and Section 4.3;

City's abandonment of the Premises (within the meaning of California Civil Code Section 1951.3), provided, however, that Landlord acknowledges City anticipates an approximate six (6) month period between completion of construction of the Excavation Shaft and the commencement of the tunnel boring machine excavation work, and City's election not to actively use the Premises during such period shall not be deemed an abandonment of the Premises; or

City's failure to perform any other covenant or obligation of City hereunder (not involving the payment of money) and to cure such non-performance within thirty (30) days of the date of receipt of notice thereof from Landlord, provided that if more than thirty (30) days are reasonably required for such cure, no Event of Default shall occur if City commences such cure within such period and diligently prosecutes such cure to completion.

## **Landlord's Remedies**

Upon the occurrence of any Event of Default that is not cured within the applicable grace period as provided above, Landlord shall have all rights and remedies available pursuant to law or granted hereunder, including the following:

(a) The rights and remedies provided by California Civil Code Section 1951.2 (damages on termination for breach), including, but not limited to, the right to terminate City's right to possession of the Premises and to recover the worth at the time of award of the amount by which the unpaid Rent for the balance of the Term after the time of award exceeds the amount of rental loss for the same period that City proves could be reasonably avoided, as computed pursuant to subsection (b) of such Section 1951.2. Pursuant to such Section 1951.2, Landlord shall also be entitled to recover (i) the worth at the time of award of the unpaid rent which had been earned at the time of termination; (ii) the worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rent loss that City proves could reasonably have been avoided; and (iii) any other amount necessary to compensate Landlord for all the detriment proximately caused by City's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result therefrom. The "worth at the time of award" of the amount referred to in the first sentence of this subparagraph (a) and clauses (i) and (ii) above is computed by allowing interest at the discount rate of the Federal Reserve Bank of San Francisco plus five percent (5%) per annum at date of termination, but in no event in excess of the maximum rate of interest permitted by law. The worth at the time of award of the amount referred to in clause (iii) above is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%). City waives any rights of redemption or relief from forfeiture under California Code of Civil Procedure Sections 1174 and 1179, or under any other applicable present or future law, if City is evicted or Landlord takes possession of the Premises by reason of any Event of Default.

The rights and remedies provided by California Civil Code Section 1951.4 (continuation of lease after breach and abandonment), which allows Landlord to continue this Lease in effect and to enforce all of its rights and remedies under this Lease, including the right to recover Rent as it becomes due, for so long as Landlord does not terminate City's right to possession, if City has the right to sublet or assign, subject only to reasonable limitations. Acts of maintenance or preservation or efforts to relet the Premises or the appointment of a receiver upon initiative of Landlord to protect Landlord's interest under this Lease shall not constitute a termination of City's right to possession.

## **Landlord's Default**

If Landlord fails to perform any of its obligations under this Lease, then (without limiting any of City's other cure rights under this Lease) City may, at its sole option, perform such obligation at Landlord's expense if such failure continues after thirty (30) days from the date City gives notice to Landlord of City's intention to perform such cure. However, in the case of a default which for causes beyond Landlord's control (excluding any financial inability to perform) cannot with due diligence be cured within such thirty (30)-day period, such thirty (30)-day period shall be extended if Landlord, promptly upon receipt of City's notice, advises City of Landlord's intention to take all steps required to cure such default, and Landlord promptly commences such cure and diligently prosecutes the same to completion. Subject to the other provisions of this Lease relating to abatement of Rent, if Landlord fails to cure any default within the cure period provided above, then, whether or not City elects to cure Landlord's default as provided herein, the Base Rent and any other charges hereunder shall be abated based on the extent to which such default interferes with City's ability to carry on its business at the Premises. City's rights hereunder shall not limit in any way any of its other rights and remedies hereunder or at law or in equity. City agrees to look solely to Landlord's interest in the Premises, or any amounts received by Landlord in connection with a sale or transfer of the Premises, for recovery

of any judgment against Landlord arising in connection with this Lease, it being agreed that neither Landlord nor any successor or assign of Landlord nor any future owner of the Premises, nor any partner, shareholder, or officer of any of the foregoing, shall ever be personally liable for any such judgment.

## **16. INDEMNITIES**

### **City's Indemnity**

To the fullest extent permitted by law, City shall indemnify, defend and hold harmless ("Indemnify") Landlord and its Agents from and against any and all claims, costs, expenses, losses, demands, actions, suits, and damages, including, without limitation, punitive damages and reasonable attorneys' fees, consultants' fees or expert fees (collectively, "Claims"), incurred as a result of, caused by, arising out of, resulting from or occurring in connection with (a) City's use of the Premises, (b) any Event of Default arising from City's failure to perform any of its material obligations under this Lease, (c) any negligent acts or omissions of City or its Agents or Invitees in, on or about the Premises, (d) the City's failure to comply with the requirements of this Lease in performing any of the City Work at the Premises, including City's obligation to perform the City Work in compliance with all applicable laws, (e) the alleged or actual acts or omissions at the Premises, whether active or passive, of City or City's agents, representatives, employees, contractors, or subcontractors, to the extent such Claim is not caused by Landlord or its Agents, or (f) any allegation that City's performance of any of the City Work, or City's payment of any amounts to Landlord pursuant to this Lease, including without limitation City's obligation to reimburse Landlord as consideration for increases in construction costs pursuant to Section 4.2, imposes any prevailing wage (or any similar public improvement) requirements upon the Modified Landlord Project (except to the extent that such increases in construction costs as a result of any such requirements are reimbursed to Landlord as part of the Construction Cost Increase); provided, however, City shall not be obligated to Indemnify Landlord or its Agents to the extent any Claim arises out of the negligence or willful misconduct of Landlord or its Agents. In any action or proceeding brought against Landlord or its Agents by reason of any Claim Indemnified by City hereunder, City may, at its sole option, elect to defend such Claim by attorneys in City's Office of the City Attorney, by other attorneys selected by City, or both. City shall have the right to control the defense and to determine the settlement or compromise of any action or proceeding, provided that Landlord shall have the right, but not the obligation, to participate in the defense of any such Claim at its sole cost. City's obligations under this Section, and all other indemnity obligations of the City, shall survive the termination of the Lease. The foregoing indemnity and defense obligations are not limited by the amount of any available insurance and are in addition to any other express or implied indemnity or contribution rights available to any of Landlord or its Agents at law or in equity.

### **Landlord's Indemnity and Waiver**

Landlord shall Indemnify City and its Agents against any and all Claims incurred as a result of (a) any default by Landlord in the performance of any of its obligations under this Lease or any breach of any representations or warranties made by Landlord under this Lease, (b) Landlord's failure to design or construct the Modified Landlord Project either in conformance with the recommendations made for the development of a mixed use development at the Premises described in the Geotechnical Investigation for the Premises dated December 1, 2008 (the "Rollo Report"), or in conformance with the written recommendations of any other California-licensed engineer with expertise in such matters retained by Landlord in connection with the Modified Landlord Project, provided such engineer receives the Rollo Report, inspects the Premises, and entitles City to rely on such report, and Landlord delivers a copy of such report to City prior to commencing construction of the Modified Landlord Project, or (c) any negligent acts or omissions of Landlord or its Agents in, on or about the Premises; provided, however, Landlord shall not be obligated to Indemnify City or its Agents to the extent any Claim arises out of the negligence or willful misconduct of City or its Agents. In any action or proceeding

brought against City or its Agents by reason of any Claim Indemnified by Landlord hereunder, Landlord may, at its sole option, elect to defend such Claim by attorneys selected by Landlord. Landlord shall have the right to control the defense and to determine the settlement or compromise of any action or proceeding, provided that City shall have the right, but not the obligation, to participate in the defense of any such Claim at its sole cost. Landlord's obligations under this Section shall survive the termination of this Lease.

Provided the Excavation Shaft is constructed in compliance with the Final Plans, Landlord further agrees to waive any claims that the Excavation Shaft causes, or threatens to cause, any damage to the Modified Landlord Project or the Property, interferes with Landlord's construction or operation of Modified Landlord Project, or results in any inverse condemnation of Owner's Property. In connection with the foregoing release, Landlord expressly waives the benefits of 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 SUSPECT 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.

BY PLACING ITS INITIALS BELOW, LANDLORD SPECIFICALLY ACKNOWLEDGES AND CONFIRMS THE VALIDITY OF THE RELEASES MADE ABOVE AND THE FACT THAT LANDLORD WAS REPRESENTED BY COUNSEL WHO EXPLAINED, AT THE TIME THIS AGREEMENT WAS MADE, THE CONSEQUENCES OF THE ABOVE RELEASES.

INITIALS: LANDLORD: \_\_\_\_\_

Landlord's obligations under this Section shall survive the termination of this Lease.

## **17. INSURANCE**

### **City's Self-Insurance**

Landlord acknowledges that City maintains a program of self-insurance and agrees that City shall not be required to carry any insurance with respect to this Lease. Such program of self-insurance covers risks including without limitation of commercial general liability, damage to personal property, ownership and operation of vehicles, builder's risk, and worker's compensation. City assumes the risk of damage to any of City's Personal Property, except for damage caused by Landlord or its Agents.

### **17.1 Landlord's Insurance**

Landlord, at no cost to City, shall procure and keep in effect at all times during the Term insurance as follows: (a) Commercial general liability insurance with limits not less than One Million Dollars (\$1,000,000) each occurrence combined single limit for bodily injury and property damage, including contractual liability, independent contractors, broad-form property damage, fire damage legal liability (of not less than Fifty Thousand Dollars (\$50,000)), personal injury, products and completed operations, and explosion, collapse and underground (XCU); and (b) Worker's Compensation Insurance in Statutory Amounts with Employer's Liability Limits not less than One Million Dollars (\$1,000,000) each accident, provided, however, that Landlord shall only be required to carry such Worker's Compensation Insurance during any period of the Term that Landlord has employees.

## **17.2 Waiver of Subrogation**

Notwithstanding anything to the contrary contained herein, Landlord hereby waives any right of recovery against City for any loss or damage sustained by Landlord with respect to the Building or the Premises or any portion thereof or the contents of the same or any operation therein, whether or not such loss is caused by the fault or negligence of City, to the extent such loss or damage is covered by insurance which Landlord is required to purchase under this Lease or is otherwise actually recovered from valid and collectible insurance covering Landlord. Landlord agrees to obtain a waiver of subrogation endorsement from each insurance carrier issuing policies relative to the Building or the Premises; provided, Landlord's failure to do so shall not affect the above waiver. If City self-insures any of the risks described in Section 17.1 above, City's self-insurance protection shall be deemed to include (and City's self-insurance shall be deemed to include) the waivers of subrogation and the additional insured status mentioned above. If City ceases to self-insure any of the risks described in Section 17.1 above, City shall be deemed to have agreed to the waivers of subrogation and the additional insured status mentioned above.

## **18. ACCESS BY LANDLORD**

Landlord reserves for itself and any designated Agent the right to enter the Premises at all reasonable times and, except in cases of emergency (in which event Landlord shall give any reasonable notice), after giving City at least twenty four (24) hours' advance written or oral notice, for the purpose of **(a)** inspecting the Premises, **(b)** observing and photographing the demolition of the Building and the construction of the Excavation Shaft, Bores or any other Alterations, and the removal of the TBMs, or **(c)** posting notices of non-responsibility in connection with the construction of the Excavation Shaft or any Alteration. Landlord acknowledges that the City Work entails heavy construction activities, and Landlord shall comply with all safety rules for the Premises established by City in entering the Premises.

## **19. ESTOPPEL CERTIFICATES**

Either party, from time to time during the Term upon not less than twenty (20) days' prior written notice from the other party, may reasonably request the other party to execute, acknowledge and deliver to such persons or entities designated by such other party a certificate stating: **(a)** the Lease Commencement Date, the Rent Commencement Date, and Expiration Date of this Lease, **(b)** that this Lease is unmodified and in full force and effect (or, if there have been modifications, this the Lease is in full force and effect as modified and stating the modifications), **(c)** that there are no defaults under this Lease (or if so, specifying the same), and **(d)** the date to which Rent has been paid.

## **20. SURRENDER OF PREMISES**

Upon the expiration or sooner termination of this Lease, City shall surrender the Premises (including any constructed Excavation Shaft, Bores, or other Alterations that City is required, or has the right, to leave at the Premises pursuant to the provisions of Section 7.2) to Landlord in a safe and neat condition. Prior to the Expiration Date:

**(a)** City shall perform general site cleanup and remove from the Premises all of City's Personal Property and any Alterations City desires or is required to remove from the Premises pursuant to the provisions of Section 7.2.

**(b)** If City has constructed the Bores, City shall, in compliance with all applicable laws and the Final Plans, install concrete bulk heads that cover the entire diameter of the Bores at the property line of the Premises.

**(c)** If City has completed construction of the Excavation Shaft, City shall, in

compliance with all applicable laws and the Final Plans, install a cap that completely covers the top of the Excavation Shaft at grade level such that the remaining portion is sufficiently sealed to prevent water from entering the Excavation Shaft and to keep people from falling into the Excavation Shaft.

(d) If City has performed any other excavation work, City shall, in compliance with all applicable laws:

(1) back-fill any such excavation area with the native removed soil, compacted to 95% compaction, and

(2) deliver to Landlord a soil compaction report showing that the excavated area has been compacted in accordance with good construction practices to the condition described in clause (1) above.

(e) City shall ensure that the proposed Bores and the remaining secant piles will be installed in a manner that will support the Approved Landlord Project as depicted in the approved set of plans dated November 11, 2011. Landlord acknowledges that the Approved Landlord project will not exceed the load bearing capacity set forth in Rollo Report.

(f) City shall ensure that the Premises and all of its excavation work on the Premises shall comply with industry standard practice and that the Excavation Shaft is free from standing water during the Term.

(g) City shall leave the Premises at the end of the Lease Term in a clean and safe condition, without the introduction of any new hazards or Hazardous Material by City's use of the Premises pursuant to this Lease.

(h) City agrees that the Landlord assumes no responsibility or liability for the physical condition or safety of the Premises or any improvement on the Premises during the lease term. The City agrees to assume sole responsibility for providing a safe place for the performance of its work during the Lease Term.

(i) City acknowledges and agrees that it has not relied on and does not rely on any representations, if any, made by Landlord or its Agents and consultants with respect to the Premises or any adjacent property, including, but not limited to, the nature and extent of site conditions, differing site conditions, existing grades and elevations, Hazardous Materials, above and below grade improvements, foundations, subsurface conditions, and underground mechanical, electrical and plumbing facilities.

Notwithstanding anything to the contrary in this Lease, City shall not be required to demolish or remove the Excavation Shaft or the Bores from the Premises. Provided the Excavation Shaft and Bores are constructed in compliance with the Final Plans, and left in the condition specified in this Section, Landlord shall accept the Excavation Shaft and the Bores in their as is condition on the expiration or sooner termination of this Lease, and acknowledges that City makes no representations or warranties on the condition of the Excavation Shaft or Bores on such date or the suitability of the Excavation Shaft or Bores for any future Landlord use or purpose other than City's express representation regarding the load-bearing capacity of the Bores.

## **21. HAZARDOUS MATERIALS**

### **Definitions**

As used in this Lease, the following terms shall have the meanings hereinafter set forth:

"Environmental Laws" shall mean any federal, state, local or administrative law, rule, regulation, order or requirement relating to industrial hygiene, environmental conditions or Hazardous Material, whether now in effect or hereafter adopted.

"Hazardous Material" shall mean any material that, because of its quantity, concentration or physical or chemical characteristics, is deemed by any federal, state or local governmental authority to pose a present or potential hazard to human health or safety or to the environment. Hazardous Material includes, without limitation, any material or substance defined as a "hazardous substance," or "pollutant" or "contaminant" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA", also commonly known as the "Superfund" law), as amended (42 U.S.C. Section 9601 et seq.), or pursuant to Section 25316 of the California Health & Safety Code; any "hazardous waste" listed pursuant to Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of the structure of the Building or are naturally occurring substances on or about the Premises; and petroleum, including crude oil or any fraction thereof, natural gas or natural gas liquids liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). As defined in Environmental Laws, during the Term, City is and shall be deemed to be the "operator" of City's "facility" and the "owner" of all Hazardous Materials brought on the Premises, or discovered at the Premises and removed therefrom by City, its Agents or Invitees, and the wastes, by-products, or residues generated, resulting, or produced therefrom.

"Release" when used with respect to Hazardous Material shall include any actual or imminent spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into or inside the Building, or in, on, under or about the Premises.

### **Landlord's Representations and Covenants**

Landlord represents and warrants to City that, to Landlord's actual knowledge without investigation, the following statements are true and correct and will be true and correct as of the Lease Commencement Date: (a) the Premises is not in violation of any Environmental Laws; (b) the Premises is not now, nor has it been, used for the manufacture, use, storage, discharge, deposit, transportation or disposal of any Hazardous Material, except for the use of such substances in such limited quantities as are customarily used in theaters; (c) the Premises does not consist of any landfill or contain any underground storage tanks; (d) the Building does not consist of any asbestos-containing materials, or any building materials that contain any other Hazardous Material (except that Landlord has disclosed to City that the Building was constructed prior to 1979 and may contain lead-based paints); (e) there has been and is no Release of any Hazardous Material in the Building or in, on, under or about the Premises in violation of Environmental Laws; (f) the Premises is not subject to any claim by any governmental regulatory agency or third party related to the Release of any Hazardous Material, and there is no inquiry by any governmental agency (including, without limitation, the California Department of Toxic Substances Control or the Regional Water Quality Control Board) with respect to the presence of Hazardous Material in the Building or in, on, under or about the Premises, or the migration of Hazardous Material from or to other real property, and (g) the materials listed on the attached Exhibit G (the "Property Reports") contain all of the environmental reports, studies, surveys, tests and assessments, soils and geotechnical reports, and building condition reports in Landlord's possession or control regarding the physical and environmental condition of the Building and Premises, including the asbestos abatement work performed by Landlord at the Building (if any), and the copies of the Property Reports delivered by Landlord to City are complete and correct photocopies of the Property Reports that are in Landlord's possession or control.

## **Landlord's Environmental Indemnity and City Rent Credit**

Without limiting Landlord's Indemnity in Section 16.2 (Landlord's Indemnity), above, Landlord shall Indemnify City and its Agents against any and all Claims arising during or after the Term of this Lease **(a)** as a result of any breach of any of Landlord's representations, warranties or covenants in the preceding Section, or **(b)** in connection with any presence or Release of Hazardous Material in the Building or on, under or about the Premises, unless and to the extent that City or its Agents or its Invitees caused or contributed to such Release.

### **City's Covenants**

Neither City nor its Agents shall cause any Hazardous Material to be brought upon, kept, used, stored, generated or disposed of in, on or about the Premises, or transported to or from the Premises, in violation of any Environmental Laws, provided that City may use such substances in such limited amounts as are reasonably required for the performance of the Permitted Uses so long as such use is in compliance with all applicable Environmental Laws. City shall supply Landlord with a complete and accurate copies of any applicable Material Safety Data Sheets of any and all Hazardous Materials that are used in conjunction with the performance of the Permitted Uses, to the extent such sheets are provided to City by its contractors. Notwithstanding anything to the contrary set forth above in this Section 21.4, City shall have the right to remove the soil that must be excavated from the Premises in order to construct and modify the Excavation Shaft (the "Excavation Area") to perform the Excavation Shaft work and to demolish the Building, even if such Excavation Area soil or any portion of the Building is determined to contain any Hazardous Materials. In the event that any of the soil removed by City from the initial twelve feet (12') below ground surface in the Excavation Area is determined to contain Hazardous Materials that require such soil to be disposed of at any location other than landfill, or City determines that the Building contains asbestos that will require additional construction measures to contain such asbestos during demolition, City shall be obligated to properly dispose of such contaminated soil and take such asbestos containment measures; provided, however, that City shall have the right to offset the Increased Disposal Costs (as defined below) against Rent following City's submittal of commercially reasonable evidence of such costs to Landlord. For purposes of this Lease, the "Increased Disposal Costs" shall mean (i) the commercially reasonable amount by which the costs (including any additional fees for hauling, testing, or preparing the manifest) City incurs in disposing of such contaminated soil exceed the costs that City would have incurred in disposing of such soil if it had not been contaminated, plus (ii) the commercially reasonable costs incurred by City for such asbestos containment.

### **City's Environmental Indemnity**

If City breaches its obligations contained in the preceding Section 21.4, or if and to the extent City or its Agents or its Invitees cause or contribute to the Release of Hazardous Material from, in, on or about the Premises, then City shall Indemnify Landlord against any and all Claims arising during or after the Term of this Lease as a result of such Release, except to the extent Landlord or its Agents is responsible for the Release. The foregoing Indemnity shall not include any Claims resulting from the non-negligent aggravation by City, its Agents or Invitees of physical conditions of the Premises existing prior to City's occupancy.

## **22. RIGHT OF FIRST OFFER**

If Landlord wishes to pursue the sale of the Premises at any time during the Term of this Lease, City shall have the right of first offer as set forth in this Section ("Right of First Offer").

**(a)** If Landlord wishes to market the Premises during the Term of this Lease, Landlord shall first deliver written notice ("Marketing Notice") to City of the sales price at which Landlord intends to market the Premises. If Landlord receives any written offer for the purchase



the Premises that Landlord wishes to pursue during the Term of this Lease (a "Third Party Offer"), Landlord shall first offer the Premises to City at the purchase price and on such terms offered by such party by delivering written notice ("Offer Notice") thereof to City, together with a copy of such offer. City shall have sixty (60) days from the date that City receives a Marketing Notice or an Offer Notice (the "Response Period") to submit to Landlord a written offer to purchase the Premises at the price and on the terms contained in the Marketing Notice or Offer Notice, as applicable (a "City Offer"), or to deliver to Landlord a written counter offer to purchase the Premises at a lesser price and on terms specified in such counter offer (a "Counter Offer").

(b) If City does not offer to purchase the Premises for the purchase price and on the terms set forth in a Marketing Notice or Offer Notice, as applicable, by delivery of a City Offer, nor delivers a Counter Offer, to Landlord before the expiration of the Response Period, then Landlord shall be free to sell the Premises at a Gross Purchase Price (defined as follows) that is not less than 98% of the price set forth in the Marketing Notice or Offer Notice, as applicable; provided, however, that such sale shall include an assignment and assumption of this Lease (if such sale occurs during the Term) and shall recognize City's Right of First Offer as set forth in this Section. A "Gross Purchase Price" shall mean an amount determined without regard to any brokerage commission liability, but reduced by any credits or reductions Landlord agrees to give to the potential buyer (e.g. for such items as existing property conditions or entitlement requirements). If City delivers a Counter Offer to Landlord before the expiration of the Response Period, but Landlord rejects the Counter Offer in a written notice delivered to City, then Landlord may sell the Premises to a buyer that agrees to pay a Gross Purchase Price not less than 98% of the amount set forth in such Counter Offer. If Landlord is unable to sell the Premises for a Gross Purchase Price that is equal to or more than 98% of the Gross Purchase Price that would be payable by City pursuant to a Counter Offer and Landlord is willing to reduce the purchase price, or if Landlord does not enter into a purchase and sale agreement within 365 days following City's receipt of the Marketing Notice or Offer Notice, as applicable, and Landlord continues to desire to sell the Premises, then Landlord shall give to City another Marketing Notice or Offer Notice, as applicable (with a reduced purchase price, if applicable) and the above procedure for City's Right of First Offer shall be repeated.

(c) If City offers to pay the purchase price and comply with the terms set forth in the Marketing Notice or Offer Notice, as applicable, or if the parties agree to a revised purchase price and terms of sale following Landlord's receipt of a Counter Offer, the parties shall enter into good faith negotiations on a form of purchase agreement that reflects the agreed-upon purchase price and other terms of such purchase and sale. If the parties mutually agree on such form of purchase agreement within the forty-five (45) day period immediately following Landlord's receipt of a City Offer or Landlord's acceptance of a Counter Offer, as applicable, such purchase agreement shall be subject to the approval of the SFMTA Board of Directors ("SFMTA Board") and, if required under City's Charter, City's Board of Supervisors ("BOS") by resolution, each acting in its sole discretion.

If Landlord and SFMTA agree to the form of purchase agreement within such forty-five (45) day period, Landlord shall execute such form and, within five (5) business days of receiving such executed form from Landlord, SFMTA shall submit the form agreement to the SFMTA Board for approval. SFMTA shall have a thirty (30) calendar day period (the "SFMTA Board Review Period") following such submittal to have the proposed form agreement considered by the SFMTA Board of Directors; provided, however, that if the SFMTA Board does not hold all regularly scheduled open meetings during the original SFMTA Board Review Period, the original SFMTA Board Review Period shall be automatically extended through the date of the first regularly scheduled SFMTA Board meeting that immediately follows the initial SFMTA Board Review Period. Notwithstanding anything to the contrary herein, any automatic extensions of the SFMTA Board Review Period shall be limited to 10 days.

If the SFMTA Board approves the proposed form agreement prior to the termination of the SFMTA Board Review Period (as it may be extended pursuant to the foregoing paragraph), and SFMTA is required to obtain approval of the BOS to such form agreement, SFMTA shall submit to escrow a deposit equal to five percent (5%) of the purchase price specified in such form agreement (the "Earnest Money Deposit") within five (5) business days after SFMTA Board approval and shall submit the proposed form agreement to the Clerk of the BOS. SFMTA shall have the six (6) week period (the "BOS Review Period") immediately following the SFMTA Board approval of the proposed form agreement to have the proposed form agreement considered and approved by the BOS and the City's Mayor; provided, however, that if a regularly scheduled meeting of the BOS or the BOS committee to which the proposed form agreement is referred is not scheduled or is cancelled during the original BOS Board Review Period, the original BOS Review Period shall be automatically extended by the number of days that elapse between such unscheduled or cancelled meeting and the next regularly scheduled meeting. The Earnest Money Deposit shall be refunded to City only if the BOS or the City's Mayor does not approve the proposed form agreement within the BOS Review Period or if the Earnest Money Deposit is refundable pursuant to the conditions specified in the proposed form agreement. Notwithstanding anything to the contrary herein, any automatic extensions of the BOS Review Period shall be limited to 10 days.

If the parties do not timely agree on a final form of purchase agreement, or the parties agree to such final form of purchase agreement, but City does not timely obtain approval of such purchase agreement from the SFMTA Board and, if required under City's Charter, City's Board of Supervisors, Landlord shall be free to sell the Premises for a Gross Purchase Price of not less than that specified in the Marketing Notice, Offer Notice, or Counter Offer, as applicable, and on terms not materially less favorable to Landlord than those set forth in the proposed purchase agreement presented to the SFMTA Board of Directors.

(d) Notwithstanding anything herein to the contrary, the following conditions shall apply to City's Right of First Offer pursuant to this Section:

(i) City's Right of First Offer shall be personal to City and shall terminate upon any assignment of this Lease, or sublease of the Premises, by City to any party.

(ii) The City's Right of First Offer shall not apply to transfers to members of Joel Campos's immediate family; to any entity owned, controlled by, or under common control with Landlord, or owned or under the control or management of Joel Campos or members of his immediate family; or to transfers in connection with a corporate re-organization, merger, liquidation or dissolution; but shall be binding on any such transferee; provided, however, that such acquiring member or entity assumes Landlord's obligations under this Lease at the time of such transfer. The Right of First Offer does not apply to any transfers by Landlord to a lender for security or related purposes, nor to transfers by judicial or non-judicial foreclosure or a deed in lieu of foreclosure.

(iii) The Right of First Offer shall not be applicable and City shall have no rights under this Section so long as an Event of Default has occurred and is not timely cured.

(iv) The Right of First Offer is not assignable or transferable separate and apart from this Lease, nor may the Right of First Offer be separated from this Lease in any manner, either by reservation or otherwise.

(e) If City learns that Landlord has entered into a binding agreement to sell, or has in fact sold, the Premises to another party without complying with its obligations under this Section, City shall have the right to exercise all remedies available at law or in equity.

## **23. GENERAL PROVISIONS**

## **Notices**

Except as otherwise specifically provided in this Lease, any notice given under this Lease shall be in writing and given by delivering the notice in person or by commercial courier, or by sending it by first-class mail, certified mail, return receipt requested, or Express Mail, return receipt requested, with postage prepaid, to: **(a)** City at Tenant's address set forth in the Basic Lease Information; or **(b)** Landlord at Landlord's address set forth in the Basic Lease Information; or **(c)** such other address as either Landlord or City may designate as its new address for such purpose by notice given to the other in accordance with this Section. Any notice hereunder shall be deemed to have been given and received two (2) days after the date when it is mailed if sent by first-class, certified mail, one day after the date when it is mailed if sent by Express Mail, or upon the date personal delivery is made. For convenience of the parties, copies of notices may also be given by telefacsimile to the telefacsimile number set forth in the Basic Lease Information or such other number as may be provided from time to time; however, neither party may give official or binding notice by facsimile.

## **No Implied Waiver**

No failure by either party to insist upon the strict performance of any obligation of the other party under this Lease or to exercise any right, power or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of such term, covenant or condition. No acceptance of full or partial Rent by Landlord while City is in default hereunder shall constitute a waiver of such default by Landlord. No express written waiver of any default or the performance of any provision hereof shall affect any other default or performance, or cover any other period of time, other than the default, performance or period of time specified in such express waiver. One or more written waivers of a default or the performance of any provision hereof shall not be deemed to be a waiver of a subsequent default or performance. The consent of Landlord or City given in one instance under the terms of this Lease shall not relieve the other party of any obligation to secure the consent to any other or future instance under the terms of the Lease.

## **Amendments**

Neither this Lease nor any terms or provisions hereof may be changed, waived, discharged or terminated, except by a written instrument signed by the party against which the enforcement of the change, waiver, discharge or termination is sought. No waiver of any breach shall affect or alter this Lease, but each and every term, covenant and condition of this Lease shall continue in full force and effect with respect to any other then-existing or subsequent breach thereof. Whenever this Lease requires or permits the giving by City of its consent or approval, the SFMTA Director of Transportation, or his or her designee, shall be authorized to provide such approval, except as otherwise provided by applicable law, including the Charter of the City and County of San Francisco. Any amendments or modifications to this Lease, including, without limitation, amendments to or modifications to the exhibits to this Lease, shall be subject to the mutual written agreement of City and Landlord, and City's agreement may be made upon the sole approval of SFMTA's Director of Transportation or his or her designee; provided, however, material amendments or modifications to this Lease **(a)** changing the legal description of the Premises, **(b)** increasing the Term, **(c)** increasing the Rent, **(d)** changing the general use of the Premises from the use authorized under Section 5.1 of this Lease, and **(e)** any other amendment or modification which materially increases City's liabilities or financial obligations under this Lease shall additionally require the approval of the SFMTA Board.

## **Authority**

Landlord represents and warrants to City that the execution and delivery of this Lease by Landlord has been duly authorized and does not violate any provision of any agreement, law or regulation to which Landlord or the Premises is subject.

## **Parties and Their Agents; Approvals**

If applicable, the word "Landlord" as used in this Lease shall include the plural as well as the singular. As used in this Lease, the term "Agents" when used with respect to either party shall include the agents, employees, officers, contractors and subcontractors of such party (and with respect to Landlord shall include Landlord's lender), and the affiliates, officers, directors, shareholders, members, managers, partners, representatives, agents and employees of each of the foregoing; and the term "Invitees" when used with respect to City shall include the clients, customers, invitees, guests, licensees, assignees or subtenants of City. All approvals, consents or other determinations permitted or required by City under this Lease, including but not limited to the exercise of any option granted to City, shall be made by or through SFMTA's Director of Transportation (or his or her designee) unless otherwise provided in this Lease, subject to any applicable limitations in the City's Charter.

## **Interpretation of Lease**

The captions preceding the articles and sections of this Lease and in the table of contents have been inserted for convenience of reference only and such captions shall in no way define or limit the scope or intent of any provision of this Lease. This Lease has been negotiated at arm's length and between persons sophisticated and knowledgeable in the matters dealt with herein and shall be interpreted to achieve the intent and purposes of the parties, without any presumption against the party responsible for drafting any part of this Lease. Except as otherwise specifically provided herein, wherever in this Lease Landlord or City is required or requested to give its consent or approval to any matter or action by the other, such consent or approval shall not be unreasonably withheld or delayed and the reasons for disapproval of consent shall be stated in reasonable detail in writing. Provisions in this Lease relating to number of days shall be calendar days, unless otherwise specified, provided that if the last day of any period to give notice, reply to a notice or to undertake any other action occurs on a Saturday, Sunday or a bank or City holiday, then the last day for undertaking the action or giving or replying to the notice shall be the next succeeding business day. Use of the word "including" or similar words shall not be construed to limit any general term, statement or other matter in this Lease, whether or not language of non-limitation, such as "without limitation" or similar words, are used.

## **Successors and Assigns**

Subject to the provisions of Section 14 relating to assignment and subletting, the terms, covenants and conditions contained in this Lease shall bind and inure to the benefit of Landlord and City and, except as otherwise provided herein, their personal representatives and successors and assigns. There are no third-party beneficiaries to this Lease.

## **Brokers**

Neither party has had any contact or dealings regarding the leasing of the Premises, or any communication in connection therewith, through any licensed real estate broker or other person who could claim a right to a commission or finder's fee in connection with the lease contemplated herein, except for the broker identified in the Basic Lease Information ("Landlord's Broker"), whose commission, if any is due, shall be part of the Out of Pocket Costs. In the event that any other broker or finder perfects a claim for a commission or finder's fee based upon any such contact, dealings or communication, the party through whom the broker or finder makes his claim shall be responsible for such commission or fee and shall Indemnify the other party from any and all Claims incurred by the indemnified party in defending against the same. The provisions of this Section shall survive any termination of this Lease.

## **Severability**

If any provision of this Lease or the application thereof to any person, entity or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such provision to persons, entities or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each other provision of this Lease shall be valid and be enforceable to the full extent permitted by law, except to the extent that enforcement of this Lease without the invalidated provision would be unreasonable or inequitable under all the circumstances or would frustrate a fundamental purpose of this Lease.

## **Governing Law**

This Lease shall be construed and enforced in accordance with the laws of the State of California and the City's Charter.

## **Entire Agreement**

The parties intend that this Lease (including all of the attached exhibits, which are made a part of this Lease) shall be the final expression of their agreement with respect to the subject matter hereof and may not be contradicted by evidence of any prior or contemporaneous written or oral agreements or understandings. The parties further intend that this Lease shall constitute the complete and exclusive statement of its terms and that no extrinsic evidence whatsoever (including prior drafts hereof and changes therefrom) may be introduced in any judicial, administrative or other legal proceeding involving this Lease.

## **Attorneys' Fees**

In the event that either Landlord or City fails to perform any of its obligations under this Lease or in the event a dispute arises concerning the meaning or interpretation of any provision of this Lease, the defaulting party or the non-prevailing party in such dispute, as the case may be, shall pay the prevailing party reasonable attorneys' and experts' fees and costs, and all court costs and other costs of action incurred by the prevailing party in connection with the prosecution or defense of such action and enforcing or establishing its rights hereunder (whether or not such action is prosecuted to a judgment). For purposes of this Lease, reasonable attorneys' fees of the City's 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 Office of the City Attorney. The term "attorneys' fees" shall also include, without limitation, all such fees incurred with respect to appeals, mediations, arbitrations, and bankruptcy proceedings, and whether or not any action is brought with respect to the matter for which such fees were incurred. The term "costs" shall mean the costs and expenses of counsel to the parties, which may include printing, duplicating and other expenses, air freight charges, hiring of experts, and fees billed for law clerks, paralegals, and others not admitted to the bar but performing services under the supervision of an attorney.

## **Holding Over**

Should City hold over in possession of the Premises after the expiration of the Term with Landlord's consent, such holding over shall not be deemed to extend the Term or renew this Lease, but such tenancy thereafter shall continue as a month-to-month tenancy. Such tenancy shall be on all the terms and conditions set forth in this Lease and at the monthly Base Rent in effect during the last month of the Term of this Lease or such other rental as Landlord and City may mutually agree in writing as a condition to Landlord's consent to such holding over, and City shall continue as a month-to-month tenant until the tenancy shall be terminated by Landlord giving City or City giving Landlord at least thirty (30) days' prior written notice of termination.

Should City hold over without Landlord's consent, the rent payable by City during the first thirty (30) day period of such holding over shall be one hundred ten percent (110%) of the monthly Base Rent in effect during the last month of the Term of this Lease, and such tenancy shall otherwise be on the terms and conditions contained herein. After the first thirty (30) day period of such holding over, the monthly base rent shall be increased to one hundred fifty percent (150%) of the monthly base Rent in effect during the last month of the Term of this Lease.

### **Cumulative Remedies**

All rights and remedies of either party hereto set forth in this Lease shall be cumulative, except as may otherwise be provided herein.

### **Time of Essence**

Time is of the essence with respect to all provisions of this Lease in which a definite time for performance is specified.

### **Survival of Indemnities**

Termination of this Lease shall not affect the right of either party to enforce any and all indemnities and representations and warranties given or made to the other party under this Lease, nor shall it affect any provision of this Lease that expressly states it shall survive termination hereof. Each party hereto specifically acknowledges and agrees that, with respect to each of the indemnities contained in this Lease, the indemnitor has an immediate and independent obligation to defend the indemnitees from any claim which actually or potentially falls within the indemnity provision even if such allegation is or may be groundless, fraudulent or false, which obligation arises at the time such claim is tendered to the indemnitor by the indemnitee and continues at all times thereafter.

### **Signs**

Subject to all Laws and at City's sole cost, City may erect or post signs on or about the Premises. Any such signs shall not be deemed to be Alterations that require Landlord's prior written consent. Landlord shall have the right to post signage (to the extent such signage complies with applicable laws) upon the construction fence installed by Tenant, depicting the Modified Landlord Project. Such signage may include sales and leasing information. Landlord and Tenant shall cooperate with respect to the location and installation of any such signage.

### **Quiet Enjoyment and Title**

Landlord covenants and represents that it has full right, power and authority to grant the leasehold estate hereunder, and covenants that City, upon paying the Rent hereunder and performing the covenants hereof, shall, subject to the terms of this Lease, peaceably and quietly have, hold and enjoy the Premises and all appurtenances during the full Term of this Lease as against all persons or entities claiming by and through Landlord or on account of any action, inaction or agreement of Landlord or its Agents. Without limiting the provisions of Section 16.2 (Landlord's Indemnity), Landlord agrees to Indemnify City and its Agents against Claims arising out of any breach of Landlord's foregoing representation that would interfere with City's right to quiet enjoyment as provided in this Section.

### **Bankruptcy**

Landlord represents and warrants to City that Landlord has neither filed nor been the subject of any filing of a petition under the federal bankruptcy law or any federal or state insolvency laws or laws for composition of indebtedness or for the reorganization of debtors, and, to the best of Landlord's knowledge, no such filing is threatened. Landlord and City agree

that City's leasehold estate created hereby includes, without limitation, all rights to receive and enjoy all services as provided herein, and that if any of such services are terminated, or materially limited or restricted on account of any such case or proceeding, or for any other reason, City shall have the right to **(a)** contract directly with any third-party provider of such services, facilities or amenities to obtain the same, and **(b)** offset against the Base Rent or other charges payable hereunder any and all reasonable costs and expenses incurred by City in obtaining such services.

[Intentionally deleted]

### **Non-Liability of City Officials, Employees and Agents of City**

Notwithstanding anything to the contrary in this Lease, no elective or appointive board, commission, member, officer, employee or agent of City shall be personally liable to Landlord, its successors and assigns, for any Event of Default or for any amount which may become due to Landlord, its successors and assigns, or for any obligation of City under this Lease.

### **MacBride Principles - Northern Ireland**

The City and County of San Francisco urges companies doing business in Northern Ireland to move toward 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 County of San Francisco also urges San Francisco companies to do business with corporations that abide by the MacBride Principles. Landlord acknowledges that it has read and understands the above statement of the City and County of San Francisco concerning doing business in Northern Ireland.

### **Controller's Certification of Funds**

*[Intentionally Deleted.]*

[Intentionally left blank]

### **Non Discrimination in City Contracts and Benefits Ordinance**

**Covenant Not to Discriminate.** In the performance of this Lease, Landlord agrees not to discriminate against any employee of, any City employee working with Landlord, or applicant for employment with Landlord, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

**Subcontracts.** Landlord shall include in all subcontracts relating to the Premises a non-discrimination clause applicable to such subcontractor in substantially the form of subsection (a) above. In addition, Landlord shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k) and 12C.3 of the San Francisco Administrative Code and shall require all subcontractors to comply with such provisions. Landlord's failure to comply with the obligations in this subsection shall constitute a material breach of this Lease.

**Non-Discrimination in Benefits.** Landlord does not as of the date of this Lease and will not during the term of this Lease, in any of its operations in San Francisco, on real property owned by City, or where the work is being performed for the City or elsewhere within the United States, 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, as well as any benefits other than the benefits specified above, 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(b) of the San Francisco Administrative Code.

**HRC Form.** As a condition to this Lease, Landlord shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission (the "HRC"). Landlord hereby represents that prior to execution of the Lease: (a) Landlord executed and submitted to the HRC Form HRC-12B-101 with supporting documentation, and (b) the HRC approved such form.

**Incorporation of Administrative Code Provisions by Reference.** The provisions of Chapters 12B and 12C of the San Francisco Administrative Code relating to non-discrimination by parties contracting for the lease of property to City are incorporated in this Section by reference and made a part of this Lease as though fully set forth herein. Landlord shall comply fully with and be bound by all of the provisions that apply to this Lease under such Chapters of the Administrative Code, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, Landlord understands that pursuant to Section 12B.2(h) of the San Francisco Administrative Code, a penalty of Fifty Dollars (\$50) for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Lease may be assessed against Landlord and/or deducted from any payments due Landlord.

**Applicable During Lease Term.** Notwithstanding anything to the contrary set forth above in this Section 23.25, City confirms and agrees that the provisions of this Section 23.25 shall only apply during the Term of this Lease.

[Intentionally left blank]

[Intentionally left blank]

[Intentionally left blank]

### **Counterparts**

This Lease may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

### **Effective Date**

The date on which this Lease shall become effective (the "Effective Date") is the date upon which (a) the SFMTA Board, in its sole and absolute discretion, adopts a resolution approving this Lease in accordance with all applicable laws, and (b) this Lease is duly executed by the parties hereto.

### **Certification by Landlord**

By executing this Lease, Landlord certifies that neither Landlord nor any of its officers or members have been suspended, disciplined or disbarred by, or prohibited from contracting with, any federal, state or local governmental agency. In the event Landlord or any of its officers or members have been so suspended, disbarred, disciplined or prohibited from contracting with any governmental agency, it shall immediately notify the City of same and the reasons therefore together with any relevant facts or information requested by City. Any such suspension,



disbarment, discipline or prohibition may result in the termination or suspension of this Lease. Landlord acknowledges that this certification is a material term of this Lease.

### **Memorandum of Lease**

On or about the Effective Date, Landlord and City shall execute the memorandum of lease in the form attached hereto as Exhibit H (the "Memorandum of Lease"), and City shall cause the Memorandum of Lease to be recorded in the Official Records of the City and County of San Francisco within two (2) business days thereafter. Upon termination of the Right of First Offer, City shall execute in recordable form such documents as reasonably requested by Landlord to establish that the Premises is no longer subject to the option.

### **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 City 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 is covered by this Section will be made available to the public upon request.

### **Conflicts of Interest**

Through its execution of this Lease, Landlord acknowledges that it is familiar with the provisions of Section 15.103 of the San Francisco Charter, Article III, Chapter 2 of 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, and certifies that it does not know of any facts which would constitute a violation of said provisions, and agrees that if Landlord becomes aware of any such fact during the Term of this Lease, Landlord shall immediately notify City.

### **Notification of Limitations on Contributions**

Through its execution of this Lease, Landlord acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the selling or leasing of any land or building to or from the City whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or a board on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Landlord acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Landlord further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Landlord's board of directors, chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than twenty percent (20%) in Landlord; and any committee that is sponsored or controlled by Landlord. Additionally, Landlord acknowledges that Landlord must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. Landlord further agrees to provide to City the names of each person, entity or committee described above.

### **Preservative-Treated Wood Containing Arsenic**

Landlord may not purchase preservative-treated wood products containing arsenic in its performance of this Lease unless an exemption from the requirements of Environment Code, Chapter 13 is obtained from the Department of Environment under Section 1304 of the Environment Code. The term "preservative-treated wood containing arsenic" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniac copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Landlord may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of Environment. This provision does not preclude Landlord from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

### **Cooperative Drafting**

This Lease has been drafted through a cooperative effort of both parties, and both parties have had an opportunity to have the Lease reviewed and revised by legal counsel. No party shall be considered the drafter of this Lease, and no presumption or rule that an ambiguity shall be construed against the party drafting the clause shall apply to the interpretation or enforcement of this Lease.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS LEASE, LANDLORD ACKNOWLEDGES AND AGREES THAT NO OFFICER OR EMPLOYEE OF CITY HAS AUTHORITY TO COMMIT CITY HERETO UNLESS AND UNTIL THE SFMTA BOARD SHALL HAVE DULY ADOPTED A RESOLUTION APPROVING THIS LEASE AND AUTHORIZING CONSUMMATION OF THE TRANSACTION CONTEMPLATED HEREBY. THEREFORE, ANY OBLIGATIONS OR LIABILITIES OF CITY HEREUNDER ARE CONTINGENT UPON ADOPTION OF SUCH A RESOLUTION, AND THIS LEASE SHALL BE NULL AND VOID UNLESS THE SFMTA BOARD APPROVES THIS LEASE, IN ITS SOLE AND ABSOLUTE DISCRETION, AND IN ACCORDANCE WITH ALL APPLICABLE LAWS. APPROVAL OF THIS LEASE BY ANY DEPARTMENT, COMMISSION OR AGENCY OF CITY SHALL NOT BE DEEMED TO IMPLY THAT SUCH RESOLUTION WILL BE ADOPTED NOR WILL ANY SUCH APPROVAL CREATE ANY BINDING OBLIGATIONS ON CITY.

[No further text this page.]

Landlord and City have executed this Lease as of the date first written above.

LANDLORD:

THE PALACE AT WASHINGTON SQUARE LLC,  
a California limited liability company (in formation)

By: \_\_\_\_\_  
Joel Campos, Member

CITY:

CITY AND COUNTY OF SAN FRANCISCO,  
a municipal corporation, acting by and through its  
Municipal Transportation Agency

By: \_\_\_\_\_  
Edward D. Reiskin  
Director of Transportation  
San Francisco Municipal Transportation Agency

APPROVED BY:

San Francisco Municipal Transportation Agency  
Board of Directors  
Resolution No: \_\_\_\_\_  
Adopted: \_\_\_\_\_  
Attest:

\_\_\_\_\_  
Secretary, SFMTA Board of Directors

APPROVED AS TO FORM:

DENNIS J. HERRERA, City Attorney

By: \_\_\_\_\_  
Deputy City Attorney

**EXHIBIT A**

**LEGAL DESCRIPTION OF PREMISES**

THAT CERTAIN REAL PROPERTY SITUATION IN THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

[TO BE ATTACHED]

**Note: a hard copy of the Exhibit is available at the SFMTA Real Estate Unit**

**One South Van Ness Ave. 8<sup>th</sup> Floor**

**EXHIBIT B**

**DEPICTION OF PREMISES**

[TO BE ATTACHED]

**Note: a hard copy of the Exhibit is available at the SFMTA Real Estate Unit**

**One South Van Ness Ave. 8<sup>th</sup> Floor**

**EXHIBIT C**

**NOTICE OF LEASE DATES**

[Date]

Mr. Edward D. Reiskin  
San Francisco Municipal Transportation Agency  
1 South Van Ness Avenue, 7<sup>th</sup> Floor  
San Francisco, CA 94103

RE: Acknowledgement of Commencement Dates, Lease Between \_\_\_\_\_ (Landlord),  
and the CITY AND COUNTY OF SAN FRANCISCO (Tenant), for premises located at  
1731-1741 Powell Street, San Francisco, California 94133

Dear Mr. Reiskin:

This letter is to confirm the following dates pursuant to the Lease:

Lease Commencement Date:  
(Section \_\_\_\_)

Rent Commencement Date:  
(Section \_\_\_\_)

Lease Expiration Date:  
(Section \_\_\_\_)

Please acknowledge your acceptance of the dates specified in this letter by signing below  
and returning a copy of this countersigned letter.

Sincerely,

Accepted by:

\_\_\_\_\_  
Edward D. Reiskin  
Director of Transportation  
San Francisco Municipal Transportation Agency

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

**EXHIBIT D**

**FORM OF LENDER CONSENT**

[TO BE ATTACHED]

**Note: a hard copy of the Exhibit is available at the SFMTA Real Estate Unit**

**One South Van Ness Ave. 8<sup>th</sup> Floor**

**EXHIBIT E**

[Intentionally deleted]



**EXHIBIT F**

**CITY PROJECT PLANS AND SPECIFICATIONS**

[TO BE ATTACHED]

**Note: a hard copy of the Exhibit is available at the SFMTA Real Estate Unit**

**One South Van Ness Ave. 8<sup>th</sup> Floor**

## **EXHIBIT G**

### **PROPERTY REPORTS**

1. Phase One-Environmental Site Assessment-Theatre Building dated May 30, 2001
2. EnviroNova Asbestos and Lead Survey dated June 19, 2009
3. Steve Walker Studio Letter of Interest dated October 25, 2012
4. Geotechnical Investigation for the Premises prepared by Treadwell & Rollo, Inc., dated December 1, 2008

**Note: a hard copy of the Exhibit is available at the SFMTA Real Estate Unit  
One South Van Ness Ave. 8<sup>th</sup> Floor**

**EXHIBIT H**

**FORM OF MEMORANDUM OF LEASE**

RECORDING REQUESTED BY, AND  
WHEN RECORDED, MAIL TO:

City and County of San Francisco  
SFMTA Real Estate Section  
Finance and Information Technology Division  
1 South Van Ness, 8<sup>th</sup> Floor  
San Francisco, CA 94103  
Attn: Senior Manager

FOR RECORDER'S USE ONLY

**MEMORANDUM OF LEASE**

This Memorandum of Lease ("Memorandum"), dated for reference purposes as of \_\_\_\_\_, 2013, is by and between \_\_\_\_\_ ("Landlord"), and the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, acting by and through its Municipal Transportation Agency ("City").

**Recitals**

A. Concurrently herewith, Landlord and City have entered into that certain Lease, dated \_\_\_\_\_, 2013 (the "Lease"), pursuant to which Landlord leased to City and City leased from Landlord the real property more particularly described in the attached Exhibit A (the "Property"), which is incorporated by this reference.

B. The Lease provides City a right of first offer to acquire the Property (the "Right of First Offer") on the terms specified in Section 22 of the Lease.

C. Landlord and City desire to execute this Memorandum to provide constructive notice of the Lease and the Right of First Offer to all third parties, and all of the terms and conditions of the Lease are incorporated herein by reference as if they were fully set forth herein and reference is made to the Lease itself for a complete and definitive statement of the rights and obligations of Landlord and Tenant thereunder.

For good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. Term. Pursuant to the terms of the Lease, Landlord leased the Property to City for a term commencing on \_\_\_\_\_ (the "Lease Commencement Date"), and City's obligation to pay Base Rent (the "Rent Commencement Date") commenced on \_\_\_\_\_, 2013. The term of the Lease shall expire at midnight on the last day of the Twenty-Forth (24<sup>th</sup>) full month immediately following the Rent Commencement Date, unless earlier terminated in accordance with the terms of the Lease.

2. Lease Terms. The lease of the Property to City is made pursuant to the Lease, which is incorporated in this Memorandum by reference. This Memorandum shall not be deemed to modify, alter or amend in any way the provisions of the Lease. In the event any

conflict exists between the terms of the Lease and this Memorandum, the terms of the Lease shall govern. Except as otherwise defined in this Memorandum, capitalized terms shall have the meanings given them in the Lease.

3. Successors and Assigns. This Memorandum and the Lease shall bind and inure to the benefit of the parties and their respective heirs, successors, and assigns, subject, however, to the provisions of the Lease.

IN WITNESS WHEREOF, Landlord and City have executed this Memorandum of Lease as of the day and year first above written.

LANDLORD:

CITY:

CITY AND COUNTY OF SAN FRANCISCO,  
a municipal corporation, acting by and through its  
Municipal Transportation Agency

By: \_\_\_\_\_  
Edward D. Reiskin  
Director of Transportation

APPROVED AS TO FORM:

DENNIS J. HERRERA, City Attorney

By: \_\_\_\_\_  
Deputy City Attorney

State of California )  
County of \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

State of California )  
County of \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

**EXHIBIT A**

to

**Memorandum of Lease**

**Legal Description of Property**

THAT CERTAIN REAL PROPERTY SITUATION IN THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

**Note: a hard copy of the Exhibit is available at the SFMTA Real Estate Unit**

**One South Van Ness Ave. 8<sup>th</sup> Floor**