**LEASE AND DEVELOPMENT AGREEMENT**

**between**

**THE PORT AUTHORITY OF NEW YORK   
AND NEW JERSEY**

**and**

**[LESSEE]**

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LEASE AND DEVELOPMENT AGREEMENT

**Parties**

This LEASE AND DEVELOPMENT AGREEMENT is made as of the day of 2014, by and between THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY (the “**Port Authority**”), a body corporate and politic created by Compact between the States of New York and New Jersey with the consent of the Congress of the United States of America and having its office at 225 Park Avenue South, 15th Floor, New York, New York 10003, whose representative is the Executive Director of the Port Authority, and [LESSEE] (the “**Lessee**”), a limited liability company organized and existing under the laws of Delaware and having an office and place of business at , whose representative is , its .

**Recitals**

1. The Port Authority is the ground lessee, pursuant to the Basic Lease, of the Airport, including the Premises.

2. The TWA Flight Center, designed in the late 1950’s by renowned architect Eero Saarinen and opened in 1962 as the Trans World Airlines air terminal, is situated in the Premises. The TWA Flight Center has been designated a New York City landmark and is listed on the National and New York State Registers of Historic Places.

3. Air terminal operations ceased at the TWA Flight Center in 2001. In 2004 the Port Authority, the New York State Historic Preservation Office (“**SHPO**”), the FAA and the Advisory Council on Historic Preservation entered into a Memorandum of Agreement (the “**MOA**”), a copy of which is attached as Exhibit B, setting forth various stipulations relating to the rehabilitation, restoration and adaptive reuse of the TWA Flight Center.

4. The MOA provides, *inter alia*, that final design plans for the restoration, rehabilitation and adaptive reuse of the TWA Flight Center are to be submitted to SHPO for comment, and that the Port Authority, in consultation with SHPO, is to assure that the TWA Flight Center is restored and rehabilitated by the “adaptive reuse developer” in accordance with the Secretary of Interior Standards for the Treatment of Historical Properties.

5. The Port Authority has issued Request for Proposals #38826 (the “**RFP**”), seeking proposals for a “creative and innovative hotel development” at the Premises that would respect and enhance the historic significance of the TWA Flight Center “as an international icon of visionary architecture”.

6. A development team affiliated with the Lessee responded to the RFP with a proposal (the “**Lessee Team Proposal**”) for the development at the Premises of a “[X Brand} Hotel”, an upscale hotel targeted to a diverse clientele, with food, beverage, meeting, event, spa, retail and cultural space, all managed and operated by . The Lessee Team Proposal contemplated the restoration of the public spaces, such as restaurants and lobby areas, to their original appearance and function, or as otherwise shown in the approved development plans, and [ ].

7. The Port Authority has already performed substantial rehabilitation and restoration work on the interior and exterior portions of the TWA Flight Center.

8. The Port Authority has engaged in an extensive program of modernization and redevelopment of the Airport, including the construction of new air terminals, reconfigured roadways and other major infrastructure improvements.

9. The Premises are located in the Central Terminal Area of the Airport, and Port Authority desires the redeveloped TWA Flight Center to provide upscale services and amenities consistent with the redeveloped Airport, to serve the users of the Airport and the surrounding community.

10. Based on the Lessee Team Proposal, which incorporates the requirements of the RFP, the Port Authority has selected the Lessee to redevelop and operate the Premises, and for that purpose the Parties desire to enter into this Agreement.

**Terms of Agreement**

In consideration of the covenants and mutual agreements herein contained, the Port Authority and the Lessee hereby covenant and agree as follows:

# ARTICLE 1. DEFINITIONS

“**Accounting Principles**” shall mean generally accepted accounting principles (GAAP) consistently applied.

“**Affiliate**” shall mean any Person (as defined below) which, directly or indirectly, controls, is controlled by or is under common control with any other Person. “**Control**” shall be deemed to exist where any Person has possession of the power, directly or indirectly, to cause the direction of management and policies of a corporation, partnership, trust or other business entity, whether through voting securities, by contract, by common directors, officers or trustees or otherwise, provided, however, that notwithstanding the foregoing “Control” shall, in any event, be deemed to exist where any Person has ownership of fifty percent (50%) or more of all of the voting stock of a corporation or more than fifty percent (50%) of all of the legal or equitable interests in any other business entity. Affiliate shall also mean any individual who is a member of the immediate family (whether by birth or marriage) of a Person who is an individual, which includes for purposes of this definition a spouse, a brother or a sister of the whole or half blood of such Person, the spouse of any such brother or sister, a lineal descendant or ancestor (including an individual related by or through legal adoption) of such Person or any of the foregoing or a trust for the benefit of such Person or any of the foregoing.

“**Airport**” shall mean John F. Kennedy International Airport in the County of Queens, City and State of New York.

“**Basic Lease**” shall mean the Amended and Restated Agreement of Lease between The City of New York, as landlord, and the Port Authority, as tenant, dated as of November 24, 2004, as the same from time to time may be supplemented or amended and/or restated. Said agreement dated as of November 24, 2004, has been recorded in the Office of the Register of The City of New York, County of Queens, on December 3, 2004 with a City Register File Number of 2004000748687.

“**Basic Rental**” shall mean the rental provided for in Section 4.1 hereof.

“**Building**” shall have the meaning provided in Section 5.1 hereof.

“**Business Day**” shall mean any day which is not a Saturday, Sunday or a day observed as a holiday by the State of New York, the State of New York or the Federal government.

“**Central Terminal Area**” shall mean the area within the Airport so designated by the Port Authority, as shown on the drawing attached as Exhibit C, as such drawing may hereafter be amended.

“**Certificate of Completion**” and “**Certificate of Partial Completion**” shall have the meanings provided in Section 5.21 hereof.

“**City**” shall mean The City of New York, a municipal corporation of the State of New York.

“**Conceptual Plan**” shall have the meaning provided in Section 5.2 hereof.

“**Construction Application**” shall have the meaning provided in Section 5.3 hereof.

“**Construction Completion Date**” shall have the meaning provided in Section 5.21 hereof.

**“Construction Completion Deadline”** shall have the meaning provided in Section 5.3 hereof.

“**Construction Loan**” shall have the meaning provided in Section 14A.l hereof.

“**Construction Mortgage**” shall have the meaning provided in Section 14A.1 hereof.

“**Construction Mortgage Loan Amount**” shall have the meaning provided in Section 14A.1 hereof.

“**Construction Permit**” shall have the meaning provided in Section 5.3 hereof.

“**Construction Plans**” shall have the meaning provided in Section 5.3 hereof.

“**Construction Work**” shall mean any and all construction work performed by the Lessee, its contractors, subcontractors, agents or employees relating to or in connection with the Project pursuant to the terms of this Agreement, including but not limited to any “Partial Approval Work” (as defined below) and work performed subsequent to the Construction Completion Date.

“**Control**” shall have the meaning provided in the definition of “Affiliate” above in this Article 1.

“**Development Costs**” shall have the meaning provided in Section 15.1 hereof.

“**EDC**”shall mean the New York City Economic Development Corporation, a local development corporation formed pursuant to Section 1411 of the Not-for-Profit Corporation Law of the State of New York, or such successor entity as may be designated by the City under the Basic Lease.

“**Environmental Damages**” shall mean any one or more of the following: (i) the presence on, about or under the Premises of any Hazardous Substance and/or (ii) the disposal, release or threatened release of any Hazardous Substance from the Premises, and/or (iii) any personal injury (including wrongful death), property damage, deed/use restriction or natural resources damages arising out of or related to Hazardous Substances on, about or under the Premises or disposed of or released from the Premises, and/or (iv) the violation of any Environmental Requirements pertaining to Hazardous Substances.

“**Environmental Management Plan**” shall have the meaning provided in Section 5.16(c) hereof.

“**Environmental Requirement(s)**” shall mean all applicable present and future laws, statutes, enactments, resolutions, regulations, rules, ordinances, codes, licenses, permits, orders, approvals, plans, authorizations, concessions, franchises, requirements and similar items, of all governmental agencies, departments, commissions, boards, bureaus, or instrumentalities of the United States, states and political subdivisions thereof and all applicable judicial, administrative, and regulatory decrees, judgments, and orders relating to the protection of human health or the environment, and in the event that there shall be more than one compliance standard, the standard for any of the foregoing to be that which requires the lowest level of a Hazardous Substance, the foregoing to include without limitation:

#### All requirements pertaining to reporting, licensing, permitting, investigation, and remediation of emissions, discharges, releases, or threatened releases of Hazardous Substances into the air, surface water, groundwater, or land, or relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of Hazardous Substances, including without limitation the JFK SPEDES Permit; and

#### All requirements pertaining to the protection of the health, and safety of employees, the public or the environment.

“**Existing Condition**” shall have the meaning provided in Section 20B(a) hereof.

“**Expiration Date**” shall mean the day preceding the seventy-fifth anniversary of the earlier of (x) the Construction Completion Date and (y) the Construction Completion Deadline.

“**FAA**” shall mean the Federal Aviation Administration of the United States of America.

“**Flight Center IP Rights**” shall have the meaning provided in Section 25.1 hereof.

“**Force Majeure**” shall have the meaning provided in Section 26.5 hereof.

“**Franchise Agreement**” shall mean any franchise agreement entered into between the Lessee and the owner of a hotel brand or chain with respect to the development and/or operation of the Hotel, and (subject to the consent rights of the Port Authority pursuant to this Agreement) any successor to or replacement of such agreement.

“**Governmental Authority(ies)**” shall mean the United States of America, the State of New York, the City of New York, and any agency, department, corporation, commission, board, bureau, instrumentality or political subdivision of any of the foregoing (excluding the Port Authority acting in its proprietary capacity) now existing or hereafter created, having or exercising jurisdiction over the Premises or any portion thereof including, without limitation, jurisdiction over the administration or enforcement of any Environmental Requirements.

**“Gross Revenues”** shall have the meaning provided in Section 4.3.

“**Hazardous Substance(s)**” shall mean and include without limitation any pollutant, contaminant, toxic or hazardous waste, dangerous substance, potentially dangerous substance, noxious substance, toxic substance, flammable, explosive or radioactive material, urea formaldehyde foam insulation, asbestos, polychlorinated biphenyls (PCBs), chemicals known to cause cancer or reproductive toxicity, petroleum and petroleum products and other substances which have been or in the future shall be declared to be hazardous or toxic, or the removal of which have been or in the future shall be required, or the manufacture, preparation, production, generation, use, maintenance, treatment, storage, transfer, handling or ownership of which have been or in the future shall be restricted, prohibited, regulated or penalized by any Environmental Requirement.

“**Hotel**” shall mean the hotel developed and operated on the Premises pursuant to this Agreement.

“**Hotel Management Agreement**” shall mean the hotel management agreement entered into between the Lessee [ ] with respect to the management and operation of the Hotel, a copy of which is attached as Exhibit E, and (subject to the consent rights of the Port Authority pursuant to this Agreement) any successor to or replacement of such agreement.

“**Indemnified Party(ies)**” shall mean the City, EDC and the Port Authority, the Mayor of the City, each Commissioner of the Port Authority and each officer, director, agent, elected official, attorney for, employee and representative of the City, EDC and the Port Authority.

“**Index**” shall mean the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor, New York, New York — Northeastern New York Area, All Items (1982-1984 = 100) or its successor.

“**Institutional Investor**” shall have the meaning provided in Section 14A.1 hereof.

“**JFK SPEDES Permit**” shall have the meaning provided in Section 5.16(a) hereof.

“**Land**” shall have the meaning provided in Section 2.1 hereof.

“**Lease Commencement Date**” shall have the meaning provided in Section 3.1 hereof.

**“Lease Year”** shall mean (x) the period from the Lease Commencement Date through the last day of the calendar month in which the day preceding the anniversary of the Lease Commencement Date occurs, (y) each succeeding twelve-calendar-month period thereafter and (z) the succeeding period, if any, of less than twelve (12) full calendar months ending on the Expiration Date.

“**Lessee**” shall mean [LESSEE], whose owners are ; or if the Lessee assigns or transfers its interest hereunder in accordance with the terms of this Agreement, the term “Lessee” shall also mean such assignee or transferee.

**“Lessee’s Architect/Engineer”** shall have the meaning provided in Section 5.3 hereof.

**“Lessee’s Certificate”** shall have the meaning provided in Section 5.16 hereof.

“**Matter**” shall have the meaning provided in Section 5.15 hereof.

**“Meaningful Participation”** shall have the meaning provided in Section 23.3 hereof.

“**MOA**” shall have the meaning provided in the Recitals.

“**MOA Maintenance Guidelines**” shall have the meaning provided in Section 7.2 hereof.

“**Mortgage**” shall have the meaning provided in Section 14.1 hereof.

“**Mortgage Amount**” shall have the meaning provided in Section 14A.l hereof.

“**New Lease**” shall have the meaning provided in Section 14A.11 hereof.

“**Notice(s)**” shall have the meaning provided in Section 24.1 hereof.

“**Partial Approval Plans**” shall have the meaning provided in Section 5.4 hereof.

“**Partial Approval Work**” shall have the meaning provided in Section 5.4 hereof.

“**Partial Construction Permit**” shall have the meaning provided in Section 5.4 hereof.

“**Partial Occupancy Request**” shall have the meaning provided in Section 5.21 hereof.

“**Payment Period**” shall have the meaning provided in Section 4.3 hereof.

“**Permanent Loan**” shall have the meaning provided in Section 14A.1 hereof.

“**Permanent Mortgage**” shall have the meaning provided in Section 14A.l hereof.

“**Permanent Mortgage Loan Amount**” shall have the meaning provided in Section 14A.l hereof.

“**Person**” shall mean and include an individual, company (including a limited liability company), corporation, partnership, joint venture, estate, trust, unincorporated association, any Federal, state, county or municipal government, bureau, department or agency thereof, and any other entity.

“**Premises**” shall have the meaning provided in Section 2.1 hereof.

“**Present Value**” shall mean the value as of the date in question of a sum or sums to be paid or collected in the future, to be calculated using a discount rate equal to the weekly Bond Buyer Revenue Bond Index, as published in *The Bond Buyer* as of the date in question, plus one hundred (100) basis points; provided, however, that if the Bond Buyer Revenue Bond Index is no longer available, a successor index shall be used, or, in the absence thereof, the rate to be used for calculating Present Value shall be a discount rate certified by the Port Authority’s Chief Financial Officer, as of the date in question, as appropriate for such calculation.

“**Proceeds Payment**” shall have the meaning provided in Section 15.2 hereof.

“**Proceeds Percentage**” shall have the meaning provided in Section 15.1 hereof.

“**Prohibited Party**” shall mean any Person, or any Person that is controlled by a Person, or any Person who is an Affiliate of, or holds five percent (5%) or more of the equity interest in, a Person:

(1) that has been or is currently under indictment for or convicted of a crime in any jurisdiction, or the subject of a criminal investigation by any federal, state or local prosecuting or investigative agency and/or a civil anti-trust investigation by any federal, state or local prosecuting or investigative agency;

(2) that has had a development agreement with the Port Authority terminated for willful default or breach, has had a contract terminated by a governmental agency in the States of New York or New Jersey for willful breach or default or has had a contract terminated for any cause relating to an indictment or conviction of such Person or its principals;

(3) that is in material default beyond any applicable grace period, under any agreement with the Port Authority or has been, within the preceding five (5) years, in material default, beyond any applicable grace period, under any agreement with the Port Authority;

(4) that has been suspended, debarred, found not responsible or otherwise disqualified from entering into any contract with any governmental agency or been denied a government contract for failure to meet standards related to integrity;

(5) that has had any sanction imposed as a result of a judicial or administrative proceeding related to fraud, extortion, bribery, bid rigging, embezzlement, misrepresentation or anti-trust regardless of the dollar amount of the sanctions or the date of their imposition;

(6) that is organized in or controlled from a country which is subject to any of the following: (i) the Trading with the Enemy Act of 1917, 50 U.S.C. App. §1, et seq., as amended; (ii) the International Emergency Economic Powers Act of 1976, 50 U.S.C. § 1701, et seq., as amended; and (iii) the Anti-Terrorism and Arms Export Amendments Act of 1989, codified at Section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. § 2405, as amended;

(7) that engages in any dealings or transactions or is blocked or subject to blocking pursuant to Executive Order 13224 of September 23, 2001 Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism (66 Fed. Reg. 49079 (2001)) (the “**Executive Order**”), or is otherwise associated with any such Person in any manner violative of the Executive Order or any State or City of New York or the State of New Jersey statutes, codes, regulations, orders or other governmental action relating to activities referenced in this clause (7);

(8) that is on the list of Specially Designated Nationals and Blocked Persons or subject to the limitations or prohibitions under any other U.S. Department of Treasury’s Office of Foreign Assets Control regulation or executive order (“**OFAC**”) and/or with whom the Port Authority is restricted from doing business with under OFAC or under any statute, executive order, or other governmental action or any State or City of New York or the State of New Jersey statutes, codes, regulations, orders or other governmental action relating to activities referenced in this clause (8);

(9) that has (w) filed a petition under any insolvency statute, (x) made a general assignment for the benefit of its creditors, (y) commenced a proceeding for the appointment of a receiver, trustee, liquidator or conservator of itself or of the whole or any substantial part of its property or shall otherwise be dissolved or liquidated, or (z) filed a petition seeking reorganization or liquidation or similar relief under any applicable law or statute, or has been subject to any of foregoing in the preceding five (5) years;

(10) that is involved or has been involved in a material litigation or similar proceeding adverse to the Port Authority or any subsidiary thereof;

(11) whose involvement or presence in the Project or the Premises, in the Port Authority’s sole discretion, could create a potential security threat, and/or is repugnant to the public policy of the United States or other Governmental Authorities (it being understood that if any Person’s involvement in the Project and/or the Premises is subject to the express approval of a federal or state governmental actor, and all such approvals are granted, then such Person shall be deemed excluded from this clause (11));

(12) whose involvement or presence in the Project or the Premises would create any conflict of interest as defined under the Public Officers Law of the State of New York between any Commissioner of the Port Authority and itself or its chief executive officer, chief operating officer, chief financial officer, president, chairman of the board, other similar senior executive, or any Person or entity which controls, is controlled by, or is under common control with it; and

(13) that shall not subject or submit itself to the jurisdiction of the courts of the State of New York in any actions relating to the Project and/or this Agreement.

“**Project**” shall mean the redevelopment of the Building and all other improvements to be located in and on the Premises, including the planning, design and construction work therefor.

“**Proportionate Share**” shall have the meaning provided in Section 15.1 hereof.

“**Recognized Mortgagee**” shall have the meaning provided in Section 14A.1 hereof.

“**Refinancing Loan**” shall have the meaning provided in Section 14A.1 hereof.

“**Refinancing Mortgage**” shall have the meaning provided in Section 14A.l hereof.

“**Refinancing Mortgage Loan Amount**” shall have the meaning provided in Section 14A.l hereof.

“**Remediate**” and “**Remediation**” shall have the meaning provided in Section 20B hereof.

**“Rent Commencement Date”** shall mean the earliest to occur of the following: (x) the date that is 24 calendar months following the Lease Commencement Date (*e.g.* if the Lease Commencement Date were December 2, 2014, then the Rent Commencement Date would be December 2, 2016), (y) the date of issuance of the Certificate of Completion and (z) the date of issuance of the first Certificate of Partial Completion for any portion of the Building.

“**Rental**” or “**rental**” shall mean all payments to be made by the Lessee pursuant to any provision of this Agreement, including without limitation all payments to be made by the Lessee pursuant to Article 5 hereof and late charges.

“**Requirements**” shall mean all present and future laws, rules, orders, enactments, ordinances, resolutions, regulations, statutes, requirements, codes, directions and executive orders of any Governmental Authority, and shall also mean all present and future conditions imposed in connection with the issuance of any permit applicable to the Premises by any Governmental Authority.

“**Resident Engineer**” shall mean the person designated as the Resident Engineer at the Airport by the Chief Engineer of the Port Authority.

“**RFP**” shall have the meaning provided in the Recitals.

“**Rules and Regulations**” shall mean the Rules and Regulations of the Airport from time to time in effect.

“**Sale**” shall have the meaning provided in Section 15.1 hereof.

“**SHPO**” shall have the meaning provided in the Recitals.

“**Single Purpose Entity**” shall have the meaning provided in Section 3.3 hereof.

“**Sublease**” shall have the meaning provided in Section 14.1 hereof.

“**Subtenant**” shall have the meaning provided in Section 14.1 hereof.

“**Subtenant Impositions**” shall have the meaning provided in Section 4.4 hereof.

“**Taxes**” shall mean ad valorem real estate taxes now or hereafter levied or assessed by the State of New York and/or the City of New York.

**“Termination Notice”** shall have the meaning provided in Section 14A.5 hereof.

**“Total Project Cost”** shall mean all Development Costs incurred through the Construction Completion Date to the extent such costs are included in the project budget approved by the prospective Recognized Mortgagee under the Construction Loan.

“**Transfer**” shall have the meaning provided in Section 14.1 hereof.

**“Upper Scale Hotel”** shall mean a (x) hotel that is ranked as “upper upscale” or better in the chain scale segment by Smith Travel Research (STR) or that is ranked in the “upscale” segment or better by J.D. Power and Associates North America Guest Satisfaction Index Study and that is within the market price segments defined by STR as representing the top 30% of average room rates in the New York, New York metro STR market or (y) a hotel that is a boutique hotel with no chain affiliation that meets the quality level standards set forth in the preceding clause (x). If the hotel rankings published by both Smith Travel Research and J.D. Power and Associates North American Guest Satisfaction Index Study are discontinued, the parties shall mutually agree upon another substantially similar publication which ranks hotel chains based upon substantially similar criteria such as performance and services.

**“WBE”** shall have the meaning provided in Section 21.3 hereof.

# ARTICLE 2. LETTING - LEASEHOLD ESTATE

## Section 2.1 Letting.

1. *Premises.* Subject to and in accordance with the terms and conditions of this Agreement, the Port Authority hereby lets to the Lessee and the Lessee hereby hires and takes from the Port Authority at the Airport the premises, substantially as shown on Exhibit A hereto, together with all buildings, structures, fixtures, improvements and other property of the Port Authority located therein, thereon or thereunder, and all structures, improvements, additions, buildings, installations and facilities located, constructed or installed, or which may be located, constructed or installed therein, thereon or thereunder, and the equipment permanently affixed or permanently located therein, such as electrical, plumbing, sprinkler, fire protection and fire alarm, heating, steam, sewage, drainage, refrigerating, communications, gas and other systems, and their pipes, wires, mains, lines, tubes, conduits, equipment and fixtures, and all paving, drains, culverts, ditches and catch-basins constructed therein, thereon or thereunder as of the Lease Commencement Date (all of the foregoing, collectively, the “**Premises”**). The parties acknowledge that the Premises constitute non-residential real property.
2. *No Rights in Air Space.*Except as and to the extent expressly approved by the Port Authority pursuant to the provisions of Article 5, entitled “*Construction*”, nothing contained in this Agreement shall grant to the Lessee any rights whatsoever in the air space above the Premises. In no event shall the Lessee place any structure or other obstruction above the line-of-sight height limitations shown in Exhibit D.

## Section 2.2 Limitations of Rights and Privileges.

The Premises are let to the Lessee and the Lessee takes the same subject to all easements, restrictions, reservations, covenants and agreements to which the Premises may be subject as of the Lease Commencement Date, consisting of the following: (i) the Basic Lease; (ii) the MOA and the stipulations contained therein that are applicable to the Project; (iii) rights of the public in and to any public street; (iv) rights, if any, of any enterprise, public or private, which is engaged in furnishing lighting, power, telegraph, telephone, steam or other utility services, and of the City, and of the State of New York; and (v) permits, licenses, regulations and restrictions, if any, of the United States, the City, the State of New York or of any other Governmental Authority.

## Section 2.3 Condition of Premises*.*

The Lessee acknowledges that the Lessee is fully familiar with the Premises, the physical condition thereof, and the Basic Lease. The Lessee acknowledges and agrees that except as otherwise expressly set forth in this Agreement, no representations, statements, or warranties, express or implied, have been made by or on behalf of the Port Authority in respect of the Premises, the status of title thereof, the physical condition thereof, the zoning or other laws, regulations, rules and orders applicable thereto, Taxes, or the use that may be made of the Premises, that the Lessee has relied on no such representations, statements or warranties, and that the Port Authority shall not in any event whatsoever be liable for any latent or patent defects in the Premises. Except as otherwise expressly set forth herein, the Lessee hereby agrees to take the Premises in the condition they are in as of the Lease Commencement Date, to assume all responsibility for any and all risks, costs and expenses of any kind whatsoever caused by, arising out of or in connection with the condition of the Premises, whether any aspect of such condition existed prior to, on or after the Lease Commencement Date, including without limitation all Environmental Requirements and Environmental Damages, and to indemnify and hold harmless the Indemnified Parties for all such risks, responsibilities, costs and expenses. The Lessee’s foregoing obligations with respect to the responsibilities, risks, costs and expenses assumed by the Lessee shall survive the expiration or termination of this Agreement.

## Section 2.4 Delivery of Possession*.*

Except as otherwise expressly provided herein, the Port Authority shall deliver possession of the Premises on the Lease Commencement Date vacant and free of occupants and tenancies.

# ARTICLE 3. TERM OF LETTING AND PERMITTED USE

## Section 3.1 Term.

The term of the letting under this Agreement shall commence on , 201 (the “**Lease Commencement Date**”) and shall expire, unless sooner terminated in accordance with any other provisions of this Agreement, at 11:59 P.M. local time on the Expiration Date.

## Section 3.2 Permitted Use.

1. *Permitted Use.* The Premises may be used solely for the development and operation of a full-service hotel incorporating the TWA Flight Center, with a minimum Upper Scale Hotel market class designation, with retail, meeting and event facilities; spa and fitness center; restaurants and lounges; an interpretive display relating to the TWA Flight Center and the Airport; and outdoor recreation areas. The Lessee shall not use or allow the use of the Premises for any other purpose or purposes whatsoever.

(b) *Management and Franchise Agreements.*

(1) Each Hotel Management Agreement and Franchise Agreement (including the Franchise Agreement, if any, entered into with respect to the Premises for the operation of the Hotel, and all amendments and/or modifications thereto) shall be subject to the approval of the Port Authority and shall provide that in the event of the Port Authority’s reentry and repossession of the Premises following a termination of this Agreement due to an Event of Default, such Hotel Management Agreement or Franchise Agreement shall be terminable by the Port Authority on not more than thirty (30) days’ written notice at no cost or other obligation on the part of the Port Authority. Although the Port Authority shall be afforded an opportunity to review and approve each Hotel Management Agreement or Franchise Agreement, such review shall in no event be deemed to be a consent by the Port Authority to any of the terms set forth in such Hotel Management Agreement or Franchise Agreement a waiver of any of the terms of this Agreement, and the provisions of this Agreement shall control in all events.

Section 3.3 Single Purpose Entity.

1. *Lessee to be Single Purpose Entity*. The Lessee shall at all times hereunder be a Single Purpose Entity.

(b) *Definition.*

“**Single Purpose Entity**” shall mean a Person, other than an individual, that:

#### is formed or organized solely for the purpose of holding, in the case of the Lessee, directly, or, in the case of a general partner, managing member or sole member of the Lessee, indirectly, an ownership interest in the leasehold estate created by this Agreement,

#### does not engage in any business unrelated to its ownership of the leasehold estate created by this Agreement and its operation, improvement, financing, leasing and management of the Premises,

#### has not and will not have (A) any assets other than those related to its business as described in the foregoing clause (ii) and (B) any indebtedness other than (p) indebtedness which is not prohibited to be incurred by the terms of this Agreement, (q) trade payables incurred in the ordinary course of business, (r) partner or member loans (pursuant to which the lender thereunder has no enforcement rights against the Premises whatsoever other than the right to convert into direct or indirect equity ownership in the Lessee and no rights to initiate any litigation or bankruptcy proceeding against the Lessee other than litigation to enforce any such conversion right), (s) obligations assumed hereunder on the Lease Commencement Date, (t) obligations incurred and related to its ownership, operation, improvement, financing, leasing and management of its interest in the Premises, and (u) obligations otherwise incurred in accordance with the terms of this Agreement,

#### maintains its own separate books and records and its own accounts, which in each case are separate and apart from the books and records and accounts of any other Person,

#### holds itself out as being a Person, separate and apart from any other Person,

#### does not and will not commingle its funds or assets with those of any other Person,

#### conducts its own business in its own name,

#### maintains separate financial statements,

#### pays its own liabilities out of its own funds,

#### observes all partnership, corporate or limited liability company formalities applicable to it,

#### maintains an arm’s-length relationship with its Affiliates,

#### pays the salaries of its own employees, if any, and maintains a sufficient number of employees in light of its contemplated business operations,

#### does not guarantee or otherwise obligate itself with respect to the debts of any other Person or hold out its credit as being available to satisfy the obligations of any other Person, other than “take-over” or similar obligations,

#### does not acquire obligations or securities of its partners, members or shareholders,

#### allocates fairly and reasonably shared expenses, including without limitation any overhead for shared office space, if any,

#### uses separate stationery, invoices, and checks,

#### does not and will not pledge its assets for the benefit of any other Person or make any loans or advances to any other Person, in each case other than as permitted pursuant to the terms of this Agreement or any agreement applicable to the ownership, operation, management, improvement or financing of its interest in the Premises,

#### takes all reasonable steps and actions to correct any known misunderstanding regarding its separate identity, and

#### maintains, or has reasonable access to, reasonably adequate capital in light of its contemplated business operations.

#### (c) *Additional Requirements.* In addition to the requirements set forth above, the following requirements shall be applicable to the Lessee and its general partner(s), managing member(s) or non-member manager(s) (or if the Lessee is wholly-owned by a single member limited liability company, to Lessee’s managing member or non-member manager):

#### if such Person is a partnership, all general partners of such Person shall be Single Purpose Entities;

#### if such Person is a partnership and has more than one general partner, then the organizational documents of such Person shall provide that it shall continue (and not dissolve) for so long as a solvent general partner exists;

#### if such Person is a corporation, then, at all times, such Person shall have at least one (1) Independent Director/Manager, and the board of directors of such Person may not take any action requiring the unanimous affirmative vote of 100% of the members of the board of directors unless all of the directors, including all Independent Directors/Managers, shall have participated in such vote;

#### except as set forth above, if such Person is a limited liability company, each managing member or non-member manager shall be a Single Purpose Entity;

#### if such Person is a limited liability company, the articles of organization, certificate of formation and/or operating agreement, as applicable, of such Person shall provide that it shall not dissolve upon the bankruptcy of its managing member or sole member unless a new managing member or new sole member shall not be appointed upon any such bankruptcy (or, if such Person is a Delaware limited liability company, as otherwise provided under Section 18-802 of the Delaware Limited Liability Company Act), and if such Person has more than one managing member, then the organizational documents shall provide that such Person shall continue (and not dissolve) for so long as a solvent managing member exists;

#### such Person without the unanimous consent of all of the partners, directors or members, as applicable, including the unanimous consent of all Independent Directors/Managers, has not and will not with respect to itself or to any other Person in which it has a direct or indirect legal or beneficial interest (A) seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or other similar official for such Person or all or any portion of such Person’s properties, or (B) take any action that would cause such Person to become insolvent; and

#### the Lessee and each Person required to be a Single Purpose Entity hereunder shall obtain the consent of all its members or partners, as applicable, including, without limitation, each Independent Director/Manager, to (A) file a bankruptcy or insolvency petition or otherwise institute insolvency proceedings or to authorize it to do so, or (B) consent to or acquiesce in the filing of an involuntary bankruptcy or insolvency proceeding, and the organizational documents of each of them shall expressly prohibit the taking of any action to (x) dissolve or liquidate, or (y) amend its organizational documents with respect to any Single Purpose Entity requirements as set forth in this definition.

# ARTICLE 4. RENTAL

## [Section 4.1 Commencement Rental.

On the Lease Commencement Date, the Lessee shall pay to the Port Authority a lump sum rental (the “**Commencement Rental**”) in the amount of Thousand Dollars and No Cents ($ ,000.00). The Lessee hereby acknowledges that the Commencement Rental is paid in consideration of the execution of this Agreement and for other consideration duly received by the Lessee, and agrees that the Commencement Rental shall not be refundable under any circumstances.][[1]](#footnote-1)

## Section 4.2 Basic Rental*.*

(a) *Obligation to Pay Basic Rental*. Beginning on the Rent Commencement Date and continuing throughout the term of the letting under this Agreement, the Lessee shall pay to the Port Authority a basic rental (the “**Basic Rental**”) for the Premises as follows:

(1) For the period from the Rent Commencement Date through the last day of the calendar month in which the Rent Commencement Date occurs, the Lessee shall pay Basic Rental in an amount equal to the product of (x) Dollars and No Cents ($ .00) and (y) a fraction of which the numerator shall be the number of days from and including the Rent Commencement Date through the last day of such calendar month and the denominator shall be the number of days in such calendar month.

(2) For the period from the first day of the calendar month immediately following the calendar month in which the Rent Commencement Date occurs (such first day, the “**Basic Rental Index Date**”) through the day preceding the th (\_th) anniversary of the Basic Rental Index Date, the Lessee shall pay Basic Rental at the rate of Thousand Dollars and No Cents ($ ,000.00) per annum, payable in equal monthly installments of Dollars ($ .00) each, payable on the Basic Rental Index Date and on the first day of each calendar month thereafter.

(b) *Escalations of Basic Rental.*

On the th (\_th) anniversary of the Basic Rental Index Date, and on each th (\_th) anniversary thereafter, the annual rate of Basic Rental shall be increased to an amount equal to One Hundred Percent (1\_\_%) times the annual rate of Basic Rental theretofore payable.

(c) *Proration for Final Month.*

Notwithstanding the foregoing provisions of this Section, if the Expiration Date occurs on a date that is other than the last day of a calendar month, the Basic Rental payable with respect to the portion of the month in which the Expiration Date occurs shall be an amount equal to the then-applicable monthly installment of Basic Rental multiplied by a fraction of which the numerator shall be the number of days from the first day of such calendar month through the Expiration Date and the denominator shall be the actual number of days in that calendar month.

(d) *Partial Certificate of Completion.*

Notwithstanding the foregoing provisions of this Section, *if* the Rent Commencement Date has occurred by reason of the issuance of the first Certificate of Partial Completion for any portion of the Building (pursuant to subdivision (z) of the definition of “Rent Commencement Date”) *then*, for the period from the Rent Commencement Date through the earlier to occur of (x) the date that is 24 calendar months following the Lease Commencement Date and (y) the date of issuance of the Certificate of Completion, the applicable Basic Rental, as set forth above, shall be pro-rated in the proportion that the area of all portions of the Premises with respect to which a Certificate of Partial Completion has been issued, from time to time, bears to the entire area of the Premises. After the end of the foregoing period, full Basic Rental, as set forth in the foregoing paragraphs, shall be payable.

## Section 4.3 Percentage Rental.

(a) *Certain Definitions*.

**“Gross Revenues”** shall mean all amounts, monies, revenues, receipts and income of every type paid for sales made and for services rendered at or from the Premises, and any other amounts, monies, revenues, receipts and income of any type arising out of or in connection with the operation of the Hotel, including without limitation (but subject to the provisos below) all amounts paid by subtenants, occupants, users, concessionaires, licensees or guests of the Premises for the use and occupancy of all or any portion of the Premises (including without limitation sign and rooftop leases or licenses), or from providers of telecommunications or other services to the Premises or otherwise directly or indirectly arising out of the Premises, any part thereof, any right or interest therein or in respect thereof, or the leasing, use, occupancy or operation of the Premises, or any part thereof, calculated in accordance with Accounting Principles, including without limitation the following: (A) room fees and charges, fixed rental, minimum rental, rental computed on the basis of sales or other criteria, additional rental, escalation rental and security deposits applied in payment of any rental; (B) charges for the providing of goods or services of any kind (including without limitation fees from membership in or usage of any club or recreational facilities located in the Hotel; income from vending machines; income derived from food and beverage sales, catering services, internet and video services, valet services and any other Hotel services; wholesale and retail sales of merchandise; and service charges) paid by any Persons in or on the Premises, or in connection with the use, occupancy or operation of the Premises (even if such goods or services are provided from or to a location off the Premises), and (C) the proceeds of rental or business interruption insurance and any award received in connection with a temporary taking as provided in the Article hereof entitled “*Condemnation*”, deposits not refunded; and any amount recovered in any legal action or proceeding or settlement thereof which arose out of the operation of the Hotel and which would have been included in Gross Revenues if collected without need for such legal action or proceeding; provided, however, that in the event there exists any Sublease, license or other arrangement existing with respect to any portion of the Premises or any goods or services provided therein or in connection with the Hotel, “Gross Revenues” shall include (x) all amounts paid by the consumers or purchasers of such goods or services or (y) the rent, fee or other amounts paid under such Sublease, license or other arrangement, whichever of the foregoing (x) and (y) is greater; provided, further, that in the event that any space in the Premises is subleased to, or any goods or services of the nature described in clause (B) above are provided to, any Affiliate of the Lessee, there shall be included in Gross Revenues the greater of (p) the fair rental or market value of such space or goods and services and (q) the actual rental or amount paid for such space or goods and services. Notwithstanding the foregoing, Gross Revenues shall not include (i) payments of New York City hotel room occupancy taxes and any other excise, sales, use or other taxes or impositions collected directly from guests or other Persons and required to be remitted to any Governmental Authority; (ii) gratuities paid to, or collected for payment to, hotel employees; (iii) the proceeds of any financing or refinancing; (iv) proceeds from the sale of capital assets, including Project property no longer required for the operation of the Premises, (v) any insurance proceeds other than the proceeds of rental or business interruption insurance (as provided above); (vi) any condemnation awards other than awards for use and occupancy in connection with a temporary taking (as provided above); (vii) employee meals, (viii) fees paid to Affiliates of the Lessee for services actually rendered to the extent that the amount of such fees are not in excess of arms-length, fair market amounts,(ix) proceeds from any litigation concerning the construction, structure or maintenance of the Hotel and (x) interest earned on any tax, insurance or similar escrow account.

“**Payment Period**” shall mean (x) each three (3) month period from January 1 through March 31, from April 1 through June 30, from July 1 through September 30 and from October 1 through December 31 each calendar year, (y) a period (if any) of less than three (3) months commencing on the Rent Commencement Date and ending on the immediately following March 31, June 30, September 30 or December 31, as the case may be, and (z) a period (if any) of less than three (3) months commencing on January 1, April 1, July 1 or October 1 and ending on the Expiration Date.

(b) *Obligation to Pay Percentage Rental*.

Commencing from the Rent Commencement Date, and continuing throughout the term of the letting under this Agreement, the Lessee shall pay to the Port Authority a Percentage Rental (the “**Percentage Rental**”) in the amount of Percent ( %) of Gross Revenues.

(c) *Payments*.

Commencing from the Rent Commencement Date, the Lessee shall, at its own cost and expense, furnish to the Port Authority no later than thirty (30) days after the end of each Payment Period during the term of the letting under this Agreement (and thirty (30) days following the expiration or termination of such letting), a statement, in such detail as the Port Authority may reasonably require, of all Gross Revenues during the Payment Period then just ended. Each such statement shall be certified as complete and correct in all material respects by an officer of the Lessee (if a corporation) or, if the Lessee is a partnership or limited liability company, the financial controller. Each statement furnished to the Port Authority pursuant to this Section shall be accompanied by payment of the Percentage Rental, if any, due for the Payment Period for which such statement is prepared.

Section 4.4 Subtenant Impositions.

(a) *Obligation to Pay Subtenant Impositions.* It is understood and agreed that the Lessee’s obligations hereunder shall include an obligation to pay all applicable Subtenant Impositions. “**Subtenant Impositions**” shall mean any of the following which are of general application in the City of New York and which at any time during the term of the letting hereunder may be assessed, levied, confirmed, imposed upon or become due and payable in respect of the Premises, or which would be applicable to the Lessee were the Premises owned by a private corporation rather than the Port Authority:

(1) personal property taxes, occupancy and rent taxes, water, water meter and sewer rents, rates and charges, excises, levies and license and permit fees;

(2) any fines, penalties and other similar governmental charges applicable to the foregoing, together with any interest or costs with respect to the foregoing; and

(3) except as otherwise expressly provided in this Agreement, any other governmental levies, fees, rents, assessments or taxes and charges, general and special, ordinary and extraordinary, foreseen or unforeseen, of any kind whatsoever, together with any fines and penalties and any interest or cost with respect thereto.

(b) *Right to Pay in Installments*. The Lessee shall have the right, without the consent of the Port Authority, to exercise any option granted to a taxpayer by law to pay any special assessments or other Subtenant Impositions in installments, notwithstanding the fact that interest may accrue on the unpaid installments, and if the Lessee exercises any such option it shall pay, as and when they become due, all installments which fall due during the term of the letting hereunder, together with all interest payable thereon.

(c) *Right to Contest*.

(1) The Lessee shall have the right at its sole cost and expense to challenge, contest or review by appropriate legal proceedings, or in such other manner as may be provided by law, the validity, applicability or amount of any Subtenant Imposition or other tax, assessment, levy, fee or charge which it may be required to pay pursuant to the provisions hereof, and the Lessee shall indemnify the Port Authority against any claims, damages or losses that may arise or result therefrom.

(2) Such challenge, contest or review shall not, unless required by applicable law to prosecute such challenge, contest or review, be in the name of the Port Authority, and in the event such challenge, contest or review would be unavailable to the Lessee without the participation of the lessor of the Premises, the Port Authority will join in such challenge, contest or review to the extent required for the Lessee to maintain such challenge or contest or obtain such review; provided, however, that the Port Authority shall not settle or compromise any such challenge, contest or review on behalf or in the name of the Lessee. The Lessee shall reimburse the Port Authority for all expenses, including the cost of inside or outside legal counsel, incurred by the Port Authority as a result of its participation in such challenge, contest or review.

(3) In connection with any such challenge, contest or review, the Lessee shall in any event raise no defense or claim involving in any way the immunity of the Port Authority, its governmental nature or the provisions of any statutes respecting the Port Authority without first obtaining in each instance the express advance consent of the General Counsel of the Port Authority.

(4) In connection with any such challenge, contest or review, the Lessee shall not defer or suspend compliance with any such Requirement and shall not defer or suspend payment of any such tax, assessment, levy, fee or charge unless by law it is permissible to suspend or defer such compliance or payment and in such event the Lessee shall provide the Port Authority with such security as the Port Authority shall determine is appropriate to protect the Port Authority against losses or penalties which may be imposed as a result of the Lessee’s actions.

(5) Any refunds of Subtenant Impositions previously paid by the Lessee shall be the property of the Lessee, and shall be promptly paid over to the Lessee if received by the Port Authority.

(d) *Nature of Obligation to Pay Subtenant Impositions.* The Lessee’s obligation to pay all Subtenant Impositions shall be deemed a Rental obligation of the Lessee and from time to time upon the request of the Port Authority, the Lessee shall furnish to the Port Authority evidence of the payment of any Subtenant Imposition for which such evidence is requested.

# ARTICLE 4A. SECURITY DEPOSIT

## (a) *Letter of Credit Required.* Upon the Lessee’s execution and delivery of this Agreement to the Port Authority, the Lessee shall deliver to the Port Authority, and shall maintain throughout the term of this Agreement as security for the Lessee’s full, faithful and prompt performance of and compliance with all of its obligations under this Agreement and as security for the payment of all rentals, fees, charges and obligations of the Lessee owed or which may become due and owing to the Port Authority, a clean irrevocable letter of credit in favor of the Port Authority in the amount of **Dollars and No Cents ($ ,000.00)[[2]](#footnote-2)**, issued by a banking institution acceptable to the Port Authority and having its main office within the Port of New York District.

## (b)*Form Subject to Prior Approval.*The form and terms of each letter of credit delivered under this Section, as well as the institution issuing it (which shall be an investment-grade rated bank), shall be subject to the prior and continuing approval of the Port Authority; **the form of any proposed letter of credit shall be submitted to the Port Authority in advance for review and approval by its Credit, Collection and Accounts Receivable unit.** Such letter of credit shall provide that it shall continue throughout the term of the letting under this Agreement and for a period of not less than six (6) months thereafter; such continuance may be by provision for automatic renewal or by substitution of a subsequent satisfactory letter of credit.

## (c) *Replacements.*Upon notice of cancellation of a letter of credit, the Lessee agrees that unless, by a date twenty (20) days prior to the effective date of cancellation, the letter of credit is replaced by another letter of credit satisfactory to the Port Authority, the Port Authority may draw down the full amount thereof and thereafter the Port Authority will hold the same as cash security as set forth in paragraph (g) of this Section. If at any time any bank shall fail to make any payment to the Port Authority in accordance with a letter of credit issued by such bank, the Lessee shall cause to be delivered to the Port Authority on demand a replacement letter of credit issued by a different bank satisfactory to the Port Authority, so that at all times the Port Authority shall have one or more letters of credit in the amount set forth in paragraph (a) of this Section.

## (d) *Right to Draw Down.*In addition to any and all other remedies available to it, the Port Authority shall have the right, at its option at any time and from time to time, with or without notice, to draw upon each letter of credit or any part thereof in whole or partial satisfaction of any of its claims or demands against the Lessee. There shall be no obligation on the Port Authority to exercise such right and neither the existence of such right nor the holding of a letter of credit or any cash security shall cure any default or breach of this Agreement on the part of the Lessee. No action by the Port Authority pursuant to the terms of any letter of credit, or receipt by the Port Authority of funds from any bank issuing any letter of credit, shall constitute a waiver of any breach or default by the Lessee of its obligations under this Agreement; and the existence of or recourse to any such letter of credit shall not limit the Port Authority’s rights and remedies otherwise available under this Agreement upon any such breach or default.

## (e) *Material Inducement.*The Lessee acknowledges that the Port Authority is entering into this Agreement in reliance on the Lessee’s agreement to the provisions of this Section, and that such agreement constitutes a material element of the consideration inducing the Port Authority to enter into and execute this Agreement. In the event of any failure of the Lessee at any time during the term of the letting under this Agreement to provide such letter of credit valid and available to the Port Authority, and any failure of any banking institution issuing any such letter of credit to make one or more payments as provided in such letter of credit, the Port Authority shall have the right, in addition to any and all other remedies provided under this Agreement or at law or in equity, to immediately terminate this Agreement upon written notice to the Lessee; provided, however, that notwithstanding the foregoing, so long as (x) the Lessee is not in default of any financial obligation hereunder, (y) no Event of Default has occurred and is continuing and (z) no notice of termination has been delivered pursuant to Section 17.1 hereof, the Lessee shall have a period of two (2) Business Days following notice from the Port Authority in which to cure any such failure described above in this Section 4A(e).

## (f) *Replenishment*. If the Port Authority shall make any drawing under a letter of credit held by the Port Authority hereunder, the Lessee, within two (2) days after demand of the Port Authority therefor, shall bring the letter of credit back up to its full amount.

## (g) *Use of Proceeds.*In the event that the Port Authority shall have drawn down the letter of credit referred to in paragraph (a) of this Section, the Port Authority shall have the right, at its option, at any time and from time to time, with or without notice, to use the amount held, or any part thereof, as cash security in whole or partial satisfaction of any of its claims or demands against the Lessee. There shall be no obligation on the Port Authority to exercise such right and neither the existence of such right nor the holding of such cash security itself shall cure any default or breach, on the part of the Lessee, of this Agreement. The Lessee agrees that it will not assign, mortgage or encumber such cash security. The Port Authority shall not pay or allow interest thereon; but the Lessee may collect or receive annually any interest paid on cash deposited in interest-bearing bank accounts less any part thereof or amount which the Port Authority is or may hereafter be entitled or authorized by law to retain or to charge in connection therewith, whether as or in lieu of administrative expense or custodial charge, or otherwise, provided, however, that the Port Authority shall not be obligated by this provision to place or to keep cash deposited hereunder in interest-bearing bank accounts. Upon the Port Authority’s acceptance of a substitute letter of credit, and upon request by the Lessee made thereafter, the Port Authority will return any cash security deposit resulting from the drawing down of the original letter of credit. The Lessee shall have the same rights to receive any such deposit during the existence of a valid letter of credit as it would have to receive such sum upon expiration of the letting and fulfillment of the obligations of the Lessee under this Agreement.

## (h) *After Expiration or Termination.*After the expiration of the letting and upon written request therefor by the Lessee, the Port Authority will return to the Lessee any valid letters of credit and any cash security delivered to the Port Authority by the Lessee hereunder, less the amount of any and all unpaid claims and damages of the Port Authority under this Agreement. Upon a termination of the letting, the Port Authority may, at its option, retain the letter of credit and any cash security until the date set forth in paragraph (b) of this Section (as such date may be extended in connection with any extended term of the letting hereunder) and shall thereafter upon demand of the Lessee return the same to the Lessee less the amount of any and all unpaid claims and damages, including but not limited to estimated damages of the Port Authority under this Agreement.

## (i) *Employer Identification Number.*For purposes of the foregoing, the Lessee hereby certifies that its I.R.S. Employer Identification Number is - .

# ARTICLE 5. CONSTRUCTION

**[Subject to revision as developer’s designs and construction plans are submitted]**

## Section 5.1. Construction Obligation.

The Lessee shall, at its own cost and expense, design, construct, install and equip the Project on the Premises in accordance with the terms and conditions set forth below, as follows:

(1) a hotel building, redeveloped to the standard of a “[X Brand] Hotel” and qualifying for “LEED” certification, containing (or such greater or lesser number as the Port Authority may approve) guest rooms, conference and meeting space, food and beverage service areas and retail space (such hotel building, together with all associated and related systems, fixtures, furnishings, equipment, areas and facilities, and any permitted additions, modifications, and replacements, the **“Building**”);

(2) all lines, mains, pipes, drains, cables, manholes, wires, conduits and other facilities required to be constructed (or relocated) within the Premises in connection with or relating to the utility, mechanical, electrical, storm sewer, sanitary sewer, communication, security, radio, telephone, fire alarm, fire protection, gas and other systems and facilities needed for the Building;

(3) all necessary driveways, ramps and pedestrian circulation areas, together with all associated and related areas and facilities to the extent required for, or resulting from, the completion of the Lessee’s construction obligations provided in this Agreement;

(4) all necessary grading and paving of ground areas and appropriate landscaping, together with all associated and related areas within the Premises, and driveway aprons serving and contiguous to the Premises.

Section 5.2 Conceptual Plan.

The Port Authority has approved the Lessee’s plan for the redevelopment of the Premises (the “**Conceptual Plan**”), including the conceptual design of the open space and including, without limitation, renderings and layouts of the Building, estimated commencement and completion dates and preliminary information relating to scheduling requirements during construction, estimated times and manner of delivery of equipment and materials, and preliminary functional plans showing the proposed location of on-site utility systems and all connections to utility supply lines at the perimeter of the Premises, all necessary roadways, ramps, pedestrian circulation and parking areas, appropriate landscaping (including the landscaping of open space) and fences. Conceptual drawings of the Project are attached as Exhibit F.

## Section 5.3 Construction Application.

(a) *Designation of Design and Construction Professionals*.

(1) The Port Authority shall designate to the Lessee the Port Authority’s architect or engineer for coordinating the review and processing of the Construction Application (as defined below) and inspection of construction.

(2) The Lessee shall retain the services of an architect or engineer to provide architectural and engineering services in connection with the Project (the “**Lessee’s Architect/Engineer**”). The Port Authority shall have the right to disapprove any architect or engineer who may be unacceptable to it.

(b) *Submission*. Prior to the commencement of the Construction Work, the Lessee shall execute and submit to the Port Authority for approval a “Tenant Alteration Application(s)” in the form prescribed by the Port Authority (the “**Construction Application**”), which shall include final and complete plans and specifications, drawings, calculations and data (the “**Construction Plans**”), setting forth in detail the Construction Work the Lessee proposes to perform and the manner of and projected time periods for performing the same. Additionally, the Lessee’s Architect/Engineer shall include in this submittal a certification that these Construction Plans are in conformance and consistent with the previously approved Conceptual Plans. The Construction Application, including the Construction Plans, shall bear the seal of the Lessee’s Architect/Engineer. The Construction Plans shall be in sufficient detail for a contractor to perform the work shown thereon and shall identify separately each item of work and shall describe in detail the systems, improvements, fixtures and equipment to be installed by the Lessee. The Lessee shall submit such additional data, detail or information as the Port Authority may request in order to complete the Lessee’s Construction Application for Port Authority review. The Conceptual Plans, the Construction Plans and all such additional data, detail or information submitted to the Port Authority shall be retained by, and become the property of, the Port Authority.

(c) *Port Authority Review.*

(1) Following the Port Authority’s receipt of the Lessee’s Construction Application and Construction Plans, the Port Authority shall give its written approval thereto or shall request revisions or modifications thereto. The Port Authority may refuse to grant approval of the Construction Application if, in its opinion, any of the proposed Construction Work as set forth in the Construction Plans (all in such detail as may permit the Port Authority to make a determination as to whether the requirements referred to below are met):

#### is unsafe, unsound, hazardous or improper for the use and occupancy for which it is designed; or

#### is designed for use for purposes other than those authorized under this Agreement; or

#### is inconsistent with the approved Conceptual Plan; or

#### does not comply with any other provisions and terms of this Agreement, or

#### does not comply with any applicable Requirements, including without limitation FAA requirements applicable to the Premises, and Port Authority standards and guidelines; or

#### does not comply with the provisions of the Basic Lease, including, without limiting the generality thereof, those provisions of the Basic Lease providing that the Port Authority shall conform to the enactments, ordinances, resolutions and regulations of The City of New York and its various departments, boards and businesses in regard to the construction and maintenance of buildings and structures and in regard to health and fire protection which would be applicable if the Port Authority were a private corporation to the extent that the Port Authority finds it practicable so to do, or

#### does not comply with all applicable rules, regulations, requirements, orders and directions of the National Fire Protection Association and the New York Fire Insurance Rating Organization, and of any other board or organization exercising or which may exercise similar functions; or

#### does not comply with the standards set forth in the “*Tenant Construction and Alteration Process Manual*”, a copy of which has been delivered to the Lessee; or

#### does not comply with the Port Authority’s requirements with respect to landscaping, or

#### does not comply with Port Authority’s requirements and standards with respect to noise, air pollution, water pollution or other types of pollution, or

#### does not properly coordinate construction staging with other ongoing Airport construction projects and Airport operations.

(2) If revisions or modifications are requested by the Port Authority in accordance with the foregoing paragraph (a), the Lessee shall promptly revise and modify its Construction Plans accordingly. Until the Port Authority has approved the Construction Application, the Lessee shall continue to resubmit revised Construction Plans or additional information as required by the Port Authority.

(d) *Final Approval*.

(1) Upon the Port Authority’s approval of the Lessee’s Construction Application, the Port Authority shall provide to the Lessee a construction permit (the “**Construction Permit**”). Subject to the provisions below relating to Partial Approval Work, no portion of the Lessee’s Construction Work shall be commenced on any portion of the Premises until the Port Authority has approved the Construction Application and has issued the Construction Permit.

(2) Upon final approval of the Construction Application and issuance of the Construction Permit, the Lessee shall promptly commence construction so as to complete construction of the Project in accordance with the construction schedule set forth in the Lessee’s approved Conceptual Plan, but in all events not later than the first day of the twenty-fourth (24th) month following the Lease Commencement Date (the “**Construction Completion Deadline**”). The Port Authority may, in its discretion, extend the Construction Completion Deadline upon the request of the Lessee and review of reasons for such request.

(e) *This Agreement Controls*. The Lessee shall comply with all the terms and provisions of the approved Construction Application, *provided, however,* that in the event of any inconsistency between the terms of the Construction Application and the terms of this Agreement, the terms of this Agreement shall prevail and control.

(f) *Lessee Solely Responsible*. The Lessee agrees to be solely responsible for any plans and specifications used by it and for any loss or damages resulting from the use thereof, notwithstanding that the same have been approved by the Port Authority and notwithstanding the incorporation therein of Port Authority recommendations or requirements. In no event shall approval by the Port Authority of any plans, whether the Conceptual Plan, Construction Plans, Partial Approval Plans or otherwise, impose any liability on the Port Authority to the Lessee or any other Person for any errors or defects contained in such plans or for the failure of the Building or work provided for such plans to comply with any Requirements, any such liability to be that of the Lessee and/or the professionals who prepared such plans. The obligations assumed by the Lessee in this Article, as well as elsewhere in this Agreement, shall not be limited, affected, impaired or in any manner modified by the Port Authority’s approval of any Construction Application and supporting plans, specifications and contracts covering Construction Work.

## Section 5.4 Partial Approval Work.

(a) *Partial Approval Work.* The Lessee may wish to commence construction and installation of portions of the Construction Work prior to the Port Authority’s approval of the Construction Application for all of the Construction Work for the Project. In such event the Lessee shall submit to the Port Authority a written request covering each portion of the Construction Work the Lessee wishes to commence prior to the Port Authority’s approval of the complete Construction Application for all of the Construction Work for the Project (the portions of the Lessee’s Construction Work which the Lessee proposes to commence prior to the Port Authority’s approval of the complete Construction Application for all of the Construction Work for the Project being hereafter referred to as the “**Partial Approval Work**”) together with a Construction Application covering each item of Partial Approval Work which the Lessee proposes to perform, to be accompanied by final and complete plans, specifications, drawings, and data with respect thereto (such final and complete plans, specifications, drawings, and data, the “**Partial Approval Plans**”) setting forth in detail the Partial Approval Work to be performed.

(b) *Construction Pursuant to Port Authority Approval.* Upon the Port Authority’s approval of the Construction Application covering the Partial Approval Work, the Port Authority shall issue to the Lessee a construction permit covering the Partial Approval Work (a “**Partial Construction Permit**”). The Lessee may thereupon proceed to perform the Partial Approval Work covered by the Partial Construction Permit, subject to and in accordance with the following terms and conditions:

(1) The Lessee’s performance of any item of Partial Approval Work in accordance with the Port Authority’s approval shall be at its sole risk, and if for any reason the Construction Plans for the balance of the Lessee’s Construction Work for the Project, or any part thereof, are not approved by the Port Authority or if the approval thereof calls for modifications or changes in the Partial Approval Work undertaken by the Lessee under any approval granted by the Port Authority pursuant to this Section, the Lessee shall, as directed by the Port Authority, and at the Lessee’s sole cost and expense, either restore the portion of the Premises affected to the condition existing prior to the commencement of such item of Partial Approval Work or make such modifications and changes to such work as may be required by the Port Authority.

(2) Nothing contained in any approval given pursuant to this Section shall constitute a determination or indication by the Port Authority that the Lessee has complied with any Requirements that may pertain to the Partial Approval Work, and no such approval shall constitute a waiver of the Lessee’s obligation hereunder to comply with Requirements.

(3) Each item of Partial Approval Work shall be performed in accordance with and subject to the terms and provisions of this Agreement covering Construction Work and in accordance with the approved Construction Application covering such item of Partial Approval Work, and subject to any requirements, stipulations, and provisions which the Port Authority may impose in its approval of the performance of such item of Partial Approval Work.

(4) No Partial Approval Work performed by the Lessee pursuant to the provisions of this Section shall affect or limit the obligations of the Lessee under any prior approvals it may have obtained with respect to any Construction Work.

(5) The fact that the Lessee has performed any item of Partial Approval Work and that the Port Authority has consented to the performance thereof shall not affect or limit the obligations of the Lessee under this Agreement with respect to Construction Work. The Lessee specifically understands that neither the Port Authority’s approval of any Construction Application covering any item of Partial Approval Work nor the performance by the Lessee of any item of Partial Approval Work pursuant to such approval shall obligate the Port Authority to approve any subsequent Construction Application for the balance of the Construction Work for the Project or shall create or be deemed to create any obligation on the part of the Port Authority to permit the performance of subsequent proposed Partial Approval Work.

(6) Without limiting the generality of the provisions of this Section, it is specifically understood that the Port Authority may withhold its approval of a Construction Application and the accompanying Partial Approval Plans covering any item of Partial Approval Work if the Port Authority determines that review of subsequent items of Partial Approval Work is required before the Port Authority can approve, reject, or comment upon the Construction Application covering the proposed Partial Approval Work in question.

(7) If in the opinion of the Port Authority the Lessee, at any time during the performance of any portion of any item of Partial Approval Work approved pursuant to this Section, fails to comply with, or is in breach of, (x) any of the provisions of this Agreement with respect to Construction Work, (y) the provisions of the Construction Application covering such Partial Approval Work or (z) any requirements, stipulations, or provisions imposed by the Port Authority in its approval of the Construction Application covering such Partial Approval Work, the Port Authority shall have the right to cause the Lessee to cease all of such item of Partial Approval Work or such part of such item of Partial Approval Work as is being performed in violation of this Agreement, the Construction Application or the conditions of the Port Authority’s approval. Upon direction from the Port Authority, the Lessee shall promptly cease performance of all or a portion of such item of Partial Approval Work, as specified. The Lessee shall thereupon submit to the Port Authority for its written approval the Lessee’s proposal for making modifications, corrections or changes in or to the item of Partial Approval Work that has been or is to be performed so that the same will comply with the provisions of this Agreement, the Construction Application or the conditions of the Port Authority’s approval. The Lessee shall not commence the Construction Work that has been halted pursuant to the foregoing until the Lessee has received written approval of the proposed modifications, corrections or changes.

(8) The Port Authority shall in no event have any duty or obligation of any kind whatsoever to inspect or police the performance of any Partial Approval Work, and the rights granted hereunder shall not create or be deemed to create such a duty or obligation. Accordingly, the fact that the Port Authority has not exercised its right to require the Lessee to cease performance of all or any part of an item of Partial Approval Work shall not constitute an agreement or acknowledgment on the part of the Port Authority that the Lessee has in fact performed such work in accordance with the terms of this Agreement, the Construction Application covering such work, or any of the conditions imposed in connection with the approval of such work, nor shall such fact constitute a waiver by the Port Authority of any of the requirements of this Agreement with respect to such work, or any of the requirements of the Construction Application covering such work, or any of the conditions imposed in connection with the approval of such Construction Application.

## Section 5.5 Fees for Port Authority Review.

(a) *Initial Construction.* The Lessee shall not be required to pay to the Port Authority any fee or deposit in connection with the Port Authority’s review and approval of the Construction Application (and any revisions or resubmissions thereof) relating to the initial construction of the Project.

(b) *Future Construction.* With respect to any future construction at the Premises, however, the Lessee may be required to pay to the Port Authority a fee or deposit in connection with the Port Authority’s review and approval of any Construction Application (and any proposed changes, modifications or revisions thereto). Such fee would be in lieu of any other building permit or other similar fee customarily charged by the City or the Port Authority for similar reviews or approvals. The foregoing fee would be payable to the Port Authority at the time the Construction Application (or proposed change, modification or revision) is submitted to the Port Authority for approval.

## Section 5.6 Contractors and Subcontractors.

(a) *Lists*. The Lessee has heretofore provided to the Port Authority a listing of contractors and subcontractors the Lessee expects to select to perform the Construction Work. The listing includes for each contractor and subcontractor, its name, business address and telephone number. The Port Authority has indicated to the Lessee the contractors and subcontractors that are acceptable to the Port Authority, and the Lessee shall be free to use any and all of such acceptable contractors and subcontractors without further referral to or approval by the Port Authority, provided only that the Lessee shall notify the Port Authority of the name and, if not previously provided, the business address and federal tax identification number of each contractor or subcontractor from such lists that will be utilized in the performance of Construction Work. Such notification shall be provided to the Port Authority prior to the commencement by the contractor or subcontractor of any part of the Construction Work.

(b) *Unlisted Contractors and Subcontractors.* If at any time after the date hereof the Lessee determines that it may need to utilize a contractor or subcontractor not included on the lists referred to in the preceding paragraph, the Lessee shall submit the firm name, business address and federal tax identification number of such contractor or subcontractor to the Port Authority, and shall identify the specific contract work contemplated to be performed, no later than seven (7) days prior to the contemplated date of use of such contractor or subcontractor.

(c) *Required Insurance.* In retaining each and every contractor and/or subcontractor, the Lessee shall ensure that there is included as a requirement of the contract between the Lessee and the contractor and/or between the contractor and subcontractor that there be submitted to the Lessee evidence of effective insurance coverage in accordance with the provisions of the Section of this Article entitled “Insurance” that is applicable to contractors or subcontractors.

(d) *No Right of Action.* Nothing contained in this Agreement shall grant or be deemed to grant any contractor, architect, supplier, subcontractor or any other Person engaged by the Lessee or any of its contractors in the performance of any part of the Construction Work any right of action or claim against the Port Authority or any of the other Indemnified Parties with respect to any work any of them may do in connection with the Construction Work.

(e) *No Relationship.* Nothing contained herein shall create or be deemed to create any relationship between the Port Authority and any such contractor, architect, supplier, subcontractor or any other Person engaged by the Lessee or any of its contractors in the performance of any part of the Construction Work and the Port Authority shall not be responsible to any of the foregoing for any payments due or alleged to be due thereto for any Construction Work performed or materials purchased in connection with the Construction Work.

(f) *Warranties for Benefit of Port Authority.* Any warranties contained in any construction contract entered into by the Lessee for the performance of any Construction Work that are freely assignable and have not been assigned to a Recognized Mortgagee shall be for the benefit of the Port Authority as well as the Lessee, and shall be enforceable by the Port Authority as well as the Lessee.

(g) *No Contractor Rights against Port Authority.* Nothing contained in this Agreement shall grant or be deemed to grant any contractor, architect, supplier, subcontractor or any other person engaged by the Lessee or any of its contractors in the performance of any part of the Construction Work any right of action or claim against any Indemnified Party with respect to any work any of them may do in connection with the Construction Work. Nothing contained herein shall create or be deemed to create any relationship between the Port Authority and any such contractor, architect, supplier, subcontractor or any other person engaged by the Lessee or any of its contractors in the performance of any part of the Construction Work, and the Port Authority shall in no event be responsible to any of the foregoing for any payments due or alleged to be due for any work performed or materials purchased in connection with the Construction Work.

(h) *No Port Authority Liability.* Notwithstanding any rights the Port Authority may have reserved to itself hereunder, the Port Authority shall have no liabilities or obligations of any kind to any contractors engaged by the Lessee or for any other matter in connection therewith and the Lessee hereby releases and discharges the Indemnified Parties of and from any and all liability, claims for damages or losses of any kind, whether legal or equitable, or from any action or cause of action arising or alleged to arise out of the performance of any Construction Work pursuant to the contracts between the Lessee and its contractors.

(i) *Lessee’s Payment of Contractors’ Claims.* The Lessee shall pay or cause to be paid all claims lawfully made against it by its contractors, subcontractors, materialmen and workmen, and all claims lawfully made against it by other third persons arising out of or in connection with or because of the performance of any Construction Work, and shall cause its contractors and subcontractors to pay all such claims lawfully made against them, provided, however,that nothing herein contained shall be construed to limit the right of the Lessee to contest any claim or lien of any contractor, subcontractor, materialmen, workman or other person and no such claim shall be considered to be an obligation of the Lessee within the meaning of this paragraph unless and until the same shall have been finally adjudicated. Subject to the foregoing, the Lessee shall promptly commence and diligently and continuously pursue resolution of any such claims and shall keep the Port Authority fully informed of its actions with respect thereto.

(j) *Payment and Performance Bond.* Prior to the commencement of any Construction Work, the Lessee shall procure, and cause to be delivered to the Port Authority, a payment and performance bond covering the Construction Work (the “**Bond**”) in such form as has been approved in advance in form and substance by the Port Authority in its sole discretion, whereby the Port Authority and the Lessee shall be listed as the payee, protecting the Port Authority and the Lessee from monetary risk during, relating to or arising out of the Construction Work, and in all events the Bond shall be only with a surety listed in the Financial Management Service of the United States Department of the Treasury**.** The Bond shall be in an amount equal to the entire contract price for the Construction Work, and shall guarantee the full, faithful and prompt performance of and compliance with, on the part of the Lessee’s general contractor, all of the terms, provisions, covenants and conditions of this Agreement relating to the Construction Work, including without limitation the terms, provisions, covenants and conditions which relate to the Construction Work generally and the insurance, indemnity and environmental obligations associated therewith. The Bond shall remain in effect in all respects through and after the Completion Date, and indefinitely until the General Contractor has fully satisfied its obligations relating to the Construction Work. The existence of the Bond shall not limit or alter any other remedies of the Port Authority under this Agreement, and the Port Authority may from time to time and at any time elect to pursue (or not to pursue) its rights under the Bond without thereby limiting, voiding or relinquishing any of its other rights or remedies under this Agreement.

## Section 5.7 Commencement of Construction.

The Lessee shall give the Port Authority at least sixty (60) days’ notice prior to the commencement of construction.

## Section 5.8 Quality of Work.

(a) *Quality of Work.*  All Construction Work, including workmanship and materials, shall be of first class quality.

(b) *Construction Standards.*  All Construction Work shall be performed (x) in accordance with and subject to the terms and provisions of this Agreement covering the Construction Work, (y) substantially in accordance with the approved Construction Application and (z) subject to any requirements, stipulations and provisions that the Port Authority may impose in its approval of the performance of such Construction Work. For the purposes of this paragraph (b), Construction Work shall be deemed to have been performed “substantially in accordance with the approved Construction Application” if (x) such Construction Work has been performed in compliance with all Requirements, (y) all life safety and fire protection systems, if any, included in such Construction Work have been completed and installed in accordance with the approved Construction Application for such work and (z) such Construction Work has otherwise been performed in accordance with the approved Construction Application for such work, subject to minor deviations therefrom that do not affect the quality of the Construction Work, the structural integrity of the Building, the functioning of any Building systems or the compliance of the Building with the Requirements. The Lessee shall redo, replace or construct, at its own cost and expense, any Construction Work not done substantially in accordance with the approved Construction Application or the provisions of this Agreement.

(c) *MOA Requirements.* Without limitation as to the foregoing provisions of this Section 5.8, it is understood that all Construction Work shall be subject to the requirements of the MOA.

## Section 5.9 Construction Supervision and Inspection.

(a) *Lessee’s On-Site Engineer*. During the performance of the Construction Work for the Project, including any Partial Approval Work, the Lessee shall provide a State of New York licensed engineer or registered architect employed by the Lessee’s Architect/Engineer to perform on-site construction supervision of the Construction Work and witness all special inspections required under the New York Uniform Construction Code sufficient to enable the Lessee’s Architect/Engineer to issue the Lessee Certificate, as required below in the Section entitled “*Completion*”.

(b) *Port Authority Field Engineer*.

(1) The Port Authority will assign a field engineer(s) to the Project during the construction period.

(2) The appointment of any such engineer shall not give the Port Authority any rights, powers or obligations not otherwise herein provided for and, without limiting the generality of the foregoing, shall not affect any of the other provisions of this Article or any rights of the Port Authority hereunder. It is expressly understood and agreed that the Port Authority’s field engineer assigned pursuant to this paragraph has no authority to approve (x) any change or modification to the approved Construction Application with respect to any portion of the Construction Work, (y) the construction by the Lessee of any portion of the Construction Work that is not in accordance with the Construction Application approved by the Port Authority or (z) any variation by the Lessee from compliance with the terms of this Agreement, nor does such field engineer have authority to certify that the Construction Work has been performed in accordance with the approved Construction Application covering such Construction. It is hereby further understood and agreed that should such field engineer give any directions or approvals with respect to the Lessee’s performance of any portion of the Construction Work that are contrary to the provisions of this Agreement or the approved Construction Application, such directions or approvals shall not affect the obligations of the Lessee as set forth herein, nor release or relieve the Lessee from compliance therewith.

(c) *Port Authority’s Right of Inspection.*

(1) The Port Authority shall have the right, through its duly designated representatives, to inspect the Construction Work and the plans and specifications thereof, at any and all times during the progress thereof and from time to time, in its discretion, to take samples and perform testing in any part of the Construction Work.

(2) Prior to backfilling any excavations in which the construction of utilities has been completed, the Lessee shall notify the Resident Engineer that such excavations are ready to be backfilled. Such excavations shall not be backfilled until the Port Authority shall have documented and surveyed the line and grade of such utilities.

(d) *Non-Compliance.*

(1) In the event that the Port Authority determines that the Lessee has failed at any time during the performance of any portion of the Construction Work under this Agreement to comply with the requirements of the approved Construction Application or the provisions of this Agreement relating to the Construction Work, the Lessee shall, at the Port Authority’s direction, submit to the Port Authority for its written approval the Lessee’s proposal for making modifications, corrections, or changes or to the Construction Work that has been or is to be performed so that the same will comply with the provisions of this Agreement.

(2) In the event that the Port Authority deems such non-compliance to be material and substantial, the Port Authority shall have the right to cause the Lessee to cease such part of the Construction Work as is being performed in violation of this Agreement. Upon direction from the Port Authority (which need not be in writing in the event of an emergency, including without limitation any non-compliance involving life safety issues) specifying the reasons therefor, the Lessee shall promptly cease construction of the portion of the Construction Work specified.

(3) If the Port Authority has required the Lessee to cease performance of the Construction Work in accordance with the foregoing subparagraph (2), the Lessee shall not resume construction of any portion of the Construction Work that has been so halted until it has received the Port Authority’s written approval of the modifications, corrections or changes in or to the Construction Work that the Lessee proposes to make.

(e) *No Duty to Police.* Notwithstanding the foregoing, it is hereby understood and agreed that the Port Authority has no duty or obligation of any kind whatsoever to inspect or police the performance of the Construction Work, and the rights granted to the Port Authority hereunder shall not create or be deemed to create any such duty or obligation. Accordingly, for example, the fact that the Port Authority has not required the Lessee to submit a proposal pursuant to subparagraph 5.9(d)(1), or has not exercised its right to require the Lessee to cease its construction of all or any part of the Construction Work pursuant to subparagraph 5.9(d)(2), shall not constitute an agreement or acknowledgment on the part of the Port Authority that the Lessee has in fact performed such work in accordance with the terms of this Agreement and the approved Construction Application, nor shall any such fact constitute a waiver by the Port Authority of the requirement of compliance by the Lessee in all material respects with the provisions of this Agreement and the approved Construction Application.

## Section 5.10 Studies and Forecasts.

(a) *Engineering Studies.* Prior to the commencement of construction and at all times during construction, the Lessee shall submit to the Port Authority all engineering studies with respect to construction and samples of construction materials as the Port Authority may require at any time and from time to time. In addition, except under emergency circumstances or as required by applicable Requirements, the Lessee shall notify the Port Authority prior to the Lessee’s reporting to any governmental authority any Hazardous Substances discovered in connection with or arising out of the performance of the Construction Work.

(b) *Construction Period Forecasts.* Prior to the commencement of construction and upon the Port Authority’s request from time to time thereafter, the Lessee shall submit to the Port Authority its forecasts of the number of people who will be working at various times during the period of construction and the term of the letting hereunder at the Premises, the expected utility demands, noise profiles and such other information as the Port Authority may require. The Lessee shall keep the Port Authority currently advised as to any material changes in the foregoing information.

## Section 5.11 Risk of Loss, Indemnification.

(a) *Indemnification*. The Lessee hereby assumes the risk of loss or damage to all of the Construction Work prior to the completion thereof and the risk of loss or damage to all property of the Port Authority and others and injury (including death) to persons directly or indirectly arising out of or in connection with the performance of the Construction Work, including without limitation any and all Environmental Requirements and Environmental Damages, except to the extent expressly otherwise provided in this Agreement. Except as otherwise expressly provided in this Agreement, the Lessee shall itself and shall also require its contractors to indemnify the Indemnified Parties against the following damages and claims or losses arising out of the performance of the Construction Work, whether such risks and claims or losses arise from the acts or omissions of the Lessee, any contractors of the Lessee, any Indemnified Party, third persons, acts of God or the public enemy or otherwise, excepting only risks, claims or losses which result solely from the intentional misconduct or gross negligence of any Indemnified Party with respect to the Construction Work:

(i) risks of loss or damage to all or any part of the Construction Work prior to the completion thereof, it being understood and agreed that in the event of any such loss or damage, the Lessee shall forthwith repair, replace and make good the work without cost or expense to the Port Authority; and

(ii) risk of loss or damage to any property of the Port Authority arising out of or in connection with the performance of the Construction Work, it being understood and agreed that the Lessee shall indemnify the Indemnified Parties and hold each of them harmless from all such loss or damage; and

(iii) risk of all claims and demands, just or unjust, of third Persons arising or alleged to arise out of the performance of the Construction Work, it being understood and agreed that the Lessee shall indemnify and hold harmless each Indemnified Party against and from all such claims and demands, and for all expenses (including attorneys’ fees) incurred by any Indemnified Party in the defense, settlement or satisfaction thereof, including without limitation claims and demands for death, for personal injury or for property damage, direct or consequential, and including claims and demands of the City, from which the Port Authority derives its rights in the Airport, for indemnification, arising by operation of law or through agreement of the Port Authority with the City.

(b) *Defense of Claims.*

(1) If so directed, the Lessee (or its contractor) shall at its own expense defend any suit based upon any such claim or demand (even if such suit, claim or demand is groundless, false or fraudulent), and in handling such it shall not, without obtaining the express advance permission from the General Counsel of the Port Authority, raise any defense involving in any way the jurisdiction of the tribunal over the person of the Port Authority, the immunity of the Port Authority, its Commissioners, officers, agents or employees, the governmental nature of the Port Authority or the provision of any statutes respecting suits against the Port Authority.

(2) In the event that any action or proceeding is brought against the Port Authority by reason of any claims covered by the foregoing indemnity, the Lessee shall, upon notice from the Port Authority (as applicable), resist or defend such action or proceeding by counsel satisfactory to the Port Authority (as applicable). Notwithstanding the foregoing, if such claim is covered by insurance, then defense counsel appointed by the applicable insurer shall be deemed to be satisfactory so long as the insurer has not reserved rights or disclaimed coverage as to part or all of such claim.

(3) In no event shall any Indemnified Party have the right independently to settle any such claim without the consent of the Lessee; provided, however, that upon at least ten (10) days’ prior written notice from any Indemnified Party to the Lessee, such Indemnified Party may settle any such claim if (x) the Port Authority, on behalf of itself and all other Indemnified Parties, releases the Lessee in writing of its obligation to indemnify the Indemnified Parties in respect of such claim and (y) within such ten (10) day period the Lessee does not give written notice to the Port Authority objecting to such settlement on the ground that it will prejudice the Lessee in the defense of such claim on its own behalf. The Lessee shall have the right to settle any such claim without the approval of any Indemnified Party provided that the Lessee (where such claim is not covered by insurance) demonstrates that it has the financial ability to pay such settlement in full and that it has made adequate provision for the payment of such settlement. Any such settlement must fully release the Indemnified Parties from any liability for or in respect of the claim in question. In the case of any such claim which is not covered by insurance, the Lessee shall keep the Port Authority apprised of any such settlement negotiations.

## Section 5.12 Insurance.

(a) *Liability Insurance*.

(1) In addition to all policies of insurance otherwise required in this Agreement, the Lessee in its own name as insured and with the Indemnified Parties as additional insureds shall procure and maintain a policy or policies of Commercial General Liability Insurance, including without limitation coverage with a broad form property damage endorsement, premises-operations, products liability/completed—operations (for a minimum of three (3) years after the Construction Completion Date) and explosion, collapse and underground property damages coverage, personal injury and independent contractors and providing for the coverage in the limit set forth below; Commercial Automobile Liability Insurance covering owned, non-owned and hired vehicles, automatically covering newly acquired vehicles, and providing for coverage in the limit set forth below; at any time that the removal of asbestos-containing materials is being performed at the Premises, Asbestos Abatement Liability Insurance providing for coverage in the limit set forth below; at any time that Remediation (including without limitation removal of asbestos-containing materials) is being performed at the Premises, Environmental Impairment Liability Insurance, including lead abatement, if relevant, and removal operations, and providing for coverage in the limit set forth below; and during the performance of any Remediation at the Premises, Transportation Pollution/Hazardous Waste Haulers Insurance (Form MCS90), providing for coverage in the limit set forth below; with contractual liability endorsements covering the obligations assumed by the Lessee hereunder, including without limitation the Lessee’s indemnification obligations and the indemnification obligations required of the Lessee’s contractors pursuant to Section 5.11.

(2) The foregoing insurance shall be in not less than the following amounts:

|  |  |
| --- | --- |
| **Type of Coverage** | **Minimum Limits** |
| Commercial General Liability |  |
| Combined single limit per occurrence for death, bodily injury and property damage liability: | **$100,000,000.00** |
| Commercial Automobile Liability |  |
| (covering owned, non-owned and hired vehicles) combined single limit per occurrence for death, bodily injury and property damage liability: | **$2,000,000.00** |
| Asbestos Abatement Liability |  |
| Combined single limit per occurrence for death, bodily injury and property damage liability: | **$2,000,000.00** |
| Environmental Impairment Liability |  |
| Combined single limit per occurrence for death, bodily injury and property damage liability: | **$2,000,000.00** |
| Transportation Pollution/Hazardous Waste Haulers (MCS90) |  |
| Combined single limit per occurrence for death, bodily injury and property damage liability: | **$2,000,000.00 or statutory minimum** |

(3) In addition to the foregoing, the Lessee shall provide the foregoing insurance by requiring each contractor engaged by it for the Construction Work to procure and maintain such insurance in the contractor’s name as insured and with the Port Authority, the City, EDC and the Lessee as additional insureds, including contractual liability endorsements referred to in paragraph (a) above.

(4) The foregoing insurance shall not contain any care, custody or control exclusions, or any exclusion for bodily injury to or sickness, disease or death of any employee of the Lessee or of any of its contractors that would conflict with or in any way impair the coverages resulting from the Indemnified Parties’ status as additional insureds or coverage under the contractual liability endorsement.

(5) Each policy of liability insurance shall also provide or contain an endorsement providing that the protections afforded the named insured thereunder with respect to any claim or action against the named insured by a third person shall pertain and apply with like effect with respect to any claim or action against the Lessee by an Indemnified Party, but such endorsement shall not limit, vary, change, or affect the protections afforded the Indemnified Parties thereunder as additional insureds. In addition, each policy of insurance shall also provide or contain an endorsement providing that the protections afforded the Indemnified Parties thereunder with respect to any claim or action against any Indemnified Party by the Lessee or its contractor(s) shall be the same as the protections afforded the named insured thereunder with respect to any claim or action against the named insured by a third person, as if the Indemnified Parties were the named insureds thereunder.

(6) Each policy of liability insurance shall also provide or contain an endorsement providing that the insurer shall not, without obtaining express advance permission from the General Counsel of the Port Authority, raise any defense involving in any way the jurisdiction of any tribunal over the person of the Port Authority, the immunity of the Port Authority, its Commissioners, officers, agents or employees, the governmental nature of the Port Authority or the provisions of any statutes respecting suits against the Port Authority.

(b) *Workers’ Compensation Insurance.* The Lessee shall procure and maintain Workers’ Compensation Insurance in accordance with the requirements of law, provided, however, that in the event any class of employees under any contract or subcontract for work to be performed on the Premises is not protected under the Workers’ Compensation statute, the Lessee shall provide, and cause any additional employers to provide, Employer Liability insurance for the protection of such of its employees as are not otherwise protected. Limits of Employer Liability Insurance shall be as follows:

$1,000,000 each accident  
 $1,000,000 each employee – disease  
 $1,000,000 policy limit – disease.

(c) *Builder’s Risk Insurance.* The Lessee shall procure and maintain, or cause to be procured and maintained, Builder’s Risk (All Risk) Completed Value Insurance, including coverage for terrorism, flood and earthquake, on a complete value form covering the Construction Work during the performance thereof including material intended to be incorporated in the finished improvements, whether stored off-Premises or delivered to the Premises but not attached to the realty, or existing property, until the Construction Work is completed. Such policy shall name the Recognized Mortgagee and the Indemnified Parties as insureds, as their interests may appear, with loss payable to the Recognized Mortgagee and adjusted by the Recognized Mortgagee. If there is no Recognized Mortgagee, losses shall be payable to the Port Authority, and the policy shall provide that the loss shall be adjusted with the Port Authority and the Lessee. The proceeds of such insurance shall be used solely for the repair, replacement, rebuilding or other performance of the Construction Work.

(d) *General Requirements.*

(1) The insurance required hereunder shall be maintained in effect during the performance of the Construction Work and shall be in compliance with and subject to the provisions of Article 10 hereof, entitled “*Insurance*”.

(2) Any property insurance policy provided for in this Section may be carried in blanket form and any liability insurance may be carried in the form of a primary and one or more umbrella policies.

Section 5.13 Pollution to be Minimized; Safety.

Prior to and during the performance of the Construction Work the Lessee shall take appropriate measures to prevent erosion of the soil and the blowing of sand or materials and if necessary shall erect fencing or partitioning and cover open areas with asphaltic emulsion or similar materials. The Construction Work shall be performed in such a manner that there will be at all times during construction a minimum of air pollution, water pollution or any other type of pollution and a minimum of noise emanating from, arising out of or resulting from such construction. Subject to the provisions of this Agreement, the Lessee shall construct such customary structures, fences, equipment, dewatering systems and other devices and facilities as the Port Authority shall deem necessary or appropriate to accomplish the objectives set forth in this Section. In addition to its other obligations under this Section, the Lessee shall take appropriate measures to (x) safeguard the work so as to avoid, to the extent possible, injury or damage to persons or property and (y) control rodents and insects during the performance of the Construction Work, and shall provide extermination services as required.

Section 5.14 Compliance with Sustainable Design Guidelines.

The Lessee shall, in the performance of all Construction Work, comply with the Port Authority’s policy on sustainable design as set forth in the sustainable design guidelines promulgated by the Port Authority Engineering Department from time to time.

## Section 5.15 Disposition of Matter.

#### Subject in all events to the Environmental Requirements, any soil, dirt, sand or other matter (collectively, the “**Matter**”) excavated by the Lessee during the course of the Construction Work and not used at the Premises shall be managed in accordance with the Environmental Management Plan (as defined below). The Lessee shall submit to the Port Authority all manifests and bills of lading covering any Matter transported from the Premises, and in addition shall prepare and submit to the Port Authority all documentation that the Lessee is required to submit to the disposal site or the Governmental Authority having jurisdiction with respect to any Matter.

## Section 5.16 Specific Environmental Requirements relating to Construction

(a) *Compliance with Environmental Requirements.*

#### (1) The Construction Work shall be performed in compliance with all Environmental Requirements, and in connection therewith the Lessee shall duly procure all additional permits applicable permits of Governmental Authorities required pursuant thereto.

#### (2) Notwithstanding the foregoing, where the other terms and provisions of this Agreement, including without limitation Article 20B, entitled “*Environmental Obligations*”, provide requirements that are stricter than or additional to Environmental Requirements, the Construction Work shall comply with such stricter or additional requirements, and references in this Article 5 to “Environmental Requirements” shall be interpreted accordingly.

#### (3) Without limitation as to the foregoing, but subject to paragraph (h)(1) below of this Section 5.16, all Construction Work shall be performed in compliance with Permit No. GP-0-10-001, SPDES General Permit for Stormwater Discharges from Construction Activities, issued by the DEC on January 29, 2010, and JFKIA SPDES Number NY 0008109 renewed effective March 1, 2012, including without limitation the Storm Water Pollution Prevention Plan which shall be filed pursuant thereto by the Lessee in connection with the Construction Work (including any extension or successor to such permit, the “**JFK SPDES Permit**”).

(b) *No Exacerbation.* In the performance of the Construction Work, the Lessee shall not exacerbate the existing environmental condition of the Premises, the Airport or any natural resource, including without limitation any ground water or aquifer.

(c) *Environmental Management Plan.* The Lessee shall submit to the Port Authority for its approval prior to the commencement of the Construction Work an environmental management plan setting forth in detail the Lessee’s plans for all handling, excavation, depositing, testing, screening, backfilling, removal, storage, transportation, disposal and other handling of soil and the treatment of ground and wastewater in the performance of the Construction Work (such plan, as approved by the Port Authority, the “**Environmental Management Plan**”). The Construction Work shall be performed in accordance with the Environmental Management Plan.

(d) *Remediation of Spills.*

(1) In the event that any Hazardous Substances are discovered, uncovered, exposed, spilled, released, discharged or disposed on the Airport in the performance of the Construction Work (any such event, a “**Spill**”), the Lessee shall immediately (w) notify the Port Authority of such Spill, (x) excavate all soil containing any such Hazardous Substances, (y) pump and treat all ground water containing any such Hazardous Substances, and (z) delineate such Spill to the satisfaction of the Port Authority. Such pumping and treatment, or excavation, shall continue until all such Hazardous Substances have been removed in accordance with Environmental Requirements. No Construction Work that would interfere or delay such Remediation shall be performed in the area of such Spill until all such Hazardous Substances have been so removed. Notwithstanding the foregoing, however, with respect to any Hazardous Substances discovered, tested or sampled in connection with any excavation, such responsibility for Remediation shall apply only with respect to such Hazardous Substances existing within each excavated area plus a ten (10) foot-wide (measured from the widest extent, surface or subsurface, of the excavation) strip of land around the perimeter of the entirety of such excavated area.

(2) All such testing or sampling shall be performed by a laboratory duly approved or certified by a governmental agency having jurisdiction. Prior to final disposition of any such Hazardous Substance, the Lessee shall submit to the Port Authority certifications stating the type and amount of material disposed, the method of disposal, the owner and the location of the proposed disposal facility and the name and address of the transporter. The format of such certifications, including the appropriate operating permits of the disposal facility and the transporter, shall follow the requirements of the governmental agencies having jurisdiction.

(e) *Reporting to Governmental Authority.*

In reporting a Spill, the Lessee shall follow all Environmental Requirements and shall direct such report to the attention of such individual at the relevant Governmental Authority as the General Manager of the Airport may require, in order to assure consistency in the environmental management of the Airport.

(f) *Certificate of Final Disposal.* Promptly upon final disposition of any Hazardous Substance, the Lessee shall submit to the Port Authority a “Certification of Final Disposal” stating the type and amount of material disposed, the method of disposal and the owner and location of the disposal facility. The format of such certification shall follow the requirements, if any, of Governmental Authorities having jurisdiction as if the Port Authority were a private organization, provided, however, that in all events the name of the Port Authority shall not appear on any certificate or other document as a generator or owner of such material.

(g) *Responsibility to Obtain NFA Status.* In all events, the Lessee shall be fully responsible for obtaining a No Further Action (“**NFA**”) status from the DEC with respect to all Spills reported to the DEC, and the Lessee shall complete all necessary remedial actions, monitoring and reporting necessary to obtain such NFA status. The Lessee shall be fully responsible for all costs associated with any long-term monitoring, reporting and closure activities relating to or resulting from such reported Spills both before and after the Completion Date.

(h) *Dewatering and Discharge of Wastewater*.

#### (1) The Port Authority hereby grants its permission to the Lessee to perform dewatering and discharge of wastewater in connection with the Construction Work under the JFK SPDES Permit, provided, however, that the Port Authority shall approve all dewatering plans and practices prior to any discharge, and the Lessee shall comply with all the terms and conditions of the JFK SPDES Permit and with all additional requirements of the DEC with respect to such dewatering activities and discharge of wastewater. The foregoing permission may be revoked by the Port Authority upon twenty-four (24) hours’ notice to the Lessee if the Lessee fails, within five (5) days after the Lessee’s receipt of notice of default from the Port Authority identifying the breach(es) of this paragraph (h), entitled “*Dewatering and Discharge of Wastewater*”, to cure any such breach(es).

#### (2) The Lessee shall design and implement appropriate engineering practices and controls for all dewatering activities in the performance of the Construction Work to comply with Environmental Requirements.

#### (3) Dewatering and discharges shall be monitored and reported separately for each individual discharge point that comprises the Construction Work. Accordingly, separate monitoring systems shall be used to track dewatering and discharge activities performed in connection with the Construction Work. Upon the Port Authority’s request at any time and from time to time, the Lessee shall provide additional samples and tests relating to the dewatering system. The Lessee shall keep full documentation of all ground water volumes treated, sampled and discharged, and shall provide all such documentation to the Port Authority.

#### (4) The Lessee shall install any and all treatment items requested or required by the DEC, the General Manager of the Airport or any approved Construction Application and/or indicated by water quality sampling results. All effluent shall meet the JFK SPDES Permit limits.

#### (5) In the event that the projected zone of influence of the Lessee’s dewatering system is found to extend into any area outside of the Premises, the Lessee shall notify the Port Authority by submitting to the Resident Engineer for his review and approval the proposed dewatering design, which shall identify potentially affected non-pile supported structures and pavements which may be impacted by drawdown effects during dewatering operations.

#### (6) In the event that the Lessee’s dewatering activities hereunder involve the use of wells, the Lessee shall, not later than ten (10) days after completion of dewatering activities and receipt of any approvals of a Governmental Authority, perform and complete a closure of all such wells in conformance with DEC requirements. The Lessee shall promptly notify both the Port Authority and the DEC of this action.

(i) *Lessee’s Environmental Professionals*.

#### (1) The Lessee shall designate, by written notice to the Port Authority given not later than five (5) days after the Lessee’s execution of this Agreement, a duly authorized representative of the Lessee (the “**Lessee Environmental Representative**”) who shall be responsible for the Lessee’s compliance with the JFK SPDES Permit.

#### (2) Upon notice to the Lessee by the Port Authority, which may be given at any time upon any indication of non-compliance or potential non-compliance by the Lessee with the JFK SPDES Permit, the Lessee shall at its own expense immediately retain under contract, independent of the Lessee’s construction contractor, a qualified environmental consultant approved by the Port Authority (the “**Lessee Environmental Consultant**”). The Lessee Environmental Consultant shall provide liaison with the Port Authority, and shall have the obligation to submit any and all reports, and any other requested information, directly to the Port Authority and to oversee installation, if applicable, of dewatering wells by a licensed driller, and to monitor contractor compliance with all dewatering operations. The Lessee Environmental Consultant shall at all times be an independent contractor of the Lessee. The Port Authority shall not be responsible for any act or omission or fault or neglect of the Lessee’s Environmental Consultant, nor shall the Port Authority have any liabilities or obligations of any kind to the Lessee Environmental Consultant, or any responsibility for any payments due or alleged to be due thereto.

#### (3) The Lessee Environmental Representative and/or the Lessee Environmental Consultant shall promptly notify the Port Authority’s Resident Engineer of the progress of scheduled activities, including initiation of dewatering activities, and shall provide weekly updates (by facsimile or email) on the activities at the Premises, including the status of dewatering activities (e.g. volumes removed, condition of waters).

(j) *Lessee’s Responsibility.*

In addition to and without limitation as to the following paragraph (k) or any other term or provision of this Agreement, the Lessee shall be solely responsible for any and all fines, penalties, assessments, or levies assessed due to deviation from or violation of the JFK SPDES Permit or of the Lessee’s authorization to discharge stormwater in the performance of the Construction Work during construction or of any other applicable permit, plan, authorization or permission. All design planning shall be in conformance with the requirements and conditions of the JFK SPDES Permit and applicable Environmental Requirements and of any other applicable permit, plan, authorization or permission, and the Lessee shall be responsible for complete compliance therewith.

(k) *Lessee’s Assumption of Risk.*

The Lessee shall assume all risks arising out of its performance of dewatering and discharging of wastewater at any portion or area of the Premises under the JFK SPDES Permit or of any other applicable permit, plan, authorization or permission and, without limitation as to the generality of any other term or provision contained in this Agreement, the Lessee shall indemnify, hold harmless and reimburse the Port Authority, its Commissioners, officers, employees and representatives from and against (and shall reimburse the Port Authority for the Port Authority’s costs and expenses, including without limitation legal costs and expenses incurred in connection with the defense of) all claims and demands, penalties, fines, liabilities (including without limitation strict liability), settlements, attorney and consultant fees, investigation and laboratory fees, cleanup and remediation costs, court costs and litigation expenses, damages, judgments, losses, costs and expenses, including without limitation claims for personal injury, including death, property damage and natural resources damage, of whatsoever kind or nature and whether known or unknown, contingent or otherwise, just or unjust, groundless or foreseeable or otherwise arising or alleged to arise out of, or in any way related to the Lessee’s performance of dewatering or any discharging at any portion of the Premises or the Airport or the use of the JFK SPDES Permit by the Lessee or of any other applicable permit, plan, authorization or permission. If so directed, the Lessee shall at its own expense defend any suit based upon the foregoing, and in handling such it shall not, without obtaining express advance permission from the General Counsel of the Port Authority, raise any defense involving in any way the jurisdiction of the tribunal over the person of the Port Authority, the immunity of the Port Authority, its Commissioners, officers, agents or employees, the governmental nature of the Port Authority or the provisions of any statutes respecting suits against the Port Authority.

Section 5.17 Relocation Work.

The Lessee understands that there may be communications and utility infrastructure located on or under the Premises which do not, and may not in the future, serve the Premises but which may be affected by the Construction Work. The Lessee agrees, if directed by the Port Authority so to do, to relocate and reinstall such communications and utility infrastructure on the Premises or off the Premises and to restore all affected areas (such work, collectively, the “**Relocation Work**”), the Port Authority agreeing not to act unreasonably herewith. The Lessee shall perform the Relocation Work subject to and in accordance with all the terms and provisions of this Section, and the Relocation Work shall be and become a part of the Construction Work, it being understood, however, that the Relocation Work shall not be or become a part of the Premises.

Section 5.18 No Disruption of Airport Operations;  
Public Safety Radio System*.*

(a) *Airport Operations.* The Construction Work shall be performed in a manner that does not disrupt or unreasonably disturb ongoing operations elsewhere at the Airport, including without limitation at Terminal 5.

(b) *Public Safety Radio System.* The Lessee acknowledges that the public safety radio system installed in the Premises must remain in full service before and during the period the Construction Work is in progress, as well as following completion of construction of the Project. The Lessee accordingly agrees to provide, in consultation with the Port Authority, such additional antennas or supporting equipment as may be appropriate to effectuate the foregoing.

Section 5.19 Staging Area.

The Port Authority shall make available to the Lessee, by separate agreement, a material and staging area for the Lessee’s exclusive use in connection with the prosecution and completion of all Construction Work.

Section 5.20 Title to Construction Work.

Title to all the Construction Work shall pass to The City of New York as the same or any part thereof is erected, constructed or installed, and shall be and become part of the Premises if located within the Premises.

## Section 5.21 Completion.

(a) *Lessee Certificate*. When the construction of the Project is completed and the Building is ready for use, the Lessee shall advise the Port Authority to such effect and shall deliver to the Port Authority a certificate signed and sealed by the Lessee’s Architect/Engineer, certifying that the Construction Work has been constructed in accordance with the approved Construction Application and the provisions of this Agreement and that all life safety systems have been completed in accordance with the approved Construction Application, and in compliance with all applicable Requirements (such certificate, the “**Lessee Certificate**”).

(b) *Additional Documentation.*

(1) Together with the Lessee Certificate, the Lessee shall deliver to the Port Authority complete copies of (w) the Lessee’s Architect/Engineer’s final inspection reports, (x) drawings and analysis of the fire sprinkler/protection systems constructed pursuant to the approved Construction Application, (y) HVAC balancing reports and (z) all equipment manuals and warranties.

(2) Within ninety (90) days of the issuance of the Certificate of Completion (as defined below), the Lessee shall deliver to the Port Authority two (2) sets of “as built” drawings of the Construction Work in an electronic CADD data file in a format to be designated by the Port Authority, all of which shall conform to the specifications of the Port Authority (the receipt of a copy of said specifications prior to the execution of this Agreement being hereby acknowledged by the Lessee), together with two (2) complete hard copies of such drawings, all engineering reports, engineering analysis, boring logs, survey information and engineering design calculations and operation and maintenance manuals in a comprehensive, coordinated package. The Lessee shall during the term of this Agreement maintain, and provide to the Port Authority upon request, a set of current Construction Documents showing thereon any changes or modifications which have been made.

(c) *Certificate of Completion.* Upon the Port Authority’s receipt of the Lessee Certificate, the Port Authority shall inspect the Construction Work, and if the same has been completed as certified in the Lessee Certificate, the Port Authority will issue a “Permit to Occupy or Use” (the “**Certificate of Completion**”; and the date thereof, the “**Construction Completion Date**”) with respect to the Construction Work, subject to the condition that all risks with respect to the Building, as well as the Construction Work and any liability therefor, for negligence or other reason, shall be borne by the Lessee. The Lessee shall not use or permit the use of the Building until the Lessee has received the Certificate of Completion.

(d) *Partial Occupancy.*

(1) The Lessee may wish to occupy a portion of the Building prior to the Construction Completion Date. In addition to and without affecting the foregoing obligations of the Lessee and provided that the Construction Application has been approved by the Port Authority, when an integral and material portion of the Construction Work is substantially completed and is properly usable, the Lessee may advise the Port Authority to such effect and may deliver to the Port Authority a certificate of an authorized officer of the Lessee and of the Lessee’s Architect/Engineer certifying that such portion of the Construction Work has been constructed in accordance with the approved Construction Application and the provisions of this Agreement, and in compliance with all applicable Requirements and that all life safety systems have been completed in accordance with the approved Construction Application and in compliance with all applicable Requirements, and specifying that such portion of the Construction Work can be properly and safely used even though the Construction Work has not been completed, and that the Lessee desires such use (the “**Partial Occupancy Request**”).

(2) The Port Authority shall inspect the portion of the Construction Work identified in the Partial Occupancy Request, and if the same has been completed as certified by the Lessee, the Port Authority may in its sole discretion issue a “Temporary Permit to Occupy or Use” with respect to such portion of the Construction Work, permitting the use of such portion of the Building for the purposes set forth in this Agreement (each such document, a “**Certificate of Partial Completion**”), subject to the condition that all risks thereafter in connection with such portion of the Building and the construction and installation of the same, and any liability therefor for negligence or other reason, shall be borne by the Lessee, and subject to such further conditions, restrictions and requirements as the Port Authority may at that time impose.

(3) If at any time prior to the Construction Completion Date the Port Authority determines that such portion of the Building or the use thereof is unsafe or in violation of the provisions of this Agreement, the Lessee shall promptly, upon receipt of a written notice from the Port Authority, cease the use of such portion of the Building which had been in use pursuant to the Certificate of Partial Completion.

## Section 5.22 Alterations and Changes.

Following issuance of the Certificate of Completion, the Lessee shall not make any alterations or changes (including repairs) to the Premises without the prior written consent in each instance of the Port Authority. In the event any such work is performed by the Lessee without such consent, upon notice to do so from the Port Authority, the Lessee shall remove the unauthorized installation, construction, improvement, alteration, modification or addition or, at the option of the Port Authority, cause such unauthorized installation, construction, improvement, alteration, modification or addition to be changed to the satisfaction of the Port Authority. In the event the Lessee fails to comply with any such direction, the Port Authority may remove or change such unauthorized installation, construction, improvement, alteration, modification or addition and the Lessee shall pay to the Port Authority on demand one hundred thirty percent (130%) of the cost of such removal or change.

# ARTICLE 6. SERVICES AND UTILITIES

## Section 6.1 Services to the Lessee.

## (a) *No Services Except as Expressly Provided.* Except as expressly provided in this Section, the Port Authority shall not be obligated to perform or furnish any services or utilities whatsoever in connection with this Agreement or the use and occupancy of the Premises.

## (b) *Electricity.*The Port Authority shall sell, furnish and supply to the Lessee for use on the Premises, and the Lessee agrees to take from the Port Authority and pay for electricity of the same voltage, phase and cycle as supplied to the Premises by the public utility in the vicinity, but limited however, to a maximum capacity of serving each portion of the Premises on the Lease Commencement Date, at the same charge which would be made by such public utility for the same quantity under the same conditions and in the same service classification but in no event less than an amount that would reimburse the Port Authority for its cost of obtaining and supplying electricity to the Lessee hereunder; charges shall be payable by the Lessee when billed and the quantity of electricity consumed shall be measured by the meter or meters installed for the purpose; provided, however, that if for any reason any meter or meters fail to record the consumption of electricity, the consumption during the period such meter or meters are out of service will be considered to be the same as the consumption for a like period either immediately before or after the interruption as elected by the Port Authority.

## (c) *Water.*The Port Authority agrees to sell, furnish and supply to the Lessee for use on the Premises cold water (of the character furnished by the City of New York) in reasonable quantities through existing pipes, mains and fittings and the Lessee agrees to take such water from the Port Authority. The charge therefor shall be payable by the Lessee when billed and the quantity of water consumed shall be measured by the meter or meters installed by the Lessee for the purpose; provided, however, that if, for any reason, any meter or meters fail to record the consumption of water, the consumption during the period such meter or meters are out of service will be considered to be the same as the consumption for a like period immediately before or after the interruption, as elected by the Port Authority. In the event meters are not installed to measure the consumption of water, the quantity of such water used by the Lessee will be based upon equitable estimates of consumption, which estimates shall be deemed binding on the Lessee.

## (d) *Sewerage****.*** The Lessee shall pay to the Port Authority such of the existing and future charges for sewerage services furnished by the City of New York as are presently or may hereafter be imposed or assessed against the Port Authority in respect of the Premises or its use and occupancy thereof. In the event that the City or the State of New York is now furnishing services with or without charge therefor, which are beneficial to the Lessee in its use and occupancy of the Premises, and shall hereafter impose charges or increase existing charges for such services, the Lessee agrees to pay to the Port Authority such of the charges or the increase in charges as may be imposed or assessed against the Port Authority in respect to the Premises or its use and occupancy thereof.

## (e) *Extermination.*In the event the Port Authority shall provide extermination service for the enclosed areas of the Premises, the Lessee agrees to utilize the same and to pay its pro rata share of the cost thereof upon demand. This paragraph does not impose any obligation on the Port Authority to furnish such service.

## Section 6.2 Hot Water and Chilled Water Requirements.

(a) (1) The Port Authority has entered into agreements consisting of an Energy Purchase Agreement, dated as of April 28, 1993, a Construction and Operations Agreement, dated as of April 28, 1993, and an Agreement of Lease, dated as of April 28, 1993, (all of the foregoing agreements, as the same may be supplemented, amended and extended from time to time, collectively, the “**Cogeneration Agreement**”) with KIAC Partners, a New York general partnership (“**KIAC**”), for the construction, installation and operation of a cogeneration facility at the Airport (the “**Cogeneration Facility**”), which includes portions of the central heating and refrigeration facility previously operated by the Port Authority at the Airport and which produces electricity, hot water (“**Hot Water**”) and chilled water (“**Chilled Water**”). The Cogeneration Facility shall include a thermal distribution system (the “**TDS**”) including distribution lines extending to the Premises, as provided in paragraph (f) below.

(2) The Lessee acknowledges that it has received a copy of the Cogeneration Agreement and agrees that the supply by KIAC of Hot Water and Chilled Water to the Premises is subject to all of the terms and provisions of the Cogeneration Agreement. The Lessee agrees that the Port Authority may grant waivers, consents and approvals to KIAC from time to time and the Port Authority and KIAC may, except to the extent provided in paragraph (i) below, supplement, amend or extend the Cogeneration Agreement from time to time and that the Lessee shall be subject to any such waivers, consents and approvals and supplements, amendments, and extensions as part of the Cogeneration Agreement. Copies of any such supplements, amendments and extensions will be made available to the Lessee upon request by the Lessee.

(b) (1) The Cogeneration Agreement provides, among other things, that the Port Authority will purchase from KIAC for resale to the Lessee, and the Lessee hereby agrees that it will accept and purchase from the Port Authority subject to all of the terms and conditions of the Cogeneration Agreement, for use on the Premises, to the extent the same is delivered by KIAC to the Port Authority and by the Port Authority to the Lessee, all of the Lessee’s requirements at the Premises for Hot Water and Chilled Water; and the Lessee hereby agrees to pay the Port Authority therefor as follows:

#### The Lessee acknowledges and agrees that the charge to the Lessee by the Port Authority for the Lessee’s consumption of Hot Water and Chilled Water at the Premises and Chilled Water makeup water and chemical treatment of makeup water (due to system leakage at the Premises or otherwise) shall be the sum of (A) the amount payable by the Port Authority to KIAC therefor pursuant to the Cogeneration Agreement, plus (B) Five Percent (5%) of the foregoing, plus (C) all applicable taxes.

#### The Lessee acknowledges that pursuant to the Cogeneration Agreement KIAC will furnish the Port Authority with measurements of the Lessee’s consumption of (A) Hot Water based upon energy drawn by the Lessee from KIAC’s Hot Water distribution lines, (B) Chilled Water based upon the energy absorbed from the Lessee by KIAC’s Chilled Water distribution lines and (C) Chilled Water makeup water and chemical treatment of makeup water consumed on the Premises, and the Lessee agrees that the provisions of the Cogeneration Agreement with respect to the accuracy of such measurements, the determination of such measurements in the event of inaccurate registration by metering devices, and the use of estimates in the event of the failure of such metering devices shall all be applicable to the Lessee under this Agreement as though set forth in full herein.

#### The Lessee acknowledges that the Cogeneration Agreement provides that KIAC shall provide estimated bills to the Port Authority for consumption of Hot Water and Chilled Water on a monthly basis on or about the tenth (10th) day of the month for each calendar month. KIAC is then to render a final bill with respect to each estimated bill approximately ten (10) days after the conclusion of the said month together with the estimated bill for the then current month.

#### Notwithstanding such arrangement between KIAC and the Port Authority, the Port Authority shall, with respect to each calendar year or fraction thereof, establish estimated unit rates, subject to change from time to time by the Port Authority, for the consumption on the Premises of Hot Water and Chilled Water and shall render an estimated bill to the Lessee for the consumption at the Premises at such estimated rates monthly on the last day of the calendar month following each full or partial calendar month during the term hereof which bill shall be payable on receipt.

#### As soon as practicable after the expiration of each calendar year, the Port Authority shall determine the amounts payable by the Lessee in accordance with the provisions of subparagraphs (i), (ii) and (iii) of this paragraph (b)(1). A corrected billing based upon such determination shall thereupon be rendered by the Port Authority to the Lessee, and if any monies are due to the Port Authority they shall be promptly paid by the Lessee, and if any monies are due to the Lessee they shall be credited to it. In the event the term of this Agreement expires or is sooner terminated on a date other than the last day of a calendar year, the Port Authority shall have no obligation to immediately make the computations as hereinabove provided which would determine the amounts payable by the Lessee in accordance with subparagraphs (i), (ii) and (iii) of this paragraph (b)(1) for the period during said year when this Agreement was in effect. In the event this Agreement expires on a day other than the last day of a calendar month and the actual consumption of and charges to the Lessee for such portion of the calendar month are not available, the charge to the Lessee shall be equitably prorated. Said computations shall be made subsequent to the end of the calendar year as hereinabove provided, and if any monies are due to the Port Authority they shall be paid by the Lessee and if any monies are due to the Lessee they shall be paid to it by the Port Authority less such amounts, if any, then due and owing to the Port Authority from the Lessee.

#### The Port Authority shall render a bill to the Lessee from time to time for the Lessee’s Chilled Water distribution gallonage, which shall be payable upon receipt. The charge therefor shall be based on KIAC’s charge to the Port Authority for makeup water and chemical treatment of makeup water and shall be determined in accordance with subparagraphs (i) and (ii) of this paragraph (b)(1).

#### In the event that the Lessee disputes any item of an estimated or final bill, the Lessee shall promptly pay the bill in full and the Port Authority shall make any necessary adjustments only after resolution of such dispute.

(2) The Lessee agrees that in order that KIAC or any successor thereto may maintain the status of the Cogeneration Facility as a “qualifying cogeneration facility” under applicable Federal laws, rules and regulations (“**QF Status**”) including the Public Utility Regulatory Policies Act of 1978, as the same may be amended, and any successor statute thereto, the Lessee shall, at all times it is operating at the Premises for the purposes permitted in this Agreement, purchase from the Port Authority and use on an annual basis a minimum amount of thermal energy contained in Hot Water and Chilled Water produced by use of steam from the Cogeneration Facility equivalent to the lesser of (1) an amount that, together with all thermal energy contained in Hot Water and Chilled Water purchased and used by the Port Authority and all other lessees of premises in the Central Terminal Area, is sufficient to maintain the QF Status of the Cogeneration Facility and (2) the product of (x) 167,379 mm BTUs of thermal energy, which is one-third of the use of thermal energy contained in Hot Water and Chilled Water in the Central Terminal Area of the Port Authority and the lessees of premises in the Central Terminal Area in the year ending December 31, 1989, and (y) a fraction, the numerator of which is the amount of the use of thermal energy contained in Hot Water and Chilled Water at the Premisesin the most recent complete calendar year preceding the applicable date of determination and the denominator of which is the amount of all use in the Central Terminal Area of thermal energy contained in Hot Water and Chilled Water in such calendar year.

(3) It is agreed that during or subsequent to the expiration of this Agreement no charge to or payment by the Lessee with respect to Hot Water, Chilled Water or Chilled Water distribution gallonage shall be included in, affect, or change in any way the calculation and determination of Port Authority costs or charges under any other agreement between the Lessee and the Port Authority at the Airport and any such Port Authority cost or charge shall be calculated and determined as if no charge to or payment by the Lessee with respect to Hot Water, Chilled Water or Chilled Water distribution gallonage had been incurred.

(c) So long as the Port Authority makes available Hot Water and Chilled Water for use at the Premises in accordance with this Agreement, THE LESSEE HEREBY WAIVES AND RELINQUISHES for itself, its successors and assigns any right it may have, and further agrees that it, its successors and assigns shall have no right, to manufacture or produce, to cause to be manufactured or produced, or to purchase or receive from any third party, Hot Water or Chilled Water for use on the Premises or to use any other manner of air cooling or air heating at the Premises except to purchase, receive and use Hot Water and Chilled Water from the Port Authority pursuant to this Agreement.

(d) There shall be no obligation to the Lessee by either KIAC or the Port Authority to furnish the goods and services covered by this Section at any time (i) while any component necessary therefor shall be prohibited or rationed by any federal, state or municipal, law, rule, regulation, requirement, order or direction or while the Port Authority deems it in the public interest to comply therewith even though such law, rule, regulation, requirement, order or direction may not be mandatory on the Port Authority as a public agency, (ii) while the same are curtailed or stopped because of the need to repair, replace, rebuild or alter the Cogeneration Facility, or (iii) during the continuance of any event of Force Majeure, as such term is defined in the Cogeneration Agreement. No failure, delay or interruption in supplying said goods and services shall be or be construed to be an eviction of the Lessee or grounds for the diminution or abatement of rentals, fees or other charges, nor shall any such failure, delay or interruption be grounds for any claim by the Lessee for damages, consequential or otherwise, against the Port Authority or KIAC.

(e) Without limiting any other provision of this Section, any supply of Hot Water or Chilled Water to the Premises from the Cogeneration Facility shall be limited by the safe and efficient operating capacity of the Cogeneration Facility as determined by KIAC and as approved by the Port Authority.

(f) (1) The Lessee shall install all machinery, equipment and facilities, including heat exchangers, required to be installed in the Premises in order to utilize Hot Water and Chilled Water to be distributed and shall tie into the TDS in the mechanical equipment rooms constructed by the Lessee on the Premises.

(2) The Lessee hereby agrees that the Port Authority, KIAC and the contractors or suppliers of either of them shall have the right to enter upon the Premises to install, operate and maintain any part of the Cogeneration Facility located thereon including but not limited to the TDS and any heat exchangers installed by the Port Authority or KIAC.

(g) In the event the Cogeneration Agreement is terminated and the facilities for the production of Hot Water and Chilled Water at the Airport exist and are, in the opinion of the Port Authority, economically operable, the Port Authority itself or pursuant to agreement with a contractor or permittee shall supply Hot Water and Chilled Water to the Premises and the Lessee shall take and pay therefor at the same charge to the Lessee which would be applicable as if the Cogeneration Agreement had been in full force and effect, provided, however, that notwithstanding any other provision of this Section, the charge therefor to the Lessee shall in no event be less than an amount that would reimburse the Port Authority for its capital and operating costs in connection therewith determined in accordance with the Port Authority’s normal accounting practice. In addition, the Port Authority may, in its discretion, make or consent to arrangements on one or more occasions with a third party or parties to succeed to KIAC’s operation of all or any part of the Cogeneration Facility and the Lessee shall continue to be obligated to purchase Hot Water and Chilled Water from the Port Authority pursuant to this Agreement, at the rates provided for in the Cogeneration Agreement.

(h) The Port Authority shall have no liability to the Lessee for any facilities installed by the Lessee on the Premises in connection with the use of Hot Water and Chilled Water hereunder or for any investment made in connection with the use of Hot Water and Chilled Water.

(i) The Port Authority shall have the right to grant waivers, consents and approvals with respect to the Cogeneration Agreement and to enter into amendments, supplements or extensions of the Cogeneration Agreement with KIAC or any similar agreement with any successor operator of the Cogeneration Facility or other provider of Hot Water and Chilled Water at the Airport, provided, however, that the Port Authority will not enter into any amendment, supplement or extension of the Cogeneration Agreement which will result in a change in the formula used to calculate the Hot Water and Chilled Water rates payable by the Lessee which change results in an increase in the rates payable by the Lessee pursuant to such formula (the Lessee hereby acknowledging that such formula may, according to its terms, provide for such rates to be adjusted from time to time) without the consent of the lessees (including the Port Authority as and to the extent that the Port Authority uses Hot Water and Chilled Water) of premises that purchased and used at least Fifty-One percent (51%) of the aggregate Hot Water and Chilled Water purchased and used in the Central Terminal Area during the last full calendar year preceding the effective date of such amendment, supplement or extension.

## Section 6.3 No Port Authority Obligation***.***

The Port Authority shall be under no obligation to supply services if and to the extent and during any period that the supplying of any such service or the use of any component necessary therefor shall be prohibited or rationed by any federal, state or municipal law, rule, regulation, requirement, order or direction and if the Port Authority deems it in the public interest to comply therewith, even though such law, rule, regulation, requirement, order or direction may not be mandatory on the Port Authority as a public agency.

Section 6.4 No Constructive Eviction***.***

No failure, delay or interruption in supplying agreed services (whether or not a separate charge is made therefor) shall be or be construed to be an eviction of the Lessee or grounds for any diminution or abatement of rental, or (unless resulting from the negligence or willful failure of the Port Authority) shall be grounds for any claim by the Lessee for damages, consequential or otherwise.

# ARTICLE 7. LESSEE’S MOA OBLIGATIONS

## Section 7.1 Lessee’s MOA Obligations Generally.

(a) The Lessee hereby acknowledges that the Lessee is the “adaptive reuse developer” referred to in the MOA, and agrees to be bound by and to perform all obligations intended to be imposed on the “adaptive reuse developer” pursuant to the MOA. Where the MOA obligates the Port Authority to impose any requirement on the “adaptive reuse developer”, the Lessee hereby agrees to undertake such requirement.

(b) The Parties acknowledge that it is their intention that the spirit and letter of the MOA be implemented through this Agreement, and the Lessee hereby assumes the Port Authority’s obligations under the MOA, to the extent such obligations are capable of being performed by the Lessee in its capacity as the lessee under this Agreement.

## Section 7.2 Certain Specific MOA Obligations.

Without limitation as to the generality of the Lessee’s obligations with respect to the MOA, as set forth in Section 7.1 above, and as to any other specific MOA requirements, the Lessee hereby specifically affirms its obligation with respect to the following MOA requirements:

(1) The Lessee shall keep the main lobby space in the Building open to the public, with direct access to Terminal 5 as well as the street frontage of the Premises. In accordance with Stipulation 2 of the MOA, the Lessee shall accommodate at least two (2) electronic ticketing kiosks in the main lobby space, shall make them accessible for use by airline passengers (including individuals not guests of the Hotel) and shall provide appropriate access to the airline that is responsible for the operation and maintenance of such kiosks (including its agents and contractors).

(2) As provided in Stipulation 6 of the MOA, the Lessee shall install and maintain, in a prominent location in the Building, an “interpretive display illustrating the history and significance of the [TWA Flight Center]”, which shall be accessible to the public during normal operating hours.

(3) As provided in Stipulation 12 of the MOA, the Lessee and the Port Authority, in consultation with SHPO, shall assure that the TWA Flight Center is restored and rehabilitated in accordance with the Secretary of Interior Standards for the Treatment of Historic Properties.

(4) The Lessee, in consultation with the Port Authority, shall prepare maintenance and preservation guidelines in accordance with Stipulation 17 of the MOA, shall duly submit such guidelines to SHPO for review and approval, and shall revise and resubmit such guidelines until final approval by SHPO (as thus finally approved, the “**MOA Maintenance Guidelines**”).

(5) The Lessee acknowledges that Stipulation 18 of the MOA requires that the TWA Main Terminal Building and East Tube be inspected every five years in accordance with the MOA Maintenance Guidelines, and hereby undertakes to perform such inspection and to prepare and submit the required certified report.

# ARTICLE 8. LESSEE’S OPERATIONS

## Section 8.1 Vibration and Sound.

The Lessee shall take all appropriate measures to eliminate vibrations originating in the Building which may damage any equipment, structure, building or portion of a building located off the Premises and to keep the sound level of its operations within reasonably low levels so as not unreasonably to disturb others located off the Premises.

## Section 8.2 Badges.

If requested by the Port Authority, the Lessee, for security and safety reasons, shall require its employees to wear or carry badges or other suitable means of identification while present at the Premises.

## Section 8.3 Storage of Waste Materials.

The Lessee shall store on the Premises in a manner approved by the Port Authority all garbage, debris and other waste materials (whether solid or liquid) arising out of its occupancy of the Premises or out of its operations. Any such material which may be temporarily stored in the open shall be kept in suitable garbage and waste receptacles, the same to be made of metal or other suitable material and equipped with tight-fitting covers, and to be designed to safely and properly contain whatever material may be placed therein. No such garbage, debris or other waste materials shall be or be permitted to be thrown, discharged or deposited into or upon any waters or any wetland areas.

## Section 8.4 Fire Protection Equipment.

Without limiting the Lessee’s law compliance obligations as elsewhere set forth in this Agreement, the Lessee shall maintain in good condition and in adequate quantities fire protection equipment and other safety equipment as may be required to comply with the requirements of this Agreement, including this Article. The Lessee shall install in the Building a fire alarm system and an automatic sprinkler and fire extinguishing system in accordance with Requirements regardless of whether such Requirements are applicable to the Premises or would be applicable if the Port Authority were a private corporation. The Lessee shall maintain such systems in good working order. From time to time and as often as reasonably required by the Port Authority, the Lessee shall conduct pressure, water‑flow and other appropriate tests of such systems. If requested by the Port Authority, the Lessee shall furnish the Port Authority with a copy of the written reports of such tests. The Lessee shall at all times maintain on the Premises adequate stocks of fresh, usable chemicals or other materials for use of such systems and shall train its employees in the use thereof, including in such training periodic drills. The Lessee’s obligations hereunder shall in no way create any obligation whatsoever on the part of the Port Authority.

## Section 8.5 No Nuisance.

The Lessee shall not commit any nuisance on the Premises, or do or permit to be done anything which results in the creation or commission of a nuisance on the Premises, and the Lessee shall not cause or permit to be caused or produced upon the Premises, or to emanate therefrom, any smoke, gases, vapor or odors in violation of any Environmental or other Requirements. The Lessee shall not, and shall not permit anyone to, dispose of, release or discharge any Hazardous Substance on the Premises or in the Project Area. Any Hazardous Substance disposed of, released or discharged, or permitted to be disposed of, released or discharged, by the Lessee on the Premises or in the Project Area, shall upon notice by the Port Authority to the Lessee, be completely removed and/or remediated by the Lessee. The foregoing obligations of the Lessee shall survive the expiration or termination of this Agreement.

## Section 8.6 No Overloading.

The Lessee’s operation, use and maintenance of the Premises, including the Building:

(i) shall not cause an overloading of the capacity of any existing or future utility, mechanical, electrical, communication or other systems or portions thereof serving the Building, the Premises and other portions of the Airport. Overloading of such systems resulting from operations of others at the Airport shall not be deemed to be the responsibility of the Lessee so long as the Lessee’s use of such systems conforms to the capacity thereof expressly reserved for use or operation of the Building; and

(ii) shall not overload any floor, roadway, passageway, pavement or other surface, wall, partition, column, supporting member or elevator or other conveyance located in the Building, which overload would invalidate or conflict with any requirements of any insurance policy(ies) covering the Premises or any part thereof. The Lessee shall repair any damage caused by any such overloading.

## Section 8.7 Compliance with Underwriters Requirements.

The Lessee shall promptly observe, comply with and execute the provisions of any and all present and future rules and regulations, requirements, orders and directions of the National Board of Underwriters and the Insurance Services Office of New York and of any other organization exercising, or which may exercise, similar functions, which may pertain or apply to the operations of the Lessee on the Premises. If by reason of any failure on the part of the Lessee to comply with the provisions of this Agreement any insurance rate at the Airport or any part thereof shall at any time be higher than it otherwise would be, then the Lessee shall pay to the Port Authority, as an item of additional Rental, that part of all insurance premiums paid by the Port Authority that shall have been charged because of such violation or failure by the Lessee, but no such payment shall relieve the Lessee of its other obligations under this Section. The Lessee shall have the same right to contest any such rule, regulation, requirement, order or direction as provided for in Section 4.4 hereof, but subject to compliance by the Lessee with the terms and conditions of such Section.

## Section 8.8 No Offensive Use.

The Lessee shall not use or allow the use of the Premises for any purposes which are in violation of law or which reasonable Persons would deem to be pornographic or similarly offensive.

## Section 8.9 Test Results, etc.

Without limiting any other of the Lessee’s obligations under this Agreement, the Lessee at its own cost shall provide the Port Authority with such information, documentation, records, correspondence, notices, reports, test results, and certifications and any other information as the Port Authority shall request in connection with any Environmental Requirements or Environmental Damages, and the Lessee shall promptly acknowledge, swear to, sign or otherwise fully execute the same. The Lessee agrees that any of the foregoing may be filed by the Port Authority with the appropriate governmental authority on behalf of the Lessee at the Lessee’s cost and expense. Further, the Lessee agrees unless directed otherwise by the Port Authority, to provide the Port Authority with copies of all information, documentation, records, correspondence, notices, certifications, reports, test results and all other submissions provided by the Lessee to a governmental authority and by a governmental authority to the Lessee within two (2) Business Days that the same are made available to or received by the Lessee with respect to any Environmental Requirements. In the event any Hazardous Substance is discovered on the Premises, the Lessee in reporting such Hazardous Substance shall direct such report to the attention of such individual at the subject governmental authority as the Port Authority shall require.

# ARTICLE 9. MAINTENANCE AND REPAIR

## Section 9.1 Duty of Maintenance and Repair.

Throughout the term of the letting under this Agreement, the Lessee shall assume the entire responsibility for, and shall relieve the Port Authority from all responsibility for, all care, maintenance, repair and rebuilding whatsoever in the Premises. Without limiting the generality of the foregoing, and subject in all events to the provisions of the MOA and the MOA Maintenance Guidelines, throughout the term of the letting hereunder the Lessee shall:

(i) remove snow and ice from the pedestrian walkways and driveways located on the Premises, from the sidewalks contiguous to the Premises and from the vehicular roadways and parking areas located on the Premises;

(ii) maintain and make all necessary repairs and replacements to the foundations, exterior walls and the structural supporting frame and roof of the Building and make all other necessary structural repairs to the Building, and maintain and make necessary repairs to all utility lines and systems located on the Premises where the responsibility to repair such utility lines and systems is not that of utility companies or other third parties;

(iii) take good care of the Premises and the Building and all parts thereof and make all structural or non—structural, ordinary or extraordinary repairs thereto and maintain the same in good condition and perform all necessary preventive maintenance, including, but not limited to, painting if required as the necessity arises therefor regardless of the cause of the condition requiring the same, and perform periodic inspections of the Building and its facilities for the purpose of determining whether any repairs or maintenance are required, so that at the expiration or termination of the letting and all times during the letting hereunder, the Building (or a reconstruction of all or any part thereof) will be in as good condition as it was upon the completion of the construction (or reconstruction) thereof, or, in the case of improvements made during the letting hereunder (other than improvements made to prepare space in the Building for occupancy by any subtenant), in as good condition as at the time of the installation or construction thereof, in each case except for reasonable wear and tear which does not adversely affect the watertight condition or structural integrity of the Building or other structures on the Premises or adversely affect the permitted use of the Building or such structures;

(iv) repair any damage to the paving or other exterior surfaces of the Premises; and

(v) supply (where required by reason of food service operations), replace, install, repair, maintain and keep clean, or cause the same to be done, all grease traps in all drainage pipes used exclusively in connection with the operation of the Building, whether such pipes are located on the Premises or elsewhere.

## Section 9.2 Self-Help by Port Authority.

In the event the Lessee fails to perform its obligations under Section 9.1 within ten (10) Business Days after notice from the Port Authority to do so (except in the case of an emergency) or, where such obligation by its nature is not susceptible of complete performance within such period, the Lessee has commenced within such period but fails diligently and continuously to perform such obligation to completion, the Port Authority may, at its option, perform the Lessee’s obligations under Section 9.1 in addition to any other remedy available to it, and an amount equal to 130% of the actual cost of such work shall be payable by the Lessee to the Port Authority on demand, and shall constitute and be deemed additional Rental hereunder. Any work to be performed by the Port Authority, its agents, employees or contractors in accordance with this Section shall be performed, except in an emergency requiring immediate action, on reasonable prior notice, at reasonable hours, and subject to reasonable security requirements. Nothing contained herein shall or shall be deemed to obligate the Port Authority to perform any work which the Lessee is required to perform pursuant to the provisions of this Agreement, and the Lessee shall be solely responsible for any failure to perform any such work.

## Section 9.3 MOA Maintenance Guidelines.

All maintenance and repair work pertaining to the historic portions of the Building shall be performed in accordance with the MOA Maintenance Guidelines and shall involve architects experienced in the restoration of historic structures. All maintenance and repair work pertaining to the historic portions of the Building, or otherwise performed pursuant to the MOA Maintenance Guidelines, shall be performed by contractors qualified to perform maintenance and preservation work on historic structures.

# ARTICLE 10. INSURANCE

## Section 10.1 Required Insurance.

(a) *Lessee to Secure and Maintain.* In addition to any other insurance provided for or required under this Agreement, the Lessee shall secure and maintain the policies of insurance set forth below in this Section, which policies shall be effective on the Lease Commencement Date (to the extent then applicable) and throughout the term of the letting under this Agreement.

(b) *Property.* The Lessee shall procure and maintain all-risk property damage insurance, including coverage for flood and earthquake, covering the full replacement cost of the Building and any other improvement constructed by the Lessee pursuant to this Agreement and all structures, improvements, fixtures and equipment, furnishings and physical property owned, leased or within the care, custody or control of the Lessee and now or in the future located on or constituting a part of the Premises.

(c) *Boiler and Machinery*. The Lessee shall procure and maintain boiler and machinery insurance covering all boilers, pressure-vessels and air conditioning and any other related equipment operated by the Lessee in or on the Building, including expedited expense, the policy to be effective throughout the term of the letting in such amounts as to sufficiently cover the replacement cost of such boilers, pressure-vessels and air conditioning and other related equipment and to be in the form as may now or in the future be prescribed as of the effective date of said insurance by the rating organization having jurisdiction and/or the Superintendent of Insurance of the State of New York.

(d) *Business Interruption Insurance.* The Lessee shall procure and maintain business interruption insurance on an actual loss sustained basis written on an “all risks of physical loss” basis in an amount equal to the greater of (x) the gross rents payable by users of the Hotel and subtenants of the Premises for a period of two (2) years and (y) the aggregate amount of Basic Rental, Percentage Rental and Subtenant Impositions payable by the Lessee hereunder for a two (2) year period. The proceeds of such insurance shall be payable to the Port Authority, which shall apply such proceeds to the Rental obligations of the Lessee, with any remaining balance to be paid to the Lessee.

(e) *Liability.*

The Lessee, in its own name as insured and including the Indemnified Parties as additional insureds, shall procure and maintain a policy or policies of Commercial General Liability Insurance, including products/completed operations, premises—operations, explosion, collapse and underground property damage independent contractors coverage and broad form property damage coverage, and covering bodily injury, including death, and property damage liability, broadened to include or equivalent separate policies covering sprinkler leakage legal liability and water damage legal liability (including damage caused by water and any other substance discharged from any part of the fire protective equipment for the Building or the collapse or fall of tanks forming part thereof, or the component parts or supports of such tanks), none of the foregoing to contain care, custody or control exclusions, and providing for coverage in the limits set forth below; Commercial Automobile Liability Insurance covering owned, non-owned and hired vehicles and including automatic coverage for newly acquired vehicles and providing for coverage in the limit set forth below; Garage Keepers Liability Insurance, covering fire and explosion, theft of the entire automobile, rust and vandalism and collision, in the limit set forth below; and Liquor Liability Insurance in the limit set forth below.

|  |  |
| --- | --- |
| **Type of Coverage** | **Minimum Limits** |
| Commercial General Liability |  |
| Combined single limit per occurrence for death, bodily injury and property damage liability: | **$100,000,000.00** |
| Commercial Automobile Liability |  |
| (covering owned, non-owned and hired vehicles) combined single limit per occurrence for death, bodily injury and property damage liability: | **$2,000,000.00** |
| Garage Keepers Liability |  |
| Combined single limit per occurrence for death, bodily injury and property damage liability: | **$2,000,000.00** |
| Liquor Liability |  |
| Combined single limit per occurrence for death, bodily injury and property damage liability: | **$10,000,000.00** |

(f) *Workers’ Compensation Insurance.* The Lessee shall procure and maintain Workers’ Compensation Insurance in accordance with the requirements of law, provided, however, that in the event any class of employees under any contract or subcontract for work to be performed on the Premises is not protected under the Workers’ Compensation statute, the Lessee shall provide, and cause any additional employers to provide, Employer Liability insurance for the protection of such of its employees as are not otherwise protected. Limits of Employer Liability Insurance shall be as follows:

$1,000,000.00 each accident  
 $1,000,000.00 each employee – disease  
 $1,000,000.00 policy limit – disease.

(g) *Commercial Crime Insurance.* The Lessee shall procure and maintain commercial crime insurance covering both innkeeper’s/bailee legal liability and employee dishonesty, with a combined single limit per occurrence of not less than $1,000,000.00.

(h) *Other*. The Lessee shall procure and maintain such other insurance, in such amounts, as from time to time may be required by the Port Authority.

## Section 10.2 Other Requirements as to Policies.

(a) *Insureds under Property Policies.* All property damage insurance policies required under this Agreement shall name the Recognized Mortgagee (if any), the Lessee, the City and the Port Authority (with insurance clauses consistent with the provisions of this Agreement) as the named insureds, as their respective interests may appear.

(b) *Liability Insurance Limits.* In the event the Lessee maintains any liability insurance in limits greater than aforesaid, the Indemnified Parties shall be included therein as additional insureds to the full extent of all such insurance in accordance with all the terms and provisions hereof.

(c) *Contractual Liability Coverage.* Each policy of liability insurance shall contain contractual liability coverage covering the insurable obligations assumed by the Lessee under any indemnification provisions set forth in this Agreement.

(d) *Certain Endorsements.*

(1) Each policy required under this Agreement shall contain a valid provision or endorsement that the policy may not be cancelled, terminated, changed or modified (other than to effectuate an increase in coverage) without giving at least thirty (30) days’ advance written notice thereof to the Recognized Mortgagee and the Port Authority, and an endorsement to the effect that the insurance as to the interests of all Recognized Mortgagees (if any) and the Indemnified Parties shall not be invalidated by any act or negligence of the Lessee or any other insured.

(2) Each policy of liability insurance shall contain an endorsement providing that in any action or proceeding under or in connection with such policy, the insurance carrier shall not without obtaining express advance consent from the General Counsel of the Port Authority raise any defense involving in any way the immunity of the Port Authority, the governmental nature of the Port Authority, the provisions of any statutes respecting suits against the Port Authority or the jurisdiction of the tribunal over the person of the Port Authority.

(3) Each policy of liability insurance shall contain an endorsement providing that the protection afforded the Lessee thereunder with respect to any claim or action against the Lessee by a third Person shall obtain and apply with like effect with respect to any claim or action against the Lessee by each Indemnified Party, and against each Indemnified Party by the Lessee, but such endorsement shall not limit, vary, change or affect the protections afforded the Indemnified Parties, as additional insureds.

(e) *Blanket Policies, etc.* Property insurance policies required under this Agreement may be written in the form of blanket policies and policies of liability insurance may be written in the form of a primary policy and one or more umbrella policies. On request of the Port Authority, which may be made at any time and from time to time, the Lessee shall furnish to the party or parties making such request a true copy of each of the insurance policies which the Lessee is required to carry under this Agreement; provided, however, that if any such insurance is carried in the form of a blanket policy, the Lessee need not furnish to the Port Authority the portions of such policy that relate to properties other than the Premises.

(f) *Certificates, etc.* With respect to each insurance policy, duplicate original certificates of insurance, specifically referencing the Port Authority number of this Agreement, shall be delivered to The Port Authority of New York and New Jersey, General Manager, Risk Management, 225 Park Avenue South, 12th Floor, New York, New York 10003, attention: Agreement Certificate Review (or to such other address as the Port Authority may direct by notice hereunder), not later than the Lease Commencement Date. Duplicate certificates of insurance with respect to a renewal policy shall be delivered to the Port Authority at least thirty (30) days prior to the expiration date of each expiring policy, except for any policy expiring after the date of expiration of the letting under this Agreement.

## Section 10.3 Nature of Insurers.

All insurance provided for in this Agreement shall be issued by insurance carriers authorized to do business in the State of New York or subject to service of process in the State of New York and having an A.M. Best Rating of at least A- (A minus) or an equivalent rating by a comparable insurance rating agency.

## Section 10.4 Port Authority Review.

All insurance coverages required under this Agreement may be reviewed by the Port Authority for adequacy of terms, conditions, coverages and limits of coverage at any time and from time to time during the term of the letting hereunder. The Port Authority may, at any such time, require an increase in the minimum limits, or additions, deletions, amendments or modifications to the above-scheduled insurance requirements, or may require such other and additional insurance against such other insurable hazards, as the Port Authority may deem required and the Lessee shall promptly comply therewith. The limits of coverage under any policy shall not be reduced without the Port Authority’s prior written consent.

Section 10.5 Settlement of Losses.

Losses under any policy (except any liability insurance and Workers’ Compensation Insurance) shall be adjusted with the Recognized Mortgagee, or if there is no Recognized Mortgagee, with the Port Authority. Except as otherwise provided herein, the proceeds shall be payable to the Recognized Mortgagee or, if there is no Recognized Mortgagee, to the Port Authority to be held in trust for the benefit of the Lessee, provided that, except as otherwise provided herein, all said proceeds shall be used for the repair, replacement or rebuilding of the Premises. Said proceeds shall be disbursed upon the request of an entity obligated to repair, replace or rebuild, provided that the Lessee or such entity has obtained the necessary approvals from the Port Authority to repair, replace or rebuild in accordance with the relevant provisions of this Agreement.

## Section 10.6 Separate Insurance.

The Lessee shall not carry separate insurance concurrent in form or contributing in the event of loss with that required under this Agreement, unless the Port Authority and the City are included therein as named insured, with loss payable as provided in this Agreement. The Lessee shall immediately notify the Port Authority of the carrying of any such separate insurance and, at the Port Authority’s request, shall deliver to the Port Authority the policies therefor or duplicate originals thereof.

# ARTICLE 11. CASUALTY

## Section 11.1 Repair of Damage.

If the Premises, or the Building or any other structures, improvements, fixtures and equipment, furnishings and physical property located thereon, or any part thereof, shall be damaged or destroyed by fire, the elements, the public enemy or other casualty, or by reason of any cause whatsoever and whether partial or total, the Lessee shall at its sole cost and expense and, whether or not such damage or destruction is covered by insurance proceeds sufficient for the purpose, remove all debris resulting from such damage or destruction, and shall rebuild, restore, repair and replace the Premises, and the Building and any structures, improvements, fixtures and equipment, furnishings and physical property located thereon, in accordance with the plans and specifications for the same as they existed prior to such damage or destruction or, with the consent in writing of the Port Authority make such other repairs, replacements, changes or alterations as is mutually agreed to by the Port Authority and the Lessee. Such rebuilding, restoration, repairs, replacements, or alterations shall be commenced promptly and shall proceed with all due diligence subject to the terms and conditions of this Agreement, including, without limitation, the terms and provisions of the Article of this Agreement entitled “Alterations and Improvements”.

## Section 11.2 Destruction at End of Term.

(a) *Lessee’s Options*. Notwithstanding the provisions of Section 11.1 above, if such damage or destruction occurs during the last two (2) years of the term of the letting and the cost of rebuilding, restoration, repair or replacement shall exceed fifty percent (50%) of the then full insurable value on a replacement cost basis of the Building immediately prior to such damage or destruction, the Lessee shall have the option of either:

(i) performing all rebuilding, restoration, repairs, replacements or alterations required, in accordance with the provisions of this Agreement, or

(ii) terminating the letting under this Agreement in its entirety by written notice to the Port Authority given within thirty (30) days after the occurrence of such damage or destruction, provided, that there shall be in force and effect the required insurance valid and subsisting and adequate to cover such damage or destruction without any defenses to the payment by the insurance carriers based upon acts or omissions of the Lessee or of any other insureds other than the Port Authority and the City and provided*,* further*,* that both at the time of the giving of notice and on the effective date thereof: (x) the Lessee is not in default under any of the provisions of this Agreement or under notice of termination from the Port Authority, and (y) this Agreement and any buildings, structures, improvements, fixtures and equipment, furnishings and physical property located on the Premises are unencumbered by any mortgage, security interest, judgments, or other liens (to be evidenced by a search made by a title company acceptable to the Port Authority and to be furnished by the Lessee at its sole cost and expense) and free from any pending matters that might develop into additional rental unless the Lessee shall secure payment and discharge of such mortgages, security interests, judgments or other liens and the payment of such additional rental to the Port Authority in a manner satisfactory to the Port Authority.

(b) *Insurance Proceeds.* In the event of termination pursuant to the provisions of the foregoing paragraph (a), the Lessee shall pay the Port Authority all Rental payable up to and including the date of termination. The insurance proceeds shall be (w) first, at the Port Authority’s option, used to demolish any remaining portion of the Improvements and grade and fence the Land, (x) second, paid to the Recognized Mortgagees, (y) third, paid to the Port Authority.

(c) *Surrender of Premises.* Upon the effective date of such termination, the Lessee shall surrender and deliver up the Premises, including the Building and all structures, improvements, fixtures and equipment, furnishings and other property located on the Premises, into the possession and use of the Port Authority in the manner specified in the Article of this Agreement entitled “Surrender”, subject, however, to the physical condition and state of repair thereof. Subject to the foregoing, the Lessee, upon such termination, surrender and removal, shall be released and discharged from any and all obligations under this Agreement other than those that have accrued prior to the date of such termination or shall mature on such date.

## Section 11.3 No Surrender.

Except as provided in Section 11.2 above, no destruction of or damage to the whole or any part of the Premises, or to any part of the Building or any other structures, improvements, fixtures, and equipment thereon, or any other casualty, cause or condition shall permit the Lessee to surrender or terminate this Agreement or shall relieve the Lessee from its liability to make payment of any monies, charges, fees or rentals or additional rentals payable under this Agreement or from any of its other obligations hereunder. The Lessee waives any rights now or hereafter conferred upon the Lessee by statute or otherwise to quit or surrender the Premises and terminate this Agreement or any part thereof, or to any suspension, diminution, abatement or reduction of rent on account of any destruction or damage. The parties hereby stipulate that the provisions of this Section constitute an “express agreement to the contrary” pursuant to Section 227 of the Real Property Law of New York, and neither the provisions of Section 227 of the Real Property Law of New York nor those of any similar statute shall extend or apply to this Agreement.

## Section 11.4 Application of Insurance Proceeds.

If such damage or destruction as is described in Section 11.1 above is covered by insurance, then (unless the Lessee elects to terminate this Agreement pursuant to Section 11.2 above) such proceeds shall be made available for and applied to the payment of the cost of the rebuilding, restoration, repair, replacement and alteration work required to be performed by the Lessee under the provisions of this Agreement.

# ARTICLE 12. INDEMNITY

## Section 12.1 Landlord not Liable for Injury or Damage, etc.

(a) The Port Authority shall not be liable for any injury or damage to the Lessee or to any Person happening on, in or about the Premises or its appurtenances, nor for any injury or damage to the Premises or to any property belonging to the Lessee or to any other Person that may be caused by fire, by breakage, or by the use, misuse or abuse of any portion of the Premises (including, but not limited to, any of the common areas, hatches, openings, installations, stairways or hallways or other common facilities within the Premises, and the streets, sidewalk or other public areas within the Airport) or that may arise from any other cause whatsoever unless arising solely from the willful misconduct or gross negligence of the Port Authority.

(b) The Port Authority shall not be liable to the Lessee or to any Person for any failure of water supply, gas or electric current, nor for any injury or damage to any property of the Lessee or of any Person or to any portion of the Premises caused by or resulting from gasoline, oil, steam, gas, electricity, or hurricane, tornado, flood, wind or similar storm or disturbance or by or from water, rain or snow which may leak or flow from the street, sewer, gas mains or subsurface area or from any part of the Airport or by or from leakage of gasoline or oil from pipes, appliances, sewer or plumbing works therein or from any other place, nor for interference with light or other incorporeal hereditaments by any Person, or caused by any public or quasi-public work, unless arising solely from the willful misconduct or gross negligence of the Port Authority.

(c) In no event shall the Port Authority be liable to the Lessee or to any other Person for any injury or damage to any property of the Lessee or any other Person, or to the Premises, arising out of any sinking, shifting, movement, subsidence, failure in loss-bearing capacity of, or other matter or difficulty related to, the soil, or other surface or subsurface materials, on the Premises or at the Airport, it being agreed that the Lessee shall assume and bear all risk of loss with respect thereto, unless arising solely from the willful misconduct or gross negligence of the Port Authority.

## Section 12.2 Indemnification.

(a) *Obligation to Indemnify*. The Lessee shall indemnify and hold harmless the Indemnified Parties from (and shall reimburse the Indemnified Parties for their respective costs or expenses, including legal expenses incurred in connection with the defense of) all claims and demands of third Persons, including but not limited to those for death, personal injuries or property damages, arising out of any default of the Lessee in performing or observing any term or provision of this Agreement, or out of the Lessee’s use or occupancy of the Premises or out of the acts or omissions of the Lessee, its officers, members, employers, agents, representatives, contractors, customers, guests or invitees where such acts or omissions are on the Premises, or arising out of any acts or omissions of such Lessee, its officers, members, employees, agents and representatives, where such acts or omissions are elsewhere at the Airport, and including all claims and demands of third Persons relating to the Flight Center IP Rights, except for such claims and demands arising solely from the willful misconduct or gross negligence of the Port Authority.

(b) *Defense of Claims*.

(1) If so directed, the Lessee shall at its own expense defend, with counsel acceptable to the Indemnified Party, any suit based upon any such claim or demand (even if such suit, claim or demand is groundless, false or fraudulent), and in handling such it shall not, without obtaining express advance permission from the General Counsel of the Port Authority, raise any defense involving in any way the jurisdiction of the tribunal over the person of the Port Authority, the immunity of the Port Authority, its Commissioners, officers, agents or employees, the governmental nature of the Port Authority, or the provisions of any statutes respecting suits against the Port Authority.

(2) In the event that any action or proceeding is brought against the Port Authority by reason of any claims covered by the foregoing indemnity, the Lessee shall, upon notice from the Port Authority, resist or defend such action or proceeding by counsel satisfactory to the Port Authority. Notwithstanding the foregoing, if such claim is covered by insurance, then defense counsel appointed by the applicable insurer shall be deemed to be satisfactory so long as the insurer has not reserved rights or disclaimed coverage as to part or all of such claim. The Port Authority will give reasonably prompt notice to the Lessee of any action or proceeding brought against the Port Authority by reason of any claims covered by the foregoing indemnity, together with copies of any documents served on the Port Authority in connection therewith. The Port Authority shall not defend such action or proceeding so long as the Lessee is diligently and competently doing so.

# ARTICLE 13. RIGHT TO PERFORM COVENANTS

Section 13.1 Right to Perform Lessee’s Covenants.

If (x) the Lessee fails to perform any of its obligations hereunder (including without limitation any payment of insurance premiums but not including the Lessee’s obligations under Section 9.1 above) within (except in the case of an emergency) five (5) Business Days after notice, for obligations involving the payment of money, and thirty (30) days, for other obligations, or (y) with respect to obligations which by their nature are not susceptible of complete performance within the foregoing notice periods, if the Lessee has commenced performance within the relevant notice period but fails diligently and continuously to perform such obligation to completion, then, in such event, the Port Authority, in addition to all other remedies available to them, shall have the right to perform any of such obligations without further notice. Nothing in this Agreement, including this Article, shall be construed as imposing any duty on the Port Authority to perform any obligation required to be performed by the Lessee hereunder and the performance of any such obligation by the Port Authority shall not constitute a waiver of the Lessee’s default in failing to perform the same.

Section 13.2 Reimbursement by Lessee.

An amount equal to 130% of all sums paid by the Port Authority and all costs and expenses incurred by it in connection with its performance of any obligation of the Lessee pursuant to this Article 13, together with late charges calculated pursuant to Section 23.4(a) for the period from the respective dates of the making of each such payment or incurring of each such sum, cost, expense, charge or payment until the date of actual repayment to the Port Authority, shall be paid by the Lessee to the Port Authority within thirty (30) days of receipt by the Lessee of the Port Authority’s written notice, with a statement of such costs, expenses and other items and evidence of payment thereof, and such payment due from the Lessee to the Port Authority shall constitute additional Rental under this Agreement.

# ARTICLE 14. ASSIGNMENT, TRANSFER, MORTGAGE AND SUBLETTING

## Section 14.1 Definitions.

“**Assignment**” shall mean any sale, conveyance, transfer, exchange, assignment or other disposition, of all or any portion of the Lessee’s interest in this Agreement or the leasehold estate created hereby, whether by operation of law or otherwise. “Assignment” shall include any Transfer that results in a direct or indirect change in Control of the Lessee or of the Lessee’s Direct Owners, provided, however (and without limitation as to the generality of the foregoing), that any transfer of more than fifty percent (50%) of the legal or beneficial interests in the Lessee or in the Lessee’s Direct Owners shall be deemed to constitute a “change in Control” of the Lessee or the Lessee’s Direct Owners, respectively. A Mortgage shall not constitute an Assignment.

“**Control**” shall have the meaning provided in the definition of “Affiliate” set forth in Article 1 above.

“**Lessee’s Direct Owners**” shall mean [ , and ], and their successors and assigns.

“**Mortgage**” shall mean any mortgage or deed of trust, a deed to secure debt or other security instrument by which a Lessee’s leasehold estate created hereunder is mortgaged, conveyed, assigned or otherwise transferred to secure a debt or other obligation, and all extensions, modifications and amendments thereto.

“**Sublease**” shall mean any sublease (including a sub—sublease or any further level of subletting) and any occupancy, license, franchise or concession agreement applicable to the Premises or any portion thereof.

“**Subtenant**” shall mean any subtenant (including a sub-subtenant or any further level of subtenant), operator, licensee, franchisee, concessionaire or other occupant (other than a transient hotel guest), pursuant to a Sublease.

“**Transfer**” shall mean the transfer, sale, assignment, pledge, hypothecation or other disposition of any interest in the Lessee or in any direct or indirect constituent entity of the Lessee, where such disposition (whether by itself or cumulatively with other transactions) directly or indirectly produces any change in the direct or indirect beneficial ownership of an interest in, *or* Control of, the Lessee or the Lessee’s Direct Owners, and shall include but not be limited to (1) the sale, assignment, redemption or transfer of outstanding stock of or membership interest in, respectively, any corporation or any limited liability company that is the Lessee or that is the general partner of any partnership that is the Lessee, (2) the issuance of additional stock or membership interest in, respectively, any corporation or limited liability company that is the Lessee or that is the general partner of any partnership that is the Lessee, and (3) the sale, assignment, redemption or transfer of any general or limited partner’s interest in, or the admission of a new partner to, a partnership that is the Lessee or that is a general or limited partner of any partnership that is the Lessee.

## Section 14.2 Consent Required.

(a) *No Assignment without Prior Written Consent.* Except as otherwise expressly provided in this Agreement, no Assignment, Sublease or Mortgage may be made without the prior written consent in each instance of the Port Authority, and any Assignment, Sublease or Mortgage made without such consent shall constitute a material default under this Agreement, giving rise to a right of termination by the Port Authority under the Article hereof entitled “*Termination*”.

(b) *Certain Assignments following Initial Period.* Notwithstanding the provisions of Section 14.2(a), following the tenth (10th) anniversary of the Construction Completion Date, the Port Authority shall not unreasonably withhold its consent to an Assignment to an entity that:

#### is not a Prohibited Party;

#### is financially solvent and, together with its Affiliates, has a tangible net worth (on a fair market value basis) of at least (x) $50,000,000.00 or (y) fifty percent (50%) of the fair market value of the Hotel, whichever of (x) or (y) is higher; provided, however, that the figure set forth in the foregoing clause (ii)(y) shall be increased every ten (10) years from the Lease Commencement Date by the percentage by which the Index has increased over the previous ten (10) year period;

#### either itself possesses, or has retained a hotel management company that possesses, substantial experience and a proven track record in the management and operation of other Upper Scale Hotels to a level at least comparable to the “X” brand, including the ownership or management for at least ten (10) recent years of at least four (4) Upper Scale Hotels containing at least 1,000 rooms in the aggregate, including (x) at least one property containing at least 50 rooms that is listed on the National Register of Historic Places, is a locally designated landmark or is an architecturally and historically significant building; and

#### if it is retaining the services of a hotel management company, such hotel management company shall be financially solvent and shall have sufficient net worth to perform its obligations under the Hotel Management Agreement;

provided, in each case, that (if applicable) a Franchise Agreement duly consented to by the Port Authority is in full force and effect as of the effective date of such Assignment; and

provided, further, that at least sixty (60) days prior to the effective date of such proposed Assignment, the Lessee shall provide a notice to the Port Authority setting forth the nature of the proposed Assignment and the ownership structure of the proposed new lessee, and shall provide the Port Authority, in addition to the documents and information required pursuant to Section 14.3 below, with such additional information as is reasonably necessary for the Port Authority to verify that such Assignment complies with the foregoing requirements.

(c) *Assignment by Recognized Mortgagee.* Notwithstanding the provisions of Section 14.2(a), where a Recognized Mortgagee (x) has acquired the Lessee’s interest in this Agreement through foreclosure of its Mortgage, or assignment of this Agreement in lieu of foreclosure, or (y) has entered into a New Lease, the Port Authority’s consent shall not be required to an Assignment by such Recognized Mortgagee of its interest in this Agreement or such New Lease, as the case may be, to an entity that satisfies the requirements set forth in clauses (i) through (iv) of Section 14.2(b) above;

provided, in each case, that (if applicable) a Franchise Agreement duly consented to by the Port Authority is in full force and effect as of the effective date of such Assignment; and

provided, further, that at least thirty (30) days prior to the effective date of such Assignment, the Recognized Mortgagee shall provide a notice to the Port Authority setting forth the nature of the Assignment and the ownership structure of the new lessee, and shall provide the Port Authority with such additional information as is reasonably necessary for the Port Authority to verify that such Assignment complies with the foregoing requirements.

## Section 14.3 Submission of Documents and Information.

Whenever the Lessee desires to effect an Assignment or a Sublease, the Lessee shall, and as a condition to the effectiveness thereof, at least sixty (60) days prior to the effective date of such proposed transaction, notify the Port Authority of such proposed transaction and submit to the Port Authority the following documents (which may be unexecuted but shall be in substantially final form) and information:

#### in the case of an Assignment, (x) a copy of the proposed instrument(s) of assignment, containing, inter alia, the name, address and telephone number of the proposed assignee, (y) a copy of the agreement with assignment and assumption referred to in Section 14.6 below and (z) an affidavit of the assignee or an authorized officer or general partner thereof, setting forth the following:

#### (A) in the case of a partnership, the names and addresses of all general partners and of all other partners having a five percent (5%) or greater ownership interest in the assignee,

(B) in the case of a corporation, the names and addresses of all directors and officers and of all Persons having a five percent (5%) or greater ownership interest in the assignee, and

(C) in the case of a limited liability company or other entity, the names and addresses of all managers or other Persons charged with the direction or management of its affairs and of all Persons having a five percent (5%) or greater ownership interest in the assignee;

#### in the case of an Assignment consisting of a Transfer that results in a direct or indirect change in Control of the Lessee or of the Lessee’s Direct Owners, (x) a copy of the proposed instrument(s) effecting the Transfer, containing, *inter alia*, the name, address and telephone number of the proposed Transferee, and (y) an affidavit of an authorized officer or general partner of the Lessee, setting forth the same information as is required with respect to assignees in subdivision (i)(z) above;

#### in the case of a Sublease, (x) a copy of the proposed sublease, containing, *inter alia*, the name, address and telephone number of the proposed Sublessee, and (y) an affidavit of an authorized officer or general partner of the Lessee or such proposed Sublessee, setting forth the same information as is required with respect to assignees in subdivision (i)(z) above; and

#### in all such cases, such other documents and information as the Port Authority may request to permit the evaluation of such Assignment or Sublease.

## Section 14.4 Conditions to Effectiveness of Transactions.

Notwithstanding any other provision of this Agreement, and notwithstanding that the consent of the Port Authority may have been given or may not have been required, in no event shall an Assignment, Transfer, Sublease or Mortgage be permitted, and any such purported Assignment, Transfer, Sublease or Mortgage shall be void and of no effect, if:

(i) on the proposed effective date of such Assignment, Transfer, Sublease or Mortgage (x) there exists an Event of Default that remains uncured, (y) this Agreement shall not then be in full force and effect or (z) there is then in effect any notice of termination served by the Port Authority pursuant to the Article of this Agreement entitled “*Termination*”, or

(ii) the proposed Assignment, Transfer, Sublease or Mortgage is to any Person that is a Prohibited Party, or

(iii) the proposed Assignment, Transfer, Sublease or Mortgage would entail a violation of the Port Authority Code of Ethics or the relevant conflict of interest rules.

Section 14.5 No Waiver.

(a) *Violations*. The Port Authority may collect all rentals and fees due hereunder from any assignee or Subtenant or other party claiming a right under this Agreement or letting or occupying the Premises pursuant to an Assignment, Transfer or Sublease entered into in violation of the foregoing Sections, and the Port Authority shall apply the net amount collected to the rentals and fees herein reserved; but no such collection shall be deemed a waiver by the Port Authority of the prohibitions contained in the foregoing Sections or an acceptance by the Port Authority of any such assignee, Subtenant, claimant or occupant as Lessee, nor a release of the Lessee by the Port Authority from the further performance by the Lessee of the covenants contained herein.

(b) *Consents*. Any consent granted by the Port Authority to any Assignment, Transfer, Mortgage or Sublease pursuant to the provisions hereof shall not be construed or deemed to release, relieve or discharge any succeeding proposed Assignment, Transfer, Mortgage or Sublease from the requirement of having the prior written consent of the Port Authority.

## Section 14.6 Certain Sublease Requirements.

(a) *Lessee’s Name*. The Lessee shall enter into all Subleases in its own name.

(b) *Term*. The Lessee shall not enter into any Sublease for a term (including renewal options) that expires later than the day preceding Expiration Date.

(c) *Required Provisions.* Every Sublease entered into by the Lessee shall provide as follows:

(i) It is subordinate and subject to this Agreement.

(ii) Except for security deposits and any other amounts deposited with the Lessee or with any Recognized Mortgagee in connection with the payment of insurance premiums, real property taxes and assessments and other similar charges or expenses, the Subtenant shall not pay rent or other sums payable under the Sublease to the Lessee for more than one (1) month in advance.

(iii) In the event the Port Authority has not entered into a nondisturbance agreement with such Subtenant pursuant to the provisions of this Section 14.6, then at the option of the Port Authority, on the termination of this Agreement pursuant to Article 17, the Subtenant shall attorn to, or shall enter into a direct lease on terms identical to its Sublease with, the Port Authority for the balance of the unexpired term of the Sublease.

(iv) With respect to any Sublease providing for the payment of percentage rent by the Subtenant to the Lessee, the Subtenant shall maintain full and accurate books of account and records of the Subtenant’s business operation or enterprise, which books and records shall be so kept and maintained for at least five (5) years after the end of each lease year.

(d) *Subtenant Obligations.*  The Lessee shall use its best efforts to cause all Subtenants to comply with their obligations under their Subleases. A violation or breach of any of the terms, provisions or conditions of this Agreement that results from, or is caused by, an act or omission by a Subtenant shall not relieve the Lessee of the Lessee’s obligation to cure such violation or breach.

(e) *Collection of Subrent by the Port Authority.* After an Event of Default relating to the Lessee’s monetary obligations hereunder, the Port Authority may, subject to the rights of any Recognized Mortgagee, collect rent and all other sums due under any Subleases and apply the net amount collected to the Rental payable by the Lessee hereunder. No such collection shall be, or shall be deemed to be, a waiver of any agreement, term, covenant or condition of this Agreement or the recognition by the Port Authority of any Subtenant as a direct tenant of the Port Authority or a release of the Lessee from performance of its obligations under this Agreement.

(f) *Sublease Assignment.*

(1) As additional security for the full performance of all of the Lessee’s obligations hereunder, the Lessee hereby assigns, transfers and sets over unto the Port Authority, subject to any assignment of Subleases and/or rents to a Recognized Mortgagee made in connection with its Mortgage, all of the Lessee’s right, title and interest in and to all Subleases, and hereby confers upon the Port Authority, its agents and representatives, a right of entry in, and sufficient possession of, the Premises to permit and ensure the collection by the Port Authority of all sums payable under such Subleases, and enforcement of all other rights of the Lessee under such Subleases. The exercise of such right of entry and qualified possession by the Port Authority shall not constitute an eviction of the Lessee from the Premises or any portion thereof. If such right of entry and possession is denied to the Port Authority, its agents or representatives, the Port Authority, in the exercise of this right, may use all requisite force to gain and enjoy the Premises with neither responsibility for nor liability to the Lessee, its servants, employees, guests or invitees, or any Person whatsoever.

(2) On June 30 and December 31 of each year during the term of this Agreement, commencing with the year in which the Building is first occupied by any Subtenant, the Lessee shall deliver to the Port Authority (x) a schedule of all Subleases, giving the names of all Subtenants, a description of the space that has been sublet (or licensed, etc.) expiration dates, rentals and other fees and such other information as the Port Authority may request, and (y) a photostatic copy of all Subleases, licenses and franchise and concession agreements. Upon request of the Port Authority, the Lessee shall permit the Port Authority and its agents and representatives to inspect original counterparts of all Subleases.

(g) *Nondisturbance Agreements*. From time to time, within thirty (30) days after request by the Lessee, the Port Authority will enter into a nondisturbance agreement, substantially in the form annexed hereto as “Exhibit \_” (a “**Nondisturbance Agreement**”), with any Subtenant that has entered into a Sublease for more than two thousand (2,000) square feet of space in the Premises and having a term of more than seven (7) years; provided, however, that the Port Authority shall provide Nondisturbance Agreements without charge not more than twice in any rolling one—year period; for each Nondisturbance Agreement provided by the Port Authority in excess of the foregoing frequency, the Lessee shall pay to the Port Authority a charge in the amount of One Thousand Dollars and No Cents ($1,000.00), such amount to be increased by the percentage increase in the Index as of the fifth (5th) anniversary of the Lease Commencement Date and each fifth anniversary thereafter.

# ARTICLE 14A. PERMITTED MORTGAGES

## Section 14A.l Definitions.

## For the purposes of this Article 14A, the following terms shall have the respective meanings set forth below:

“**Construction Loan**” shall mean the loan obtained to provide financing for the construction of the Project, and may include a Mortgage loan and a Mezzanine Loan.

“**Construction Mortgage**” shall mean the Mortgage securing the Construction Loan.

“**Construction Loan Amount**” shall mean an amount not in excess of eighty percent (80%) of Total Project Cost.

“**Institutional Investor**” shall mean any of the following: (i) a commercial bank, a savings and loan association, a savings bank, a trust company, a national banking association, an investment bank, a real estate investment trust, a credit union or a commercial credit corporation, whether acting for its own account or in a fiduciary capacity, including as trustee in connection with a securitization of commercial mortgage loans or as a manager of any fund; (ii) an insurance company or a pension and/or annuity company, whether acting for its own account or in a fiduciary capacity; (iii) a pension, retirement or profit sharing trust, plan or fund; (iv) a public employees’ pension or retirement system; (v) a governmental agency, body or entity; (vi) a private equity fund with unfunded capital commitments equal to or in excess of $50,000,000 (measured as of the time the financing is extended); or (vii) any entity, all of the equity or beneficial owners of which are one or more of the entities listed in the preceding clauses (i) through (vi); provided, however,that any such entity other than those described in clause (v) above must have tangible net assets in excess of Three Hundred Million Dollars ($300,000,000.00) at the time it extends Mortgage or Mezzanine Loan financing to the Lessee and at least five (5) years of experience by a principal, officer or director within the firm (whether such experience was gained at the firm or in previous positions outside the firm) with respect to financing comparable development projects at such time; and provided, further,that the foregoing dollar amounts shall be increased every five (5) years after the Lease Commencement Date by the percentage increase in the Index during the preceding five (5) year period.

“**Mezzanine Loan**” shall mean any loan obtained to provide financing for the Project (whether construction or otherwise) that is secured by direct or indirect ownership interests in the Lessee.

“**Mezzanine Pledge**” shall mean the pledge of any direct or indirect ownership interests in the Lessee to secure a Mezzanine Loan.

“**Mortgage Amount**” shall mean (x) in the case of the Construction Loan, the Construction Loan Amount; (y) in the case of the Permanent Loan, the Permanent Loan Amount; and (z) in the case of a Refinancing Loan, the Refinancing Loan Amount.

“**Permanent Loan**” shall mean the loan or loans obtained to pay and satisfy the Construction Loan.

“**Permanent Mortgage**” shall mean the Mortgage securing the Permanent Loan.

“**Permanent Loan Amount**” shall mean the greater of (x) the amount required to pay in full the outstanding principal amount of and all interest and other amounts then due under the Construction Loan and the expenses of obtaining and closing the Permanent Loan and (y) an amount not in excess of eighty percent (80%) of the value of the leasehold estate created hereunder (assuming the leasehold estate is not encumbered by any outstanding financing) at the time the Permanent Loan is funded, as established by an appraisal approved by the Recognized Mortgagee holding the Permanent Mortgage.

**“Recognized Mortgagee”** shall mean a holder of a Mortgage or Mezzanine Pledge with respect to which the Port Authority has given the notice provided in Section 14A.3(b), stating that the benefits of this Article 14A apply to such holder.

“**Refinancing Loan**” shall mean any subsequent Mortgage loan and/or Mezzanine Loan obtained to refinance the Permanent Loan or to refinance any such subsequent Mortgage loan and/or Mezzanine Loan.

“**Refinancing Mortgage**” shall mean the Mortgage securing a Refinancing Loan.

“**Refinancing Loan Amount**” shall mean the greater of (x) the amount required to pay in full the outstanding principal amount of and all interest and other amounts then due under the Permanent Loan or existing Refinancing Loan, as the case may be, and the expenses of obtaining and closing the new Refinancing Loan and (y) an amount not in excess of eighty percent (80%) of the value of the leasehold estate (assuming that the leasehold estate is not encumbered by any outstanding financing) at the time the new Refinancing Loan is funded as established by an appraisal approved by the Recognized Mortgagee holding the new Refinancing Mortgage.

## Section 14A.2 Mortgage Authorized.

(a) *Mortgage Authorized*. Notwithstanding the provisions of Article 14 of this Agreement, if this Agreement is then in full force and effect, the Lessee may, without the consent of the Port Authority, at any time and from time to time, obtain a Construction Loan, Permanent Loan and/or Refinancing Loan, as applicable, in an amount not in excess of the applicable Mortgage Amount, and grant security therefor, provided such Construction Loan, Permanent Loan and/or Refinancing Loan, as applicable:

(i) is made by an Institutional Investor as defined in this Article;

(ii) does not cover property other than the Premises;

(iii) is not cross-defaulted or cross—collateralized with agreements covering any other property; and

(iv) at the time such loan is closed no Event of Default shall have occurred and be continuing hereunder and no notice of termination shall have been given pursuant to Article 17 of this Agreement and be in effect.

(b) *More Than One Mortgage*. A loan or loans may be secured by more than one Mortgage or Mezzanine Pledge, and all such Mortgages and/or Mezzanine Pledges as shall secure such loan(s) shall collectively be referred to herein as the “**Mortgage**”.

(c) *Mortgage Amounts*. In the event the Lessee obtains a Permanent Loan with respect to the Premises, the Lessee shall first apply the proceeds of the Permanent Loan to discharge in full the Construction Loan; provided, however, that in the event the Lessee, acting diligently and in good faith, is unable to obtain a Permanent Loan in an amount at least equal to the amount of the Construction Loan or in the event that the proceeds of the Permanent Loan obtained by the Lessee are made available to the Lessee in stages so that the Lessee is unable to fully discharge the Construction Loan until the Lessee has received the full proceeds of such Permanent Loan, then, in either or both of such events only, the Lessee shall have the right to obtain a Permanent Loan without paying and satisfying the Construction Loan in full; provided, however, that the aggregate amount of any and all Mortgages at any one time outstanding shall not exceed the Permanent Loan Amount. The provisions of this paragraph shall also apply in respect of a Refinancing Loan which, for either of the reasons set forth above, does not provide proceeds sufficient to discharge the then-existing Mortgage, provided that the aggregate amount of all Mortgages at any one time outstanding in such circumstances shall not exceed the Refinancing Loan Amount.

(d) *Assignment*. No Mortgage shall be assigned, except to an Institutional Investor.

## Section 14A.3 Recognized Mortgagees.

(a) *Notice*. If the Lessee intends to mortgage its leasehold estate to a Person meeting the requirements of Section 14A.2(a), and if the proposed holder of such Mortgage shall provide the Port Authority with notice of its name and address together with a true and complete copy of such Mortgage, a certification that such holder is a Person meeting the requirements of Section 14A.2(a) and an appraisal or other evidence that the amount of the loan secured by such Mortgage is not in excess of the applicable Mortgage Amount, then and in that event, following the Port Authority’s receipt of such notice, the remaining provisions of this Article 14A shall apply in respect to such Mortgage.

(b) *Acknowledgment*. The Port Authority shall, within fifteen (15) Business Days after receipt of the notice provided in Section 14A.3(a) above, acknowledge in writing that the proposed Mortgagee described in the notice is a Recognized Mortgagee, entitled to the benefits of this Article 14A. If the Port Authority determines that the proposed Mortgagee is not entitled to such benefits, the Port Authority shall set forth the reasons therefor. The Port Authority’s determination with respect to the proposed Mortgagee under this paragraph (b) shall be based solely upon (x) whether or not the proposed Mortgagee is an Institutional Investor and (y) whether or not the amount of the Mortgage will exceed the applicable Mortgage Amount.

(c) *No More Than Two Recognized Mortgagees*. In all events, and notwithstanding any other provision of this Agreement or elsewhere, at any one time there shall not be more than two (2) Recognized Mortgagees.

## Section 14A.4 Consent of Recognized Mortgagee Required.

No cancellation, surrender or modification of this Agreement shall be effective unless consented to in writing by the applicable Recognized Mortgagee senior in lien (such consent not to be unreasonably withheld or delayed), and no cancellation, surrender or modification of this Agreement effectuated without the prior written consent of such Recognized Mortgagee shall be binding on such Recognized Mortgagee.

Section 14A.5 Default and Termination.

(a) *Default Notices*.

(1) Upon giving the Lessee any notice of (x) a default under this Agreement, or (y) a termination of the Lessee’s interest in this Agreement, or (z) a matter on which the Port Authority may predicate or claim a default by the Lessee, the Port Authority shall at the same time give a copy of such notice to every Recognized Mortgagee. No such notice by the Port Authority to the Lessee shall be deemed to have been duly given unless and until a copy thereof has been so given to each Recognized Mortgagee at its address last provided by such Recognized Mortgagee to the Port Authority pursuant to the provisions of this Article.

(2) From and after the date on which the Port Authority gives such notice to a Recognized Mortgagee, such Recognized Mortgagee shall have the same period for remedying any default or acts or omissions which are the subject matter of such notice, or causing the same to be remedied, as is given to the Lessee after the giving of such notice to the Lessee plus, in each instance, the additional periods of time specified in Section 14A.5(b) and (c) below to remedy, commence remedying or cause to be remedied the defaults or acts or omissions which are the subject matter of such notice. The Port Authority shall accept such performance by or at the instigation of such Recognized Mortgagee as if the same had been done by the Lessee. The Lessee shall authorize each Recognized Mortgagee to take any such action at such Recognized Mortgagee’s option, and shall authorize entry upon the Premises by the Recognized Mortgagee for such purpose.

(b) *Termination Notices*.

(1) Anything contained in this Agreement to the contrary notwithstanding, if any default occurs and continues for such period as entitles the Port Authority to terminate this Agreement and the letting hereunder, the Port Authority shall not have the right to effectuate such termination unless, following the expiration of the period of time given the Lessee to cure such default or the act or omission which gave rise to such default, the Port Authority shall give each Recognized Mortgagee notice of the Port Authority’s intent to so terminate (a “**Termination Notice**”) at least ten (10) Business Days in advance of the proposed effective date of such termination if such default is capable of being cured solely by the payment of money, and at least thirty (30) Business Days in advance of the proposed effective date of such termination if such default is not capable of being cured solely by the payment of money.

(2) The provisions of the following paragraph (c) shall apply if, during such ten (10) or thirty (30) Business Day period (the “**Termination Notice Period**”), a Recognized Mortgagee:

(i) notifies the Port Authority of such mortgagee’s desire to nullify such notice; and

(ii) pays or causes to be paid to the Port Authority all Rentals and other payments then due and in arrears as specified in the Termination Notice, as well as all Rentals and other payments which may become due from the Lessee during the Termination Notice Period and of which the Recognized Mortgagee is given written notice by the Port Authority; and

(iii) complies or in good faith, with diligence and continuity, commences to comply with all nonmonetary requirements of this Agreement then in default and susceptible of being complied with by such Recognized Mortgagee. If the curing of any nonmonetary default requires the Recognized Mortgagee to obtain possession of the Premises, then the Recognized Mortgagee shall be deemed to have commenced in good faith to comply with the obligation of the Lessee with diligence and continuity, subject to the effects of any stay which may prevent it from so doing, if it has commenced and is prosecuting with due diligence proceedings to obtain such possession, whether through foreclosure of its Mortgage, an application for the appointment of a receiver or otherwise or, having obtained such possession, is then undertaking to comply with such obligation with due diligence.

(c) *Procedure on Default*.

(1) If the Port Authority elects to terminate the Lessee’s leasehold interest by reason of an Event of Default, and a Recognized Mortgagee shall have proceeded in the manner provided for by Section 14A.5(b) above, the specified date for the termination of the Lessee’s leasehold interest as fixed by the Port Authority in its Termination Notice shall be extended for a period of six (6) months, provided that such Recognized Mortgagee shall, during such six (6) month period, pay or cause to be paid the Rentals and other monetary obligations of the Lessee under this Agreement as the same become due and continue its good faith efforts to perform all of the Lessee’s other obligations under this Agreement as and to the extent provided in Section 14A.5(b) above, subject to the effects of any stay which may prevent it from doing so.

(2) If at the end of such six (6) month period such Recognized Mortgagee is complying with the foregoing paragraph (b), then, provided that such Recognized Mortgagee continues so to comply, this Agreement shall not then terminate, and the time for completion by such Recognized Mortgagee of the actions being taken by it pursuant to paragraph (b)(iii) above shall be extended for such additional period of time as may be required for the completion thereof with all due diligence, taking into account the effect of any stay which may prevent the Recognized Mortgagee from proceeding with such actions. Nothing in this Article 14A, however, shall be construed to extend the term of the letting hereunder beyond the Expiration Date or to require a Recognized Mortgagee to continue any foreclosure proceedings after completion of the cure of the default in respect of which the Termination Notice was issued. If such default is cured and the Recognized Mortgagee discontinues such foreclosure proceedings, this Agreement shall continue in full force and effect as if the Lessee had not defaulted under this Agreement.

(d) *Recognized Mortgagee Need Not Cure Specified Defaults*. Nothing herein contained shall require any Recognized Mortgagee or its designee, as a condition to its exercise of its rights under this Article, or any purchaser at a foreclosure sale, to cure any non—monetary default of the Lessee not susceptible of being cured by such Recognized Mortgagee, designee or purchaser (including, by way of example and not as a limitation, the Lessee’s filing of a bankruptcy petition, as described in Section 17.1(1) below) in order to comply with the provisions of this Section 14A.5.

Section 14A.6 Eminent Domain.

Unless prohibited by applicable law, each Recognized Mortgagee shall have the right to be a party in any condemnation or eminent domain proceeding affecting the Premises and/or the Building for the purpose of protecting its interest in such proceeding.

## Section 14A.7 Casualty Loss.

A standard mortgagee clause naming each Recognized Mortgagee may be added to any and all casualty insurance policies required to be carried by the Lessee hereunder on condition that, subject to satisfaction of any conditions to disbursement set forth in the applicable loan documents, the insurance proceeds are to be applied in the manner specified in this Agreement, and the Mortgage shall so provide; provided, however, that the Mortgage may provide a manner for the disposition of such proceeds, if any, otherwise payable directly to the Lessee.

Section 14A.8 Estoppel Certificate.

The Port Authority shall, at any time and from time to time hereafter, within thirty (30) Business Days after written request by the Lessee to do so, certify to the Recognized Mortgagee or purchaser, or any other Person specified in such request, by written instrument duly executed and acknowledged by the Port Authority (such instrument, an “**Estoppel Certificate**”),as follows: (A) as to whether this Agreement has been supplemented or amended, and if so, the date and substance of each such supplement or amendment; (B) as to the validity, force and effect of this Agreement, as amended, in accordance with its tenor; (C) as to whether any notice has been sent, pursuant to Section 17.1 hereof, by reason of the occurrence of an Event or Default hereunder; (D) as to the existence of any offsets, counterclaims or defenses hereto on the part of the Lessee known to the Port Authority; (E) as to the commencement and expiration dates of the term of this Agreement; and (F) as to any other matters as may be reasonably so requested including, without limitation, the annual amounts of Basic Rental. The Port Authority shall provide Estoppel Certificates without charge not more than twice in any rolling one—year period; for each Estoppel Certificate provided by the Port Authority in excess of the foregoing frequency, the Lessee shall pay to the Port Authority a charge in the amount of One Thousand Dollars and No Cents ($1,000.00), such amount to be increased by the percentage increase in the Index as of the fifth (5th) anniversary of the Lease Commencement Date and each fifth anniversary thereafter.

## Section 14A.10 Notices.

(a) *Address*. Notices from the Port Authority to a Recognized Mortgagee shall be mailed to the address furnished to the Port Authority pursuant to Section 14A.3 above, and those from the Recognized Mortgagee to the Port Authority shall be mailed to the address designated in or pursuant to the provisions of Article 24 hereof. In the event of any assignment of a Mortgage or in the event of a change of address of a Recognized Mortgagee or of an assignee thereof, notice of the new name and address shall be provided to the Port Authority.

(b) *Manner.* Such notices, demands and requests shall be given in the manner described in Article 24 and shall be governed by the provisions of that Article.

## Section 14A.11 New Lease.

(a) *New Lease*. In the event of a termination of the Lessee’s leasehold interest, notwithstanding the fact that the Recognized Mortgagee may have had and did not exercise or properly exercise the right under Section 14A.5 hereof to prevent such termination, the Port Authority shall, in addition to any notice provided for in Section 14A.5 hereof, provide each Recognized Mortgagee with written notice that this Agreement has been terminated, together with a statement of all sums which would at that time be due by the Lessee under this Agreement but for such termination, and of all other defaults, if any, hereunder then known to the Port Authority. The Port Authority agrees to enter into a new lease (the “**New Lease**”) of the Premises with such Recognized Mortgagee for the remainder of the term of this Agreement, effective as of the date of termination of this Agreement, at the Rentals and upon the terms, covenants and conditions (excluding requirements which are not applicable or which have already been fulfilled) of this Agreement, provided that:

(i) such Recognized Mortgagee shall make written request upon the Port Authority for such New Lease within sixty (60) days after the date such Recognized Mortgagee receives the Port Authority’s Notice of Termination of this Agreement given pursuant to this Section 14A.11; and

(ii) such Recognized Mortgagee or its designee shall pay or cause to be paid to the Port Authority at the time of the execution and delivery of such New Lease any and all sums that would at the time of execution and delivery thereof be due pursuant to this Agreement but for such termination and, in addition thereto, all expenses, including attorney’s fees, that the Port Authority shall have incurred by reason of such termination and the execution and delivery of the New Lease and which have not otherwise been received by the Port Authority from the Lessee. The Port Authority shall give such Recognized Mortgagee written notice of all such sums, and neither the Recognized Mortgagee nor its designee shall be responsible for paying any such sum until it has been so notified of the amount thereof.

(b) *Priority.* Any New Lease made pursuant to this Section 14A.11 shall be prior to any mortgage or other lien, charge or encumbrance on the Premises, and the lessee under such New Lease shall have the same right, title and interest in and to the Premises and the Building as the Lessee had under this Agreement.

(c) *More Than One Recognized Mortgagee.* If more than one Recognized Mortgagee requests a New Lease pursuant to paragraph (a) of this Section, the Port Authority shall enter into such New Lease with the Recognized Mortgagee whose mortgage is prior in lien, or with the designee of such Recognized Mortgagee. The Port Authority, without liability to the Lessee or any Recognized Mortgagee with an adverse claim, may rely upon a mortgagee title insurance policy or title certificate issued by a responsible title insurance company doing business within the State of New York as the basis for determining the appropriate Recognized Mortgagee that is entitled to such New Lease.

(d) *Space Leases.* Following the termination of the Lessee’s leasehold interest, and until the right of a Recognized Mortgagee to obtain a New Lease pursuant to this Section 14A.11 has expired without being exercised, the Port Authority shall not terminate any sublease of space in the Building without the prior written consent of such Recognized Mortgagee.

## Section 14A.12 Subordination.

Notwithstanding anything contained in any Mortgage or in this Article 14A, it is understood and agreed that the rights of the holder of any Mortgage, including a Recognized Mortgagee, shall be subject and subordinate to this Agreement. The terms, covenants, conditions and provisions of this Agreement shall govern as between the Port Authority, the Lessee and any Recognized Mortgagee, and in the event of any inconsistency between the terms, covenants, conditions and provisions of this Agreement and the terms, covenants, conditions and provisions of a Mortgage, the terms, covenants, conditions, and provisions of this Agreement shall control. Notwithstanding any provisions of any Mortgage to the contrary, the Lessee shall be deemed to be the Lessee hereunder for all purposes unless and until a Recognized Mortgagee shall have acquired the Lessee’s interest herein or a New Lease has been executed pursuant to this Article, as the case may be. Any Mortgage granted hereunder shall make reference to the provisions of this Agreement and shall provide that the Mortgage and the rights of the Recognized Mortgagee thereunder are and shall be in all respects subject to all provisions of this Agreement. Without limiting the generality of the foregoing, each Mortgage shall contain the following provisions:

“This mortgage is executed upon the condition (i) that no purchaser at any foreclosure sale shall acquire any right, title or interest in or to the agreement hereby mortgaged (the “**Lease**”) unless such purchaser, or the person, firm or corporation to whom or to which such purchaser’s right has been assigned, in the instrument transferring to such purchaser or to such assignee of the interest of the Lessee under the Lease, assumes and agrees to perform all of the terms, covenants and conditions of the Lease thereafter to be observed or performed on the part of such Lessee, (ii) that no further or additional mortgage or assignment of the Lease shall be made except in accordance with the provisions of the Lease and (iii) that a duplicate original of the instrument containing such assumption agreement, duly executed and acknowledged by purchaser or assignee and in recordable form, is delivered to the Port Authority promptly after the consummation of such sale or assignment.”

“The mortgagee agrees to have the proceeds of any insurance or the proceeds of any condemnation award applied to the repair or restoration of the mortgaged premises to the extent such application is required by the provisions of the Lease.”

## Section 14A.13 Assignment by Recognized Mortgagee.

A Recognized Mortgagee shall have the right, at any time and without the consent of the Port Authority, to assign the Mortgage held by it to another Institutional Investor or to grant participations in its Mortgage so long as a single Institutional Investor continues to act as the Recognized Mortgagee thereunder, and the Port Authority will be obligated to give notices to and otherwise deal with only the one Institutional Investor that acts as such Recognized Mortgagee.

## Section 14A.14 No Merger.

So long as any Mortgage held by a Recognized Mortgagee is in effect, unless all Recognized Mortgagees shall otherwise expressly consent in writing, the Port Authority’s interest in the Premises and the leasehold estate of the Lessee created herein shall not merge, but shall remain separate and distinct, notwithstanding the acquisition of the fee title and leasehold estate by the Port Authority, the Lessee or any third party, by purchase or otherwise.

## Section 14A.15 No Mortgage by Port Authority.

## The Port Authority acknowledges that it has not granted any mortgage encumbering the Premises, and confirms that this Agreement and the Lessee’s interest hereunder are and shall remain prior to any mortgage that the Port Authority may make of its interest in the Premises.

# ARTICLE 15. LANDLORD’S PARTICIPATION IN PROCEEDS

Section 15.1 Definitions.

“**Adjusted Gross Proceeds**” shall mean the amount by which the Transaction Receipts of a transaction exceed the Transaction Expenses applicable to the transaction.

“**Alternative Disposition**” shall mean any transaction which, by virtue of transfer of control or other incidents of owner­ship, would allow the Lessee or the beneficial owners of the Lessee to realize appreciation in the value of the leasehold estate created by this Agreement or would constitute the functional equivalent of a Sale.

“**Development Costs**” shall mean all actual hard and soft costs of construction, development and equipping of the Project incurred after [ , 201\_. Soft costs shall be defined as: planning and design, general contractor’s and construction management fees (which shall, if paid to an Affiliate, be no more than twenty percent (20%) of the total Development Costs for the Project), professional fees (including without limitation legal, appraisal, environmental, accounting, historical preservationist, architectural and engineering fees), premiums and fees for construction period insurance, construction financing fees and expenses (including construction period interest), property testing and remediation costs, mortgage taxes, transfer taxes and the Lessee’s reasonable salary and overhead costs. In no event, however, shall Development Costs include (i) amounts contributed to reserve funds unless and until such amounts are actually expended for purposes which would otherwise constitute Development Costs, (ii) developer fees of any kind paid, incurred or imputed to the Lessee or an Affiliate, (iii) any amounts paid or owed to an Affiliate to the extent such are in excess of that which would have been paid to an unrelated party in an arms-length transaction, (iv) principal payments or, to the extent the Lessee or its beneficial owners realize the benefit of currently deducting interest expenses for income tax purposes (*i.e.*, dollar tax savings), interest payments on Mortgages (other than construction period interest), and (v) any expense for which the Lessee is reimbursed, directly or indirectly, including, without limitation, by the City, the State, other public entities, or any Subtenant.

“**Financing**” shall mean (x) any Mortgage or other financing secured by the Lessee’s interest in all or any part of this Agreement or the leasehold estate created hereby, or (y) any refinancing, assignment, or restructuring of any such Mortgage or financing; *provided*, *however*, that neither the Construction Loan nor the Permanent Loan shall be deemed to be a Financing unless the amount of either Loan exceeds the Development Costs of the Project, in which case such excess amount shall be deemed a Financing.

“**Major Sublease**” shall mean any Sublease for (x) fifty percent (50%) or more of the Gross Square Footage of the Retail Space or (y) thirty percent (30%) or more of the total number of Hotel Rooms.

“**Proceeds Percentage**” shall mean [ ] percent ( %).

“**Proportionate Share**” of any item included in Transaction Receipts, with respect to a particular transaction, shall be equal to the percentage of the total assets, the entire leasehold interest, or the total ownership interest in the Lessee or its constituent entity (as the case may be) that is being sold.

“**Sale**” shall mean any Assignment, Transfer, Major Sublease, license, unsecured loan, sale (including without limitation, resale or sale among shareholders, partners or members), syndication, or other transfer of part or all of the Lessee’s interest in this Agreement or the leasehold estate created hereby, or any Alternative Disposition.

“**Total Project Cost**” shall mean the Development Costs of the Project through the Construction Completion Date, as established pursuant to Section 15.3 below.

“**Transaction Expenses**” shall mean all reasonable and customary expenses of the pertinent transaction, which expenses shall include, without limitation, attorneys’ fees and disbursements, accountants’, appraisers’, consultants’, and other professional fees, title insurance premiums, escrow fees, transfer and recording taxes, real property transfer gains taxes, mortgage recording taxes, brokerage fees, origination fees, institutional lender participations, and prepayment penalties; provided, however, that with respect to such expenses paid to any Affiliate of the Lessee, such amounts shall be no more than would have been paid to an unrelated party in an arms-length transaction.

“**Transaction Receipts**” shall mean:

(1) in the case of a Sale other than a Major Sublease, the aggregate of the following amounts, computed as of the closing date of such Sale, received as, or deemed to be, consideration for the Sale: (A) all cash or cash equivalent proceeds, (B) the fair market value of any property, other than cash, cash-equivalents or debt obligations made in connection with the Sale, (C) the outstanding principal amount of any Mortgages or other debt assumed or satisfied by the purchaser at such Sale or to which the Sale is made subject, (D) the principal amount of any purchase money note or debt obligation made in connection with such Sale and (E) any other consideration for the Sale (e.g., debt forbearance), if, as, and when received from each Sale, or at such time as the transferor is relieved of a Mortgage or other debt obligation;

(2) in the case of a Financing, the cash proceeds received in connection with the Financing; and

(3) in the case of a Major Sublease, the rental and any other amounts paid to the Lessee under such Major Sublease for each month during the term thereof.

Section 15.2 Payments.

(a) *Proceeds Payments.*

(1) It is the intention of thisArticle that the Port Authority share in any appreciation in the value of the Leased Premises realized by the Lessee, a Master Sublessee or any other person with a direct or indirect interest in the Lessee or Master Sublessee, upon the terms and conditions of this Article. Accordingly, any transaction or series of transactions by which the Lessee, or any person, seeks to evade the clear intent and purpose of this Article, however characterized, and which is not expressly exempted from the scope of this Article, shall be deemed to come within the scope of a “Sale”.

(2) In the event of any Sale or Financing, Lessee shall pay or cause to be paid to the Port Authority as additional rent hereunder, simultaneously with the consummation of each such Sale (except as provided in Section 15.2(b) below and except as otherwise provided below in the case of a Major Sublease) or Financing, a payment (a “**Proceeds Payment**”) in a total amount equal to the Proceeds Percentage of the Adjusted Gross Proceeds; *provided, however,* that where a Sale is of interests representing assets in addition to a direct or indirect interest in the Lessee (such direct or indirect interest, the “**Lessee Interest**”), then the Proceeds Payment shall be equal to the Proceeds Percentage of the Proportionate Share of the Lessee Interest in the value of such multiple-property transaction. The Lessee shall make the Proceeds Payments in the manner specified in this Article regardless of whether Transaction Receipts are received in a lump sum or in a stream of payments, and whether based on a fixed price or a formula or index, and whether received directly or indirectly.

(b) *Certain Sales Exempt.*

(1) Notwithstanding Section 15.2(a) above, no Proceeds Payment shall be due to the Port Authority by reason of any Transfer that is both (x) made solely between Initial Owners and (y) consummated prior to the tenth (10th) anniversary of the Lease Commencement Date.

(2) Notwithstanding Section 15.2(a) above, no Proceeds Payment shall be due to the Port Authority by reason of a Transfer of publicly traded equity interests.

(c) *Distribution of Adjusted Gross Proceeds*.

Adjusted Gross Proceeds shall be distributed first to the Port Authority, in the amount of the Proceeds Payment, and thereafter to the Lessee, in the amount of the remaining balance of the Adjusted Gross Proceeds.

Section 15.3 Determination of Total Project Cost.

Not later than ninety (90) days after the Construction Completion Date, the Lessee shall deliver to the Port Authority a statement of the Development Costs expended up to the Construction Completion Date, listing in reasonable detail the components thereof, certified by an authorized corporate officer, general partner or manager (if the Lessee is a limited liability company) of Lessee, as the case may be, as being accurate in all material respects, and audited by the Certified Public Accountant (who shall give an opinion thereon that is qualified only to the extent prescribed for any comparable audit of this kind by generally accepted auditing standards). Within a period of one hundred eighty (180) days after receipt of such statement, the Port Authority may examine and audit the records, account books and other data of the Lessee used as the basis for such certified statement, all of which the Lessee shall make available to the Port Authority. If such audit shall establish that such Development Costs were overstated, then such Development Costs for purposes of this Agreement shall be reduced accordingly. The audit, if any, shall be conducted at the expense of the Port Authority unless it shall be established that the Lessee overstated such Development Costs by more than three percent (3%), in which case the Lessee shall pay the cost of the audit. If any item of Development Costs has not yet been determined by ninety (90) days after the Construction Completion Date, the Lessee shall make one or more supplemental submissions of such additional Development Cost items (which supplemental submission[s] shall be certified and audited, the cost of such audits borne as provided in the preceding sentence).

Section 15.4 Closings.

The Lessee shall notify the Port Authority of the time and location of the closing of any Sale or Financing, at least ninety (90) days prior thereto, and shall include therewith a statement of the anticipated Transaction Receipts, Transaction Expenses and Adjusted Gross Proceeds, and a copy of the most recent available drafts of the Sale or Financing documents, as the case may be. If there is any material change in the facts as set forth in such notice (including any change whatsoever in anticipated Adjusted Gross Proceeds), the Lessee shall re-notify the Port Authority, with the corrected information, as soon as reasonably practicable prior to the closing. The Lessee shall thereafter supply the Port Authority with any documents or information requested by the Port Authority in order for the Port Authority to verify the calculation of Adjusted Gross Proceeds. Representatives of the Port Authority may attend such closing. Each Proceeds Payment shall be paid to the Port Authority at such closing by certified check or by wire transfer.

Section 15.5 Monitoring of Transfers of Ownership Interests.

(a) *Amendment to Organizational Documents.*

All of the Lessee’s organizational documents and the organizational documents of any direct or indirect constituent entity of the Lessee (the “**Organizational Documents**”) shall be amended prior to or as of the Lease Commencement Date, and the Organizational Documents of any other entity shall be amended prior to becoming a direct or indirect constituent entity of Lessee, so that the Organizational Documents contain, and shall thereafter continue to contain, throughout the term of this Agreement, provisions that (x) no new partner or member shall be admitted, (y) no transfer of stock ownership or of a beneficial interest in the Lessee or in any direct or indirect constituent entity in the Lessee shall be effective and (z) no Organizational Documents shall be amended to reflect any such changes in partnership or membership interests or transfers of stock ownership or beneficial interests, *until* the Lessee receives reasonably satisfactory evidence, a copy of which the Lessee shall promptly deliver to the Port Authority, that any Proceeds Payment due to the Port Authority in connection with such change or transfer has been or will be paid.

(b) *Legend.*

In addition, any instrument evidencing a direct ownership interest in the Lessee or in any direct or indirect constituent entity of the Lessee shall contain a legend giving notice of, or a complete description of, the foregoing transfer restrictions, in form and substance satisfactory to the Port Authority.

(c) *Lessee’s Monitoring Obligations.*

If any principal of the Lessee becomes aware of any assignments or transfers of a direct ownership interest in the Lessee or in any direct or indirect constituent entity of the Lessee in respect of which a Proceeds Payment was due but was not paid, the Lessee shall charge the shareholder, partner or member or other transferor (including, if necessary, by a reduction in the capital account of the partner involved) to the extent necessary to make the requisite Proceeds Payment, with interest at the Late Charge Rate (accruing from the day the payment should have been made in accordance with this Agreement), and the Lessee shall make such payment to the Port Authority. As a condition of every Sale, the Lessee shall require that the Organizational Documents and instruments evidencing ownership of the purchaser contain identical restrictions on transfer as are contained in this Section.

(d) *Annual Certificate.*

Annually on or before each February 1 during the term of this Agreement, the Lessee shall deliver to the Port Authority a certificate, subscribed by the secretary or managing partner or manager of the Lessee, as the case may be, expressly referring to this Section 15.5, and setting forth the names, addresses and beneficial and record interests of all Persons with five percent (5%) or more of the nominal or beneficial interests in the Lessee and its direct and indirect constituent entities as of the preceding January 1.

Section 15.6 Validity of Transactions.

Nothing contained in this Article with respect to Sales and Financings shall be construed to limit the rights of the Port Authority under the applicable provisions of the Article entitled “Assignment, Transfer, Mortgage and Subletting”. Any Sale or Financing transacted in violation of such Article or this Article shall be null and void.

Section 15.7 Proceeds Payments on Major Subleases.

(a) *Payments*.

In the event of any Major Sublease, the Lessee shall pay the Proceeds Payments applicable to such transaction by paying to the Port Authority on the first day of each month an amount equal to the Proceeds Percentage of the Transaction Receipts from such Major Sublease for such month.

(b) *Transactions of Major Subtenants*.

In the event of a transaction by, or involving an interest in, a Major Subtenant, which transaction would, if the Major Subtenant were the Lessee, create the requirement for the payment of a Proceeds Payment, such a Proceeds Payment shall be payable by the Lessee to the Port Authority, in an amount calculated to produce the Proceeds Percentage share of profits from the transaction according to the principles set forth in this Article, for calculating the Proceeds Payments in connection with Lessee transactions.

# ARTICLE 16. RIGHTS OF ENTRY

## Section 16.1 Rights Of Entry Reserved.

The Port Authority by its officers, employees, agents, representatives and contractors shall have the right at all reasonable times to enter upon the Premises for the purpose of inspecting the same (including without limitation performing periodic evaluations of, *inter alia,* the maintenance program, condition and code conformance’ of electrical, mechanical, structural and fire and life safety systems), for observing the performance by the Lessee of its obligations under this Agreement (including without limitation the Lessee’s obligations to comply with Requirements and Rules and Regulations), for the repair, rebuilding and maintenance of Port Authority utilities and infrastructure that may exist within or under the Premises, and for the doing of any act or thing that the Port Authority may, pursuant to the express provisions of this Agreement or pursuant to applicable law be obligated or have the right to do, provided that, other than in the case of an emergency, the Port Authority agrees to give the Lessee reasonable prior oral notice of its intention to enter any area of the Premises. The Lessee shall have the right to have a representative present during each entry on the Premises by the Port Authority. The Port Authority, in its capacity as landlord hereunder, agrees that it will not unreasonably interfere with the operation of the Premises during any such entry.

Section 16.2 Entry at End of Term.

At any time and from time to time during ordinary business hours within the twenty-four (24) months preceding the expiration of the letting hereunder, the Port Authority, through and by its agents and employees, whether or not accompanied by prospective tenants, occupiers or users of the Premises, shall have the right to enter the Premises for the purpose of exhibiting and viewing all parts of the same, provided that the Port Authority shall give the Lessee reasonable prior oral notice of its intention to enter the Premises to exercise the rights described in this Section. The Lessee shall have the right to have a representative present during each such entry. The Port Authority, in its capacity as landlord hereunder, agrees that it will not unreasonably interfere with the operation of the Premises during any such entry.

## Section 16.3 No Eviction.

The exercise of any or all of the foregoing rights by the Port Authority and/or its agents in accordance with the provisions of this Article shall not be or be construed to be an eviction of the Lessee nor be made the grounds for any abatement of Rental nor any claim or demand for damages, consequential or otherwise.

# ARTICLE 17. TERMINATION

## Section 17.1 Events of Default.

If any one or more of the following events (each, an “**Event of Default**”) shall occur, that is to say:

(1) the Lessee becomes insolvent, or takes the benefit of any present or future insolvency statute, or makes a general assignment for the benefit of creditors, or files a voluntary petition in bankruptcy or a petition or answer seeking an arrangement or its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or under any other law or statute of the United States or of any State thereof, or consents to the appointment of a receiver, trustee or liquidator of all or substantially all its property; or

(2) a petition under any part of the federal bankruptcy laws or an action under any present or future insolvency law or statute is filed against the Lessee and is not be dismissed or vacated within ninety (90) days after the filing thereof; or

(3) by order or decree of a court, the Lessee is adjudged bankrupt or an order is made approving a petition filed by any of the creditors or stockholders of the Lessee seeking its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or under any law or statute of the United States or of any State thereof; or

(4) by or pursuant to any order or decree of any court or governmental board, agency or officer, a receiver, trustee or liquidator takes possession or control of all or substantially all the property of the Lessee, or any execution or attachment is issued against the Lessee or any of its property whereby possession of the Premises is taken by someone other than the Lessee, and any such possession or control continues in effect for a period of ninety (90) days; or

(5) the letting hereunder or a part or all of the interest or estate of the Lessee under this Agreement is sold, transferred, assigned, subleased, mortgaged, pledged, hypothecated, encumbered, conveyed, or shall pass to or devolve upon (by operation of law, by statute, or otherwise) any other Person, or if the Lessee merges or consolidates with or into any other Person, except as permitted pursuant to Articles 14 and 14A of this Agreement; or

(6) the Lessee is dissolved as the result of any act or omission of its partners, members or other principals, or any of them, or by operation of law or the order or decree of any court having jurisdiction, or for any other reason whatsoever, and following such dissolution the Lessee is not reconstituted or its business continued; or

(7) any lien is filed against the Premises because of any act or omission of the Lessee and is not removed, discharged, or bonded within sixty (60) days after the Lessee has received notice thereof; or

(8) the Lessee voluntarily abandons, deserts or vacates the entire Premises or discontinues its operations at the Premises; or the Lessee voluntarily abandons, deserts or vacates the entire Premises or discontinues its operation of the Hotel; or

(9) the Lessee ceases to be a Single Purpose Entity; or

(10) the Lessee fails duly and punctually to pay any Rental (including without limitation the Basic Rental and Percentage Rental), fee, charge or other sum payable hereunder to the Port Authority within ten (10) days after receipt of notice of such default from the Port Authority; or

(11) (x) the Hotel Management Agreement and/or the Franchise Agreement, as the case may be, expires or is terminated, or (y) a notice of termination of the Hotel Management Agreement and/or Franchise Agreement, as the case may be, has been given, or (z) the Hotel Management Agreement and/or the Franchise Agreement, as the case may be, has not been renewed or extended at least thirty (30) days prior to its expiration date; or

(12) the Lessee fails to keep, perform and observe any other promise, covenant and agreement set forth in this Agreement on its part to be kept, performed or observed within thirty (30) days after receipt of notice of default thereunder from the Port Authority (or, in the case of any obligation which requires more than a period of thirty (30) days for its performance with due diligence, if the Lessee fails to commence to perform whatever may be required for fulfillment of such obligation within thirty (30) days after receipt of such notice or, having so commenced performance, thereafter fails diligently to continue and complete such performance);

then (x) upon the occurrence of any such Event of Default or at any time thereafter during the continuance thereof, the Port Authority may, subject to the rights of any Recognized Mortgagee, upon ten (10) days’ written notice terminate this Agreement, effective upon the date specified in such notice. Each such right of termination and the exercise thereof shall be and operate as a conditional limitation.

## Section 17.2 Acceptance of Rental Not a Waiver.

No acceptance by the Port Authority of Rental, fees, charges or other payments in whole or in part for any period or periods after an Event of Default has occurred and while such Event of Default is continuing shall be deemed to be a waiver of the right on the part of the Port Authority to terminate the Lessee’s leasehold interest hereunder by reason of such Event of Default.

## Section 17.3 Remedies.

The right to terminate a Lessee’s interest under this Agreement under the circumstances described in this Article shall be in addition to any other right of termination provided for in this Agreement and in addition to any other rights and remedies (other than termination) that the Port Authority would have at law or in equity consequent upon any breach of this Agreement by the Lessee, and the exercise by the Port Authority of any right of termination shall be without prejudice to any other such rights and remedies.

## Section 17.4 Waiver of Jury Trial; Limitation on Counterclaims.

The Lessee waives its right to trial by jury in any summary proceeding or action that may hereafter be instituted by the Port Authority against the Lessee in respect of the premises and/or in any action that may be brought by the Port Authority to recover fees, damages, or other sums due and owing under this Agreement. The Lessee shall not interpose any counterclaim in any summary proceeding or action for non-payment of Rental that may be brought by the Port Authority unless such counterclaim is in the nature of a mandatory counterclaim (*i.e.*, the claim of the Lessee would be waived if not brought as such a counterclaim).

## Section 17.5 Right of Re—Entry.

The Port Authority shall, as an additional remedy upon the termination of this Agreement and the letting hereunder, have the right to reenter the Premises and every part thereof upon the effective date of termination without further notice of any kind, and may regain and resume possession either with or without the institution of summary or any other legal proceedings or otherwise. Such reentry, or regaining or resumption of possession, however, shall not in any manner affect, alter or diminish any of the obligations of the Lessee under this Agreement, and shall in no event constitute an acceptance of surrender.

Section 17.6 Waiver of Redemption.

The Lessee hereby waives any and all rights to recover or regain possession of the Premises and any and all rights of redemption granted by or under any present or future law, in the event it is evicted or dispossessed for any cause, or in the event the Port Authority obtains possession of the Premises in any lawful manner.

Section 17.7 Survival of Obligations.

In the event that this Agreement is terminated in accordance with the provisions of this Article, or in the event the Port Authority has re—entered, regained or resumed possession of the Premises in accordance with this Article, all of the obligations of the Lessee under this Agreement shall survive such termination, re-entry or regaining or resumption of possession and shall remain in full force and effect for the full term of this Agreement, and damages shall become due and payable to the Port Authority as set forth below. Notwithstanding anything to the contrary contained herein, all of the obligations of the Lessee with respect to Environmental Damages and Environmental Requirements shall survive the expiration or termination of this Agreement.

## Section 17.8 Damages.

Immediately upon any termination and/or re-entry, regaining or resumption of possession in accordance with this Article, there shall become due and payable by the Lessee to the Port Authority, without notice or demand, as damages (which damages are not intended to be exclusive) the sum of the following:

(1) the amount of all then accrued and unpaid monetary obligations of the Lessee to the Port Authority under this Agreement as of the effective date of termination, re—entry or regaining or resumption of possession; and

(2) an amount equal to the cost to and the expenses of the Port Authority in connection with the termination, re-entry or regaining or resumption of possession, including legal expenses and costs, and brokerage fees and commissions in connection with any reletting of the Premises; and the Port Authority’s costs and expenses for putting the Premises in order, including without limitation cleaning, decorating and restoring (on failure of the Lessee to restore), and the Port Authority’s costs and expenses for the care and maintenance of the Premises, and the furnishing and equipping thereof during any period of vacancy; and

(3) in the event that on or before the effective date of termination, re—entry or regaining or resumption of possession, the Lessee has failed to perform and complete the design, construction and equipping of the Building to be constructed by the Lessee under this Agreement, an amount equal to the cost to and the expenses of the Port Authority in connection with the performance of such obligations, regardless of whether or not the termination, re-entry or regaining or resumption of possession is predicated upon the Lessee’s failure to perform such obligations, and all other monetary damages incurred by the Port Authority on account of the Lessee’s failure to perform such obligations. In any such event the Port Authority may itself perform or contract for the performance or completion thereof or may retain a third party to act as agent or representative in accomplishing the same and the costs and expenses of the agent or representative in addition to those of the Port Authority shall likewise be included in the amount of damages under this provision; and

(4) an amount equal to the then Present Value of all Rentals and other amounts payable by the Lessee pursuant to this Agreement for the entire term following the effective date of termination, re-entry or regaining or resumption of possession as originally fixed in this Agreement.

## Section 17.9 Collection of Damages; Credit.

The Port Authority may at any time bring an action to recover all the damages set forth in Section 17.8 above not previously recovered in separate actions, or it may bring separate actions to recover the items of damages set forth in subparagraphs (1), (2) and (3) of Section 17.8 and separate actions periodically to recover from time to time only such portions of the damages set forth in subparagraph (4) of Section 17.8 as would have accrued as rental up to the time of the action if there had been no termination, re—entry, regaining or resumption of possession. In any such action the Lessee shall be allowed a credit against its survived damages obligations equal to the amounts that the Port Authority has actually received from any subtenant, licensee, permittee or other occupier of the Premises, or any part thereof, during the period for which damages are sought, and, if recovery is sought for a period subsequent to the date of suit, a credit equal to the then Present Value of the market rental value of the Premises during such period; *provided, however,* that the credit provided for in this sentence shall not exceed the amount due and payable by the Lessee to the Port Authority. If at the time of such action the Port Authority has relet the Premises, the rental for the Premises obtained through such reletting shall be deemed to be the market rental value of the Premises or (if less than the entire Premises have been relet) be deemed to be the basis for computing such market rental value.

## Section 17.10 Relettinq.

(a) *Right to Relet*. The Port Authority, upon any termination or re-entry, regaining or resumption of possession pursuant to this Article may occupy or relet the Premises, and shall have the right to permit any Person to enter upon the Premises and use the same. The Port Authority may grant free rental or other concessions and such reletting may be of only a part of the Premises or a part thereof together with other space, and for a period of time the same as or different from the balance of the term hereunder remaining, and on terms and conditions and for purposes the same as or different from those set forth in this Agreement. The Port Authority, upon such termination or re-entry, regaining or resumption of possession pursuant to this Article, shall also have the right to repair or make structural or other changes in the Premises, including changes which alter the character of the Premises and the suitability thereof for the purposes of the Lessee under this Agreement, without affecting, altering or diminishing the obligations of the Lessee hereunder.

(b) *Credit.* In the event either of any actual reletting or of any actual use and occupancy by the Port Authority (the mere right of the Port Authority to use and occupy not being sufficient however) there shall be credited to the account of the Lessee against its survived obligations hereunder any net amount remaining after deducting from the amount actually received from any tenant, licensee, permittee or other occupier as the rental or fee in connection with the use of the Premises or portion thereof during the balance of the letting as the same is originally stated in this Agreement, or from the market value of the occupancy of such portion of the Premises as the Port Authority may during such period actually use and occupy, all expenses, costs and disbursements incurred or paid by the Port Authority in connection therewith. No such reletting shall be or be construed to be an acceptance of a surrender.

# ARTICLE 18. SURRENDER

## Section 18.1 Surrender of Premises.

The Lessee covenants and agrees to yield and deliver possession of the Premises to the Port Authority peaceably and promptly on the date of cessation of the letting hereunder, whether such cessation be by termination, expiration or otherwise, promptly and in the condition provided in Section 9.1(3). Upon the Expiration Date, all of the Premises, and all construction, buildings, structures, improvements and fixtures located thereon, shall be free and clear of all liens, encumbrances, security interests and rights of any subtenants, concessionaires or occupants of the Premises.

## Section 18.2 Removal of Property.

Unless required for the performance by the Lessee of its obligations hereunder, the Lessee shall have the right, at any time during the letting hereunder to remove and, on or before the Expiration Date or the effective date of any earlier termination of the letting under this Agreement, shall be obligated to remove, its trade fixtures, equipment, inventories, signs, detachable furniture and furnishings and its other removable fixtures and personal property from the Premises and the Building, repairing all damage caused by such removal. If the Lessee shall fail to remove any such trade fixtures, equipment, inventories, signs, detachable furniture and furnishings or its other removable fixtures and personal property on or before the termination or expiration of the letting hereunder, the Port Authority may remove the same to a public warehouse for deposit or may retain the same in its own possession and in either event may sell the same at public auction, the proceeds of which shall be applied first to the expenses of removal, including any repairs necessitated by such removal, and of storage and sale, and second to any sums owed by the Lessee to the Port Authority, with any balance remaining to be paid to the Lessee. If the expenses of such removal, repair, storage and sale shall exceed the proceeds of sale, the Lessee shall pay such excess to the Port Authority upon demand.

## Section 18.3 Failure to Comply with Section 9.1.

In the event that the Premises are not in the condition called for by Section 9.1 upon their surrender pursuant to this Article, the Port Authority shall have the right to perform any work required to place the Premises in such condition, and the Lessee shall reimburse the Port Authority for the cost thereof.

## Section 18.4 Acceptance of Surrender.

No agreement of surrender or to accept a surrender of the Premises shall be valid unless and until the same shall have been reduced to writing and signed by the duly authorized representatives of the Port Authority and the Lessee. Except as expressly provided in this Section, neither the doing of, nor any omission to do, any act or thing by any of the officers, agents or employees of the Port Authority shall be deemed an acceptance of a surrender of the Premises or the letting hereunder.

# ARTICLE 19. CONDEMNATION

## *(a) Definitions.*

The following terms, when used in this Section, shall, unless the context shall require otherwise, have the respective meanings given below:

“**Date of Taking**” shall mean the date on which title to all or any portion of the Premises, as the case may be, has vested in any lawful power or authority pursuant to a Taking.

“**Material Part**” shall mean, with reference to the Premises, such portion of the Premises as when so taken would leave remaining a balance of the Premises, due either to the area so taken or the location of the part so taken in relation to the part not so taken, that would not under economic conditions and after performance by the Lessee of all covenants, agreements, terms and provisions contained herein or required by law to be observed or performed by the Lessee, permit the restoration of the Premises so as to enable the Lessee to operate, maintain and develop the Premises in accordance with the requirements of this Agreement, including without limitation the Section hereof entitled “*Permitted Use*”, and to continue to carry on its normal operations at the Airport without using such part taken.

“**Taking**” shall mean the acquisition of a real property interest, through condemnation or the exercise of the power of eminent domain, by any body having a superior power of eminent domain.

## *(b) Permanent Taking of All or a Portion of the Premises.*

(1) If a Taking is permanent and covers the entire Premises, then this Agreement shall, as of the Date of Taking, cease and determine in the same manner and with the same effect as if such date were the original date of expiration hereof.

(2) If a Taking is permanent but covers less than all of the Premises, this Agreement and the term hereof shall continue as to the portion of the Premises not so taken, and the letting as to the part of the Premises so taken shall, as of the Date of Taking, cease and determine in the same manner and with the same effect as if the term of the letting had on that date expired, and the rentals shall be abated *pro rata*.

(3) If a Taking is permanent and covers a Material Part of the Premises, then the Lessee and the Port Authority shall each have an option exercisable by notice given within ten (l0) days after the Date of Taking to terminate the letting hereunder with respect to the Premises not taken, as of the Date of Taking, and such termination shall be effective as if the Date of Taking were the original date of expiration hereof. If the letting of the entire Premises is not terminated, the rentals shall be abated *pro rata* after the date of surrender of possession of the portion of the Premises taken.

(4) If a Taking is permanent but covers less than the entire Premises and the letting of the portion of the Premises not taken is not terminated pursuant to paragraph (b)(3) of this Section, the Lessee shall proceed diligently to restore the remaining part of the Premises not so taken so that the Premises shall be a complete, operable, self-contained architectural unit in good condition and repair and the proceeds of that portion of any award paid in trust to the Port Authority pursuant to Section 23.3 of the Basic Lease attributable to the improvements on the Premises not so taken shall be made available by the Port Authority to be used by the Lessee for that purpose. The Port Authority shall retain any excess of such award over the costs of the restoration.

(5) If a Taking (x) covers all or “substantially all of a Municipal Air Terminal”, as defined in the Basic Lease, and (y) the Basic Lease (with respect to the Airport) and this Agreement are consequently terminated, then the Port Authority shall pay to the Lessee its unamortized capital investment, if any, in the Premises, provided, however, that the Port Authority’s foregoing payment obligation to the Lessee shall be limited to a proportionate share (as determined by the Port Authority in its sole discretion following consultation with all of the Port Authority’s tenants at the Airport) of the condemnation proceeds available to be paid to the Lessee and the Port Authority’s other tenants at the Airport, and provided, further, that such available condemnation proceeds shall be limited to the amount of the condemnation proceeds received from the City remaining after the Port Authority has been compensated for (p) the value of its leasehold interest in the Airport or (q) the sum of the unamortized portion of the Port Authority’s investment in improvements at the Airport and any remaining deferred charges for equipment acquired by the Port Authority for use at or in connection with its operation of the Airport, whichever of (p) or (q) is greater (such greater amount, the “**Port Authority Share**”). In making the determination of “proportionate share” provided in the first proviso of the preceding sentence, the Port Authority shall in no event be liable, in any respect, to the Lessee or any other party by reason of such determination or the resulting distribution of proceeds, and the Lessee shall, prior to receipt of any such distribution, execute and deliver to the Port Authority such form of waiver, release and indemnification as the Port Authority may request. The Lessee understands and accepts that after payment of the Port Authority Share, there may be insufficient condemnation proceeds (or none at all) remaining to pay all or any portion of the Lessee’s unamortized capital investment.

## *(c) Temporary Taking of All or Any Part of the Premises.*

(1) If the temporary use of the whole or any part of the Premises shall be taken for any public or quasi-public purpose by any lawful power or authority pursuant to a Taking or by agreement between the Port Authority and such lawful power or authority, (w) the Lessee shall give prompt notice thereof to the Port Authority, (x) the Term shall not be reduced or affected in any way and (y) the Lessee shall continue to pay in full all rentals payable by the Lessee hereunder without reduction or abatement except as set forth in paragraph (c)(2) below.

(2) If a temporary Taking covers all or a Material Part of the Premises, then the Lessee and the Port Authority shall each have an option, exercisable by notice given within ten (10) days after the Date of Taking, to suspend the term of the letting of such of the Premises as are not so taken during the period of the Taking, and, in that event, the rentals for such portion of the Premises not so taken shall abate *pro rata* for the period of the suspension.

## *(d) Lessee’s Cooperation.*

The Lessee shall execute any and all documents that may be reasonably required in order to facilitate collection by the appropriate party of awards or payments covered by this Section.

## *(e) Condemnation Claims by the Lessee.*

To the extent a condemnation claim by the Lessee shall not diminish any claim, award, compensation or damages of or to the City or of or to the Port Authority on account of any condemnation and such condemnation claim is permitted by Section 23 of the Basic Lease, the Lessee may file a claim in a condemnation proceeding.

# ARTICLE 19A. EFFECT OF BASIC LEASE

## *(a) No Greater Rights.*

## The letting shall, in any event, terminate with the termination or expiration of the Basic Lease, such termination to be effective on such date and to have the same effect as if the Term had expired on that date. The rights of the Port Authority in the Premises are those granted to it by the Basic Lease, and no greater rights are granted to the Lessee than the Port Authority has power thereunder to grant.

## *(b) Specific Basic Lease Requirements.*

## In accordance with the provisions of the Basic Lease, the Port Authority and the Lessee hereby agree as follows:

(1) This Agreement is subject and subordinate to the Basic Lease and to any interest superior to that of the Port Authority;

(2) The Lessee shall not pay rent or other sums under this Agreement for more than one (1) month in advance (excluding security and other deposits required under this Agreement);

(3) With respect to this Agreement, the Lessee on the termination of the Basic Lease will, at the City’s option, attorn to, or enter into a direct lease on identical terms with, the City;

(4) The Lessee shall indemnify the City, as a third party beneficiary, with respect to all matters described in Section 31 of the Basic Lease;

(5) The Lessee shall not use the Premises or any other portion of the Airport for any use other than as permitted under the Basic Lease;

(6) The Lessee shall use, operate and maintain the Premises in a manner consistent with the Port Authority’s obligations under Section 28 of the Basic Lease;

(7) The failure of the Lessee to comply with the foregoing provisions shall be an event of default under this Agreement, which, after the giving of reasonable notice, shall provide the Port Authority with the right to terminate this Agreement and exercise any other rights that the Port Authority may have as the landlord hereunder; and

(8) The City shall be named as an additional insured or loss payee, as applicable, under each policy of insurance procured by the Lessee pursuant to this Agreement.

# ARTICLE 20. COMPLIANCE WITH LAWS AND RULES AND REGULATIONS

## Section 20.1 Licenses and Permits.

The Lessee shall procure and maintain in effect throughout the term of the letting under this Agreement all licenses, certificates, permits or other authorization from all Governmental Authorities having jurisdiction over the operations of the Lessee which may be necessary for the conduct of its operations in and on the Premises; provided*,* however*,* that all Construction Plan approvals and any construction, building or occupancy permit(s) with respect to the construction of the Project or occupancy of the Premises shall be subject to the jurisdiction of the Port Authority, as provided under the provisions of Article 5 of this Agreement, including without limitation Section 5.3.

Section 20.2 Compliance with Requirements.

The Lessee shall promptly:

#### comply with the provisions of any and all Requirements; and

#### cure all violations or notices of non-compliance, whether formally filed against the Premises or set forth in any summons, notice of violation, warning notice or other legal process for the enforcement of any such Requirements,

which may pertain or apply to its operations on the Premises or its occupancy of the Premises, including any such that apply to construction, maintenance, health and fire protection and which would be applicable if the owner of the Premises were a private corporation. The Lessee shall deliver to the Port Authority promptly after receipt a true copy of any such notice of violation, warning notice or other legal process requiring the performance of construction. The Lessee shall make any and all structural and non—structural improvements, alterations or repairs of the Premises and perform all Remediation (except to the extent this Agreement provides that the Lessee does not have the obligation to Remediate) in order to fully satisfy the compliance obligations set forth herein.

## Section 20.3 Effect of Port Authority Immunity.

No immunity or exemption of the Port Authority from the application to itself of any Requirement shall excuse compliance or be grounds for noncompliance on the part of the Lessee, and no provisions of this Article shall constitute a waiver of such immunity or exemption.

Section 20.4. Rules and Regulations.

The Lessee covenants and agrees to observe and obey (and to require its officers, members, employees, agents, representatives to observe and obey, and to require contractors, customers, guests, invitees and those doing business with it to observe and obey) all Rules and Regulations.

# ARTICLE 20A. JOINT PERIODIC CONDITION SURVEY

## *(a) Definitions.*

## As used herein the following terms shall have the following meanings:

“**Condition Survey**” shall mean an inspection by the Condition Survey Contractor of the Premises, including without limitation the then current state of cleaning, maintenance and repairs, janitorial services, painting, structural and nonstructural conditions, surface and subsurface conditions, environmental conditions, lighting of building areas, ramp and apron areas, and the condition of utilities and utility systems, fire-fighting and fire protection equipment and systems, communications and communications systems, antipollution systems and devices, fuel facilities and systems, and the Lessee’s fixtures, equipment and personal property.

“**Condition Survey Contract**” shall mean a contract awarded to a Condition Survey Contractor, or entered into between the Port Authority and a Condition Survey Contractor, for the performance by such Condition Survey Contractor of a Condition Survey at any of the applicable times specified in paragraph (b) hereof;

“**Condition Survey Contractor**” shall mean a reputable engineering firm, licensed or authorized to do business in the State of New York, to whom a Condition Survey Contract is awarded pursuant to paragraph (b) hereof.

“**Condition Survey Costs**” shall mean, with respect to each Condition Survey, all amounts paid and expenses incurred by the Port Authority, including all interest, costs, damages and penalties, for, relating to or in connection with Condition Survey work to be performed under the Condition Survey Contract.

“**Condition Survey Report**” shall mean the report prepared by the Condition Survey Contractor after its completion of the Condition Survey, including without limitation any and all recommendations for repair, maintenance, rebuilding and cleaning of all items or areas covered by a Condition Survey.

“**Report Date**” shall mean the date of the Port Authority’s written notice to the Lessee by which the Port Authority delivers to the Lessee the Condition Survey Report.

## *(b) Condition Survey.*

## In addition to any inspection of the Premises which may be made under any other Section of this Agreement or otherwise, a Condition Survey of the Premises shall be conducted by a Condition Survey Contractor (x) not more frequently than once every five (5) years (a “**Periodic Condition Survey**”), and (y) once within the last year of the Term (the “**Final Condition Survey**”), subject to and in accordance with the terms and conditions provided below.

## *(c) Time Period and Notice Procedure*.

## From time to time, the Port Authority may notify the Lessee of a proposed Condition Survey (which may include all or particular portions of the items enumerated above in the definition of “Condition Survey”) and including the name of the proposed Condition Survey Contractor who will perform the Condition Survey and the proposed scope and fee structure of the proposed Condition Survey Contract. Such notices of proposed Condition Survey shall, in the case of Periodic Condition Surveys, not be made more than once in every five (5) years, and in the case of the Final Condition Survey, not be made earlier than sixty (60) days preceding the last day of the month which constitutes the twelfth month preceding the Expiration Date. Within thirty (30) days after the Port Authority’s notice to the Lessee, the Lessee shall advise the Port Authority in writing of its concurrence or objection to the proposed Condition Survey Contract. In the event the Lessee fails to respond within such thirty-day period, such non-response shall be deemed a concurrence and the Port Authority shall proceed with the said Condition Survey Contract. In the event the Lessee notifies the Port Authority of its objections to the proposed Condition Survey Contract or Condition Survey Contractor, the parties shall consult with each other in good faith to resolve such dispute. If such resolution is not reached within thirty (30) days, then the Port Authority, if it so elects, shall make a determination as to the issue or issues in dispute. The parties hereby agree that the Port Authority’s determination of said issues, including the Condition Survey Contract and the Condition Survey Contractor, shall be final.

## *(d) Port Authority Policies and Practices.*

## It is hereby expressly understood and agreed that the selection of each Condition Survey Contractor and the award of any Condition Survey Contract shall be subject to and consistent with the Port Authority’s policies and practices for the selection and award of similar contracts and the Port Authority shall have as full a right to require the use of competitive bidding and award, or other basis of award, for any such Condition Survey Contract as if the work on such contract were being performed solely for the Port Authority; and, further, that the Condition Survey Contract shall contain terms and conditions which are standard to Port Authority contracts or consistent with such standard provisions.

## *(e) Costs.*

## With respect to each Condition Survey, all Condition Survey Costs shall be shared equally between the Port Authority and the Lessee. Accordingly, the Lessee hereby agrees to pay to the Port Authority fifty percent (50%) of the Condition Survey Costs with respect to each Condition Survey as follows:

### The Lessee shall pay to or reimburse the Port Authority for the Condition Survey Costs as follows: The Port Authority shall after the completion of the Condition Survey under a Condition Survey Contract and, if it elects, also from time to time during the course of the performance of such Condition Survey, submit to the Lessee a certificate or certificates setting forth the Condition Survey Costs at the date of each such certificate. Within thirty (30) days after the delivery of each such certificate, the Lessee shall pay to the Port Authority an amount representing fifty percent (50%) of the amount of the Condition Survey Costs set forth in such certificate. Upon its final determination of the Condition Survey Costs, the Port Authority shall submit to the Lessee a certificate marked “Final”, setting forth the final determination of the Condition Survey Costs with respect to each Condition Survey Contract as reduced by any previous payment with respect to such Condition Survey Contract, and the Lessee shall and hereby agrees to pay to the Port Authority within thirty (30) days of the date of such certificate an amount representing fifty percent (50%) of the amount of the Condition Survey Costs set forth in such certificate; provided, however, that neither the foregoing nor any certificate delivered by the Port Authority, nor any payment made by the Lessee shall waive or impair any right of the Port Authority of review and audit with respect to the Condition Survey Costs with respect to each Condition Survey Contract; and provided, further, that in the event any such review or audit by the Port Authority requires an adjustment of the Condition Survey Costs, the Lessee promptly shall be credited with, or shall pay, as the case may be, all amounts required by such adjustment.

(2) Any and all amounts required to be paid by the Lessee hereunder may be added to any installment of rental thereafter due hereunder and each and every part of the same shall be and become additional Rental, recoverable by the Port Authority in the same manner and with like remedies as if it were part of the Rental as set forth in the Article hereof entitled “*Rental*”.

## *(f) Required and Recommended Actions.*

## Within ninety (90) days after the Report Date, the Lessee shall commence all required or recommended items and actions contained in each Condition Survey Report that are necessary or required to meet the Lessee’s maintenance, repair or other obligations, duties or responsibilities under this Agreement, unless the Port Authority expressly advises the Lessee to the contrary as to any particular item(s), and the Lessee shall diligently continue the same to completion; provided, however, that the Lessee shall *promptly* commence any and all items, action or work related to or affecting or involving fire safety, health, structural integrity, life safety, security and other emergency response.

## *(g) Rights of Entry.*

## The Condition Survey Contractor shall have all rights of entry to the Premises during all reasonable times as appropriate or required to perform or complete the Condition Survey and the Condition Survey Report under the Condition Survey Contract.

## *(h) No Waiver, etc.*

## Neither the provisions of this Section, including without limitation the right of the Port Authority to have the Lessee perform and complete the work recommended or required by the Condition Survey Report, the obligation of the Lessee so to perform and complete such work, nor any such performance thereof by the Lessee, any failure of the parties to select a Condition Survey Contractor, any failure of any Condition Survey Contractor to perform and complete a Condition Survey Contract, nor any failure by the Lessee or the Port Authority to pay the Condition Survey Costs with respect to any Condition Survey Contract or any portion thereof, shall be deemed to release, waive, diminish, limit or impair any of the obligations, duties, responsibilities or liabilities of the Lessee under any term, provision, covenant or condition of this Agreement or to limit, waive, affect, restrict or impair any right or remedy of the Port Authority, including without limitation any right of the Port Authority to terminate the letting hereunder, whether before or after the Report Date. Without limitation as to the foregoing, it is expressly understood and agreed that the Lessee shall not postpone or delay any action, maintenance, rebuilding or repair or other item or thing required to be taken by the Lessee under any other section of this Agreement.

# ARTICLE 20B. ENVIRONMENTAL OBLIGATIONS

## *(a) Definitions.*

## The following terms shall have the respective meanings provided below:

“**Analyzed Items**” shall mean, with respect to the ground water and soil, respectively, the constituents for which the ground water samples and the soil samples described in the Environmental Report were tested.

“**Environmental Report**” shall mean the Initial Environmental Report and all Remediation Completion Reports, if any.

“**Existing Condition**” shall mean the levels of Analyzed Items in the soil and ground water for all portions of the Premises as derived by applying the methodology set forth in paragraph (j) below to the test results in the Initial Environmental Report, as such test results may be superseded and supplemented by the test results in each Remediation Completion Report in accordance with the provisions of paragraph (m) of this Section. The Lessee hereby specifically acknowledges that the “Existing Condition” does not include any condition of or within the Building, or above-ground elsewhere on the Premises, including without limitation the presence of asbestos, the remediation of which shall be solely the Lessee’s obligation.

“**Initial Environmental Report**” shall mean the report attached hereto as Exhibit G, as it may be supplemented by pre- or post-construction sampling, performed in accordance with methodologies approved in advance by the Port Authority.

“**Remediate**” or “**Remediation**” shall mean the investigation (including any feasibility studies or reports), cleanup, removal, abatement, transportation, disposal, treatment (including *in situ* treatment), management, stabilization, neutralization, collection or containment of a Hazardous Substance or contamination, that may be required to satisfy Environmental Requirements, in each case including without limitation any closure, restoration or monitoring operations and maintenance activities that may be required by any Governmental Authority after the completion of such investigation, cleanup, removal, transportation, disposal, treatment, neutralization, collection or containment activities as well as the performance of any and all obligations imposed by any Governmental Agency in connection with such investigation, cleanup, removal, transportation, disposal, treatment (including *in situ* treatment), management, stabilization, neutralization, collection or containment (including any such obligation that may be imposed pursuant to an environmental permit or a consent order).

“**Remediation Completion Report**” shall have the meaning set forth in paragraph (m) of this Section.

## *(b) Lessee’s Assumption of Environmental Liability.*

(1) Without limiting the generality of any of the other terms and provisions of this Agreement, but subject to the provisions of paragraph (b)(2) below, the Lessee hereby expressly agrees to assume all responsibility for, relieve the Port Authority from, and reimburse the Port Authority for, any and all risks, claims, penalties, costs and expenses of any kind whatsoever caused by, arising out of or in connection with, the condition of the Premises, whether any aspect of such condition existed prior to, on or after the Lease Commencement Date, including without limitation all Environmental Requirements and all Environmental Damages, and to indemnify and hold harmless the Indemnified Parties against all such risks, claims, penalties, responsibilities, costs and expenses.

(2) Notwithstanding the foregoing, it is hereby agreed and understood that *except as set forth in paragraphs (k), (q) and (r) of this Section*, the Lessee shall not be responsible for the following:

#### the Remediation of the Existing Condition;

#### the Remediation of Hazardous Substances in the soil or ground water in, on or under the Premises caused by the sole acts or omissions of the Port Authority (or its agents conducting activities on or near the Premises) on or after the Lease Commencement Date;

#### the Remediation of any Spill that is not caused or exacerbated by the Construction Work or other acts or omissions of the Lessee, its agents, contractors or sublessees, outside of any area excavated during the Construction Work, plus a ten (10)-foot wide strip of land around the perimeter of such excavated area;

#### fines and penalties arising out of the Existing Condition if the fines and penalties are imposed due to the failure to have the Existing Condition Remediated, but only so long as the Lessee shall not in any material manner have obstructed or interfered with the performance of the Remediation of the Existing Condition, and

#### any Hazardous Substance that has migrated (x) onto the Premises from outside the Premises or (y) outside the Premises from the Premises, the migration of which is not a result of or in connection with any act or omission, including without limitation any non-negligent act or omission, of the Lessee or of Persons other than the Lessee which use, occupy or are on the Premises with the consent of the Lessee.

(3) The Lessee agrees that in any legal action or proceeding in which the Port Authority and the Lessee are opposing parties, the Lessee shall have the burden of proof, as hereinafter defined, as to any and all issues of fact with respect to: (1) whether the presence of any Hazardous Substance on, about or under the Premises occurred prior or subsequent to the Lease Commencement Date; (2) whether any Hazardous Substance disposed of or released from the Premises or which migrated from the Premises came to be present on, about or under the Premises prior or subsequent to the Lease Commencement Date; and (3) whether the Lessee exacerbated any pre-existing environmental condition so as to cause a Hazardous Substance to first become regulated during the Term. “Burden of proof” shall mean both the legal burden of going forward with the evidence and the legal burden of establishing the truth of any fact by a preponderance of the evidence.

## *(c) Compliance with Environmental Requirements.*

## Without limiting the Lessee’s obligations elsewhere under this Agreement to comply with all laws, ordinances, governmental rules, regulations and orders which were or at any time are in effect during the Term, the Lessee understands and agrees that, except as provided in paragraph (b)(2) of this Section, it shall be obligated, at its cost and expense, to comply with, and relieve the Port Authority from compliance with, all Environmental Requirements which are applicable to or which affect (w) the Premises, (x) the operations of, or work performed by, the Lessee or others with the consent of the Lessee at the Premises or the Lessee’s operations at the Airport, (y) the occupancy and use of the Premises by the Lessee or by others with its consent or (z) any Hazardous Substance which has migrated from the Premises. Nothing in the foregoing shall be construed as a submission by the Port Authority to the application to itself of any Environmental Requirements; provided, however, that no immunity or exemption of the Port Authority from any Environmental Requirements shall excuse compliance or be grounds for noncompliance on the part of the Lessee. Without limiting the generality of the foregoing and as part of the Lessee’s fulfillment of the foregoing obligations, the Lessee shall be responsible, at its sole cost and expense and subject to the direction of the Port Authority, for:

(1) the preparation of and submission to all applicable Governmental Authorities of any notice, negative declaration, remedial action workplan, no further action letter, remediation agreement or any other documentation or information as may be required by Environmental Requirements;

(2) the obtaining of any surety bond or the giving of any other financial assurances; and

(3) complying with the provisions of all Environmental Requirements becoming effective on or relating to the termination, expiration or surrender of the letting of the Premises or of any portion thereof under this Agreement, or on the closure or transfer of the Lessee’s operations at the Premises.

## *(d) Obligation to Remediate.*

## In addition to and without limiting the generality of the obligations of the Lessee set forth above and elsewhere in this Agreement, the Lessee shall, at its sole cost and expense and in accordance with and subject to the provisions of the Article hereof entitled “*Construction”*, upon notice from the Port Authority, promptly take all actions to:

(1) completely Remediate all Hazardous Substances in, on and under the Premises and at the Airport resulting from or in connection with the use and occupancy of the Premises by the Lessee or any affiliated company of the Lessee or which have been or permitted to be disposed of, released, discharged or otherwise placed in, on or under the Airport by the Lessee or any affiliated company of the Lessee or which have been disposed of, released, discharged or otherwise placed in, on or under the Premises during the term of the letting of the Premises under this Agreement or during the term of any previous agreement between the Lessee or any affiliated company of the Lessee and the Port Authority covering the Lessee’s or any such affiliated company’s use and/or occupancy of the Premises or any portion thereof;

(2) except as provided in paragraph (b)(2) of this Section, Remediate, as necessary to mitigate any Environmental Damages, all Hazardous Substances in, on or under the Premises, or which have migrated from the Premises to any other property, which any Governmental Authority or any Environmental Requirement or any violation thereof require to be Remediated; and

(3) except as provided in paragraph (b)(2) of this Section, Remediate, as necessary to mitigate any Environmental Damages, all Hazardous Substances in, on or under the Premises, or which have migrated from or from under the Premises, which any Governmental Authority or any Environmental Requirement or any violation thereof require to be Remediated.

## *(e) Particular Obligations Included.*

## The obligations set forth in paragraphs (c) and (d) of this Section shall include but not be limited to the investigation of the environmental condition of the area to be Remediated, the preparation of feasibility studies, reports and remedial plans, and the performance of all Remediation and related work shall be performed in a good, safe and workmanlike manner. The Lessee shall promptly provide the Port Authority with copies of all test results and reports generated in connection with such obligations. Except as otherwise required by Environmental Requirements or any Governmental Authority, promptly upon completion of such investigation and Remediation, the Lessee shall seal or cap all monitoring wells and test holes, remove all associated equipment and restore the Remediated property.

## *(f) Port Authority Remedies.*

## Without limiting the Port Authority’s other remedies under this Agreement or, generally, at law or equity, the Port Authority shall have the right, during and after the Term, to such equitable relief, including restraining injunctions and declaratory judgments, to enforce compliance by the Lessee of its environmental obligations under this Agreement, including without limitation all the Lessee’s obligations under this Section. In the event that the Lessee fails to comply with or perform any of such obligations, the Port Authority at any time during or subsequent to the termination, expiration or surrender of the letting of the Premises or any portion thereof may elect (but shall not be required) to perform such obligations, and upon demand the Lessee shall pay to the Port Authority as additional Rental its costs thereof, including all overhead costs as determined by the Port Authority.

## *(g) Information and Reports.*

## Without limiting any other of the Lessee’s obligations under this Agreement and except as provided in paragraph (b)(2) of this Section, the Lessee, at its sole cost and expense, shall provide the General Manager of the Airport with such information, documentation, records, correspondence, notices, reports, tests, results, and certifications and any other information as the Port Authority shall request in connection with any Environmental Requirements or Environmental Damages, and the Lessee shall promptly acknowledge, swear to, sign or otherwise fully execute the same. The Lessee agrees that any of the foregoing may be filed by the Port Authority with the appropriate Governmental Authority on behalf of the Lessee at the Lessee’s cost and expense. Further, the Lessee agrees, unless directed otherwise by the Port Authority, to provide the General Manager of the Airport with copies of all information, documentation, records, correspondence, notices, certifications, reports, test results and all other submissions provided by the Lessee to a Governmental Authority, and by a Governmental Authority to the Lessee, within two (2) Business Days after the same have been made available to or received by the Lessee with respect to any Environmental Requirements or Environmental Damages.

## *(h) Indemnification.*

## Without limiting the generality of any other provision of this Agreement, and except as provided in paragraph (b)(2) of this Section and except with respect to claims where the injury was sustained prior to the Lease Commencement Date, the Lessee shall indemnify, hold harmless and reimburse the Indemnified Parties from all claims, demands, penalties, fines, liabilities (including strict liability), settlements, attorney and consultant fees, investigation and laboratory fees, Remediation costs, court costs and litigation expenses, damages, judgments, losses, costs and expenses of whatsoever kind or nature and whether known or unknown, contingent or otherwise, just or unjust, groundless, unforeseeable or otherwise, arising or alleged to arise out of or in any way related to any Environmental Damages or any Environmental Requirement which the Lessee is obligated to comply with pursuant to this Agreement, or the risks and responsibilities assumed hereunder by the Lessee for the condition of the Premises or a breach or default of the Lessee’s obligations under this Section. If so directed, the Lessee shall at its own expense defend any suit based upon the foregoing, and in handling such it shall not, without obtaining express advance permission from the General Counsel of the Port Authority, raise any defense involving in any way the jurisdiction of the tribunal over the person of the Port Authority, the immunity of the Port Authority, its Commissioners, officers, agents or employees, the governmental nature of the Port Authority or the provisions of any statutes respecting suits against the Port Authority.

## *(i) Compliance Standard.*

(1) Without limiting the generality of any provision of this Agreement, in the event that any Environmental Requirement sets forth more than one compliance standard, the Lessee agrees that the standard or standards to be applied in connection with any obligation it may have under this Agreement with respect to said Environmental Requirement shall be that which requires or permits the lowest level of a Hazardous Substance; provided, however, that in the event such lowest level of a Hazardous Substance requires or allows the imposition of any restriction of any nature whatsoever upon the use or occupancy of the Premises or any other portion of the Airport or upon any operations or activities conducted or to be conducted on the Premises or the Airport or upon the transfer of the Premises or the Airport, then the Lessee shall Remediate to such a level so that there is no such restriction placed upon the use and occupancy of the Premises or the Airport or upon any operations or activities conducted or to be conducted on the Premises or the Airport.

(2) The Lessee further agrees that, notwithstanding the terms and conditions of paragraph (i)(1) above, the Port Authority shall have the right at any time and from time to time, acting in its sole discretion and without any obligation whatsoever to the Lessee or otherwise to do so, to designate any level or levels or standard or standards of Remediation permitted or required under any Environmental Requirement, and such designation shall be binding upon the Lessee with respect to its obligations under this Agreement with respect to Environmental Requirements.

(3) Nothing in this paragraph (i) shall be construed to require the Lessee to Remediate any Analyzed Item below the Existing Condition except as otherwise required by or as set forth in this Agreement, including without limitation as required by or as set forth in paragraphs (k), (q) and (r) of this Section.

## *(j) Methodology.*

## The methodology to be used for the purpose of this Section to determine for any Existing Condition the level of an Analyzed Item at any location in, on or under the Premises shall be, for ground water, straight line interpolation methodology utilizing principles of hydrogeologic interpretation, and for soil, the EPA geostatistical software system applicable at any particular time and, notwithstanding any other evidence to the contrary, including without limitation anything contained in the reports constituting a part of the Environmental Report, the Existing Condition as so determined shall constitute, for all purposes as between the Lessee and the Port Authority, the levels of the Analyzed Items in the soil and ground water in, on and under the Premises; provided, however, that with respect to each location from which soil and/or water samples have been taken and the tests results thereof form a part of the Existing Condition, the level of each Analyzed Item that was found at such location shall constitute the test result of such Analyzed Item at such location.

## *(k) Disposal of Matter.*

(1) It is expressly understood and agreed that the proper handling, delivery, treatment, storage, transportation, disposal and depositing (collectively, “**Disposal**”), whether on or off the Airport, of any soil, dirt, sand, silt, water, asbestos, lead, PCB’s, demolition or construction debris or other matter excavated, disturbed or removed by the Lessee or its contractors at, from or under the Premises or any other area of the Airport (all such soil, etc. or other matter, collectively, the “**Matter**”) at any time or times, and regardless of the nature or composition of such Matter, including without limitation any and all Disposal of any Matter in connection with the performance of the construction, repair, replacement, rebuilding of the Premises, or any other construction work, and any and all Remediation and Disposal of any Matter and any and all other Remediation and Disposal (whether soil, upper aquifer or otherwise) necessary, required or appropriate as a result of, caused by, incidental to or triggered by such excavation, disturbance or removal of the Matter or arising therefrom, and the taking or doing of any and all other action or actions necessary, required or appropriate in connection therewith, shall be the sole and complete responsibility of the Lessee, including without limitation all costs and expenses thereof and any and all Environmental Damages, Environmental Requirements, claims, penalties and other expenses relating thereto. The foregoing obligations of the Lessee shall obtain and apply with full force and effect irrespective of the nature or source of any contaminant, pollutant, chemical, waste or other substance or whether any of the same is a Hazardous Substance or whether any of the same is at a level or levels above or below the level or levels of any of the Analyzed Items constituting the Existing Condition or whether there has or has not been any decrease or increase in such level or levels. The Lessee shall perform all of the foregoing in accordance with and subject to all the terms, provisions, covenants and conditions of this Agreement.

(2) Without limiting the generality of any other term or condition of this Agreement, title to any Matter excavated or removed by the Lessee and not used at the Premises shall vest in the Lessee upon the excavation or removal thereof and all such Matter shall be delivered and deposited by the Lessee at the Lessee’s sole cost and expense to a location off the Airport in accordance with the terms and conditions of this Agreement and all Environmental Requirements. The entire proceeds, if any, of the sale or other disposition of the Matter shall belong to the Lessee.

(3) In the event the Lessee discovers any Hazardous Substance in, on or under the Premises, the Lessee in reporting such Hazardous Substance shall direct such report to the attention of such individual at the subject Governmental Authority as the General Manager of the Airport shall require in order to assure consistency in the environmental management of the Airport, provided, however, that notwithstanding the foregoing, in no event shall the Lessee be required by this paragraph (k)(3) to violate any Environmental Requirement.

(4) Promptly upon final disposition of any Hazardous Substance from the Premises or the Airport, the Lessee shall submit to the Port Authority a “Certification of Final Disposal” stating the type and amount of material disposed, the method of disposal and the owner and location of the disposal facility. The format of such certification shall follow the requirements, if any, of Governmental Agencies having jurisdiction, as if the Port Authority were a private organization but the name of the Port Authority shall not appear on any certificate or other document as a generator or owner of such material.

## *(l) Port Authority Right to Enter for Investigations.*

## Without limiting the foregoing and without limiting the generality of the provisions of the Section hereof entitled “*Rights of Entry Reserved*”, and subject to and in accordance with the provisions of such Section, the Port Authority and its designees shall have the right but not the obligation to enter upon the Premises upon forty-eight (48) hours’ notice to the Lessee to conduct testing and related activities from existing wells, if any, to make additional wells and borings and to conduct testing and related activities therefrom and to perform such activities as shall be necessary to Remediate the Existing Condition, including but not limited to conducting pumping operations from any such wells. In the exercise of the foregoing rights, the Port Authority and its designees shall not unreasonably interfere with the Lessee’s use and occupancy of the Premises.

## *(m) Remediation Completion Reports.*

## After any Person performs any Remediation on the Premises, such Person may, but shall not be obligated to, sample and test the soil and/or aquifer of the Premises or portions thereof and set forth the results of such samplings and tests in a report (any such report and test results, a “**Remediation Completion Report**”). Upon delivery of a Remediation Completion Report to the Lessee and the Port Authority, such Remediation Completion Report shall (x) supersede and replace the existing Environmental Report or the applicable portions thereof, to the extent such test results and report are of samples of Analyzed Items taken from the same well or boring or a new well or boring immediately adjacent to such well or boring, and (y) supplement the existing Environmental Report or the applicable portions thereof to the extent the test results and report would not supersede (pursuant to the foregoing clause (x)) any test results and reports in the existing Environmental Report, provided, however, that said sampling and testing shall produce a fair and representative sampling of the Premises, shall be analyzed by a New York State approved independent laboratory, and shall have been performed in accordance with a methodology approved by the Port Authority.

## *(n) Protection and Maintenance of Wells.*

## Without limiting the generality of the provisions of the Article hereof entitled “*Maintenance and Repair*”, the Lessee agrees to protect and maintain the wells referred to the Environmental Report and paragraph (m) of this Section and shall repair any damage thereto that may occur during the term of the letting hereunder that has not been caused by the activities of the Port Authority or its designee(s) (if any) or any prior occupant of the Premises.

## *(o) Survival of Obligations.*

## Without limiting the generality of any other term or provision of this Agreement, all of the obligations of the Lessee under this Section shall survive the expiration or earlier termination of the letting of the Premises or any portion thereof.

## *(p) No Waiver of Rights against Third Parties.*

## The terms and conditions of this Section are intended to allocate the obligations and responsibilities between the Lessee and the Port Authority, and nothing in this Section or elsewhere in this Agreement shall be deemed to limit, modify waive or otherwise alter the rights, claims and remedies which the Port Authority or the Lessee may have against third parties at law, equity or otherwise.

## *(q) Lessee Responsibility for Existing Condition.*

(1) Notwithstanding any other term or provision of this Agreement, the Existing Condition shall in no event include any Hazardous Substance whose presence in, on or under the Premises was caused by or resulted from the use and occupancy of the Premises by the Lessee or by any Affiliate, or the performance of any work by any of them, or the acts or omissions of the Lessee, its officers, agents or employees, or the acts or omissions of any Affiliate of the Lessee or of any sublessees or others who occupied the Premises with the permission of the Lessee or an Affiliate of the Lessee or their officers, agents or employees.

(2) Notwithstanding any other term or provision of this Agreement, the Existing Condition shall in no event include any Hazardous Substance pre-existing in, on or under the Premises if such Hazardous Substance first becomes regulated during the Term by reason of the exacerbation of an existing condition caused by or resulting from the use and occupancy of the Premises by the Lessee or by any Affiliate, or the performance of any work by any of them, or the acts or omissions of the Lessee, its officers, agents or employees, or the acts or omissions of any Affiliate of the Lessee or of any sublessees or others who occupied the Premises with the permission of the Lessee or an Affiliate of the Lessee or their officers, agents or employees.

(3) The Lessee shall be responsible for the Remediation of the Existing Condition and for fines and penalties arising, in whole or in part, out of the inaccessibility at any time of the Premises for Remediation by any prior occupant of the Premises or by the Port Authority or its designees or others due to any act or omission, interruption, obstruction or hindrance by the Lessee or any of its agents, contractors or representatives, sublessees or subusers, including but not limited to, any refusal or failure by the Lessee or any of its agents, contractors or representatives, sublessees or subusers to grant or allow full and complete access to the Premises, or any portion thereof to any prior occupant of the Premises, the Port Authority or its designees. Neither said access nor any such work by any prior occupant of the Premises, the Port Authority or its designees, nor any approval or consent granted to any prior occupant of the Premises or any designee of the Port Authority to perform such work, shall result in or entitle the Lessee to any abatement, reduction, diminution or suspension of any of the rentals or charges under this Agreement.

## *(r) Incidental Remediation of Existing Condition.*

## Notwithstanding any other term or condition of this Agreement, it is hereby understood and agreed that the Lessee’s obligations under this Agreement shall not be diminished or relieved in any way in the event that the Existing Condition, or any portion thereof, is or will be wholly or partially Remediated in consequence of or incidental to the Lessee’s performance of any of its obligations under this Agreement, whether due to the fact that the Lessee cannot Remediate one or more Hazardous Substances for which it is responsible to Remediate without also Remediating one or more Analyzed Items for which it is not responsible, or due to cost or expedience or for any other reason; and in no event shall the Port Authority have any responsibility to participate in, or share in the cost of, any such Remediation. Without limitation as to the generality of the foregoing, the Lessee acknowledges and agrees that the proper removal and disposal of asbestos from the Premises constitutes a part of the Lessee’s Construction Work hereunder, with respect to which the Lessee is solely responsible for all costs and expenses.

## *(s) Similarly Situated Persons.*

## The Port Authority has advised the Lessee that it is the intention of the Port Authority with respect to the application of pollution prevention programs, “best management practices plans” and other voluntary programs adopted and agreements made by the Port Authority with any governmental agencies, departments, commissions, boards, bureaus or instrumentalities of the United States, states and political subdivisions thereof constituting Environmental Requirements that the Port Authority will treat the Lessee in a similar manner as similarly situated Persons at the Airport.

## *(t) Remediation to Existing Condition at End of Term.*

## The Lessee hereby covenants and agrees that it shall, on or before the cessation of the letting hereunder or any portion thereof (whether such cessation be by termination, expiration or otherwise), Remediate each Analyzed Item, as necessary, to a level not exceeding the level of such Analyzed Item constituting a part of the Existing Condition (subject in all events, however, to the provisions of paragraph (q) of this Section).

## *(u) Exit Baseline.*

(1) Without limiting any other term or provision hereof, all the obligations of the Lessee under this Section shall survive the expiration or termination of the letting of the Premises or any portion thereof, *provided*, *however,* the Lessee shall not be responsible for any Hazardous Substances in, on, under or about the Premises which the Lessee can prove occurred after the date that the Lessee shall have surrendered the Premises to the Port Authority and were not due to the acts or omissions of the Lessee.

(2) Between the eighth (8th) and sixth (6th) months immediately preceding the Expiration Date or within three months after the effective date of the termination the letting hereunder, as the case may be, the Lessee shall at its sole cost and expense and subject to the terms and provisions of the Article hereof entitled “*Construction*”, sample and test the soil and ground water in, on and under the Premises in accordance with such standards, methods, protocol and procedures as shall be required by the Port Authority in it sole discretion after consultation with the Lessee in such locations as specified by the Port Authority (such sampling and testing of the soil and groundwater, the “**Exit Baseline**”). All such sampling, testing and the preparation of any associated report shall be performed by a New York State approved independent consultant and laboratory, said sampling and testing shall produce a fair and representative sampling of the Premises and said sampling and testing shall be performed in accordance with methodology approved by the Port Authority.

(3) The Exit Baseline and the test results therefrom may be used by the Lessee to evidence that a Hazardous Substance in, on or under the Premises occurred after the date that the Lessee shall have surrendered the Premises to the Port Authority.

# ARTICLE 20C. STORAGE TANKS

## *(a) Definitions.*

## The following terms shall have the respective meanings set forth as follows:

“**Discharge**” shall mean the presence, pumping, pouring, venting, emitting, emptying, leakage, deposit, spill, discharge or other release of Hazardous Substances from Tanks or in connection with their use, operation, maintenance, testing or repair, but shall not include the Existing Condition.

“**Tanks**” shall mean all underground storage tanks and all above ground storage tanks installed in the Premises as of the commencement of the Lessee’s occupancy of the Premises or any portion thereof, together with all underground storage tanks and all above ground storage tanks installed in the Premises during the Term, and their appurtenances, pipes, lines, fixtures and other related equipment.

## *(b) Lessee to Have Responsibility for All Tanks.*

## Notwithstanding any other facts or circumstances to the contrary, including without limitation any vesting of title to the Tanks in the City of New York pursuant to any construction or alteration application or otherwise, the Lessee hereby agrees that title and ownership of the Tanks shall be and remain in the Lessee, that all Tanks shall be registered by the Lessee in the name of the Lessee as operator and owner and that the Lessee shall have full and sole responsibility for all the Tanks, and shall release and relieve the Port Authority from all costs and responsibility for the Tanks. The Port Authority has made no representations or warranties with respect to the Tanks or their location and shall assume no responsibility for the Tanks. All Tanks installed by the Lessee shall be installed pursuant to the terms and conditions of this Agreement including without limitation the Article hereof entitled “*Construction*”, and nothing in this Section shall be deemed to be permission or authorization to install any Tanks.

## *(c) Maintenance of Tanks.*

## Without limiting the generality of any of the provisions of this Agreement, the Lessee agrees that it shall be solely responsible for maintaining, testing and repairing the Tanks. The Lessee shall not perform any servicing, repair or non-routine maintenance to the Tanks without the prior written approval of the Port Authority. In addition, the Lessee, at its sole cost and expense, shall make all modifications to the Tanks and take all other actions so that the Tanks shall at all times comply with all applicable Environmental Requirements.

## *(d) Removal.*

(1) All Tanks installed during the term of the letting under this Agreement shall be removed by the Lessee from the Premises on or before the expiration of this Agreement (unless the Lessee shall have received the prior written approval of the Port Authority to abandon a tank in place and such abandonment continues to meet all applicable Environmental Requirements) and the Lessee agrees to dispose of the Tanks off the Airport in accordance with all applicable Environmental Requirements.

(2) Any removal of the Tanks shall be performed pursuant to an alteration application prepared by the Lessee and submitted to the Port Authority for the Port Authority’s approval and in connection with such removal, the Lessee shall restore the Premises to the same condition existing prior to the installation of the Tanks, shall perform such testing of the Tanks and of the soil, sub-soil and ground water in the vicinity of the Tanks as shall be required by the Port Authority and shall clean-up and remediate any contamination disclosed by said testing. In the event the Lessee does not remove the Tanks as required by subparagraph (l) above, the Port Authority may enter upon the Premises and effect the removal and disposal of the Tanks, restoration of the Premises and such remediation and the Lessee hereby agrees to pay all costs and expenses of the Port Authority arising out of such removal, disposal, restoration and remediation.

## *(e) Compliance with Environmental Requirements.*

## Without limiting the generality of any other term or provision of this Agreement, the Lessee shall at its cost and expense comply with all Environmental Requirements applicable to the Tanks, including without limitation any modifications or closures required thereby, and any Discharge, including without limitation testing the Tanks and registering the Tanks in the name of the Lessee as owner and operator, submitting all required clean-up plans, bonds and other financial assurances, performing all required clean-up and remediation of Discharges and filing all reports, making all submissions to, providing all information required by, and complying with all requirements of, all Governmental Authorities pursuant to all such Environmental Requirements. Nothing in the foregoing shall be construed as a submission by the Port Authority to the application to itself of the Environmental Requirements, provided, however, no immunity or exemption of the Port Authority from the Environmental Requirements shall excuse the compliance therewith by the Lessee or shall be grounds for non-compliance therewith by the Lessee.

## *(f) Lessee’s Assumption of Risks.*

(1) The Lessee hereby assumes all risks arising out of or in connection with the Tanks and all Discharges whether or not foreseen or unforeseen and shall indemnify and hold harmless the Indemnified Parties from and against (and shall reimburse the Port Authority for their costs and expenses including without limitation penalties, fines, liabilities, settlements, damages, attorney and consultant fees, investigation and laboratory fees, clean-up and remediation costs, court costs and litigation expenses), all claims and demands, just or unjust, of third persons (such claims and demands, “**Tank** **Claims**”) including but not limited to those for personal injuries (including death), property damages, or environmental impairment, arising or alleged to arise out of or in any way related to, the failure of the Lessee to comply with each and every term and provision of this Agreement, or the Tanks, or any Discharge, or any lawsuit brought or threatened, settlement reached or any governmental order relating to the Tanks or a Discharge, or any violation of any Environmental Requirement or demands of any Governmental Authority based upon or in any way related to the Tanks or a Discharge, and whether such arise out of the acts or omissions of the Lessee or of the contractors of the Lessee or of third persons or out of the acts of God or the public enemy or otherwise including Tank Claims by the City of New York against the Port Authority pursuant to the provisions of the Basic Lease whereby the Port Authority has agreed to indemnify the City against claims. It is understood the foregoing indemnity shall cover all claims, demands, penalties, settlements, damages, fines, costs and expenses of or imposed by any Governmental Authority under the aforesaid Environmental Requirements.

(2) If so directed the Lessee shall at its expense defend any suit based upon any such Tank Claim (even if such Tank Claim is groundless, false or fraudulent) and in handling such it shall not without first having express advance permission from the General Counsel of the Port Authority raise any defense involving in any way the jurisdiction of the tribunal over the person of the Port Authority, the immunity of the Port Authority, its Commissioners, officers, agents or employees, the governmental nature of the Port Authority or the provisions of any statutes respecting suits against the Port Authority.

(3) The terms and conditions of this paragraph (f) are intended to allocate obligations and responsibilities between the Lessee and the Port Authority only, and nothing in this paragraph (f) shall limit, modify or otherwise alter the rights and remedies which the Port Authority or the Lessee may have against third parties at law, equity or otherwise.

## *(g) Survival of Obligations.*

## Without limiting or affecting the terms and provisions of the Section hereof entitled “*Survival of Obligations*”, the Lessee’s obligations under this Section shall survive the expiration or earlier termination of this Agreement.

## *(h) Port Authority-directed Testing and Remediation.*

## In addition to the requirements of the Article hereof entitled “*Compliance with Laws and Rules and Regulations*” and paragraph (e) of this Section, the Port Authority shall have the right upon notice to the Lessee to direct the Lessee, at the Lessee’s sole cost and expense, (x) to perform such reasonable testing of the Tanks as the Port Authority shall direct and to perform such testing of the soil, subsoil and ground water of the Premises and of such surrounding area as the Port Authority shall direct, and (y) to clean-up and remediate any Discharge, regardless of whether any Environmental Requirement or Governmental Authority shall require such testing, clean-up or remediation, which testing, clean-up and remediation shall be performed pursuant to an alteration application prepared by the Lessee and submitted to the Port Authority for the Port Authority’s approval.

## *(i) Preventive Measures.*

## In the Lessee’s use and operation of the Tanks, the Lessee shall not permit any Hazardous Substance from entering the ground, and accordingly shall take appropriate preventive measures, including without limitation (subject to the Article hereof entitled “*Construction*”) installing appropriate spill and overfill devices and placing an impervious material, such as asphalt or concrete, over the ground area above or under and in the vicinity of the Tanks.

# ARTICLE 21. LABOR HARMONY, AFFIRMATIVE ACTION

## Section 21.1 Labor Harmony.

The Lessee shall use its best efforts to promote labor harmony in its operations and activities at the Premises, all to the end of avoiding and preventing, to the extent possible, strikes, walkouts, work stoppages, slowdowns, boycotts and other labor trouble and discord. In undertaking any Construction Work, the Lessee shall include in any contract such provisions relating to labor harmony as the Port Authority may require.

Section 21.2 Compliance with New York Law.

The Lessee agrees that in the performance of its construction obligations under this Agreement, it will comply with the policies of the State of New York with respect to affirmative action and equal employment opportunities.

Section 21.3 Participation of MBEs, WBEs and LBEs.

(a) *Participation of MBEs and WBEs*. In addition to and without limiting any of the other terms and conditions of this Agreement, the Lessee agrees to require its contractors to make good faith efforts, consistent with the Lessee’s exercise of good business judgment, including, without limitation, the consideration of cost competitiveness, to provide for meaningful participation by Minority Business Enterprises (MBEs) and Women—owned Business Enterprises (WBEs) in construction contracts entered into with respect to the development of the Premises. For purposes hereof, Minority Business Enterprise (MBE) shall mean any business enterprise which is at least fifty-one percent (51%) owned by, or in the case of a publicly owned business at least fifty—one percent (51%) of the stock of which is owned by, one or more citizens or permanent resident aliens who are members of one or more minority groups and whose management and daily business operations are controlled by one or more such individuals. As used herein minority group shall mean any of the following racial or ethnic groups:

Black (individuals having origins in any of the Black African racial groups not of Hispanic origin);

Hispanic (individuals of Mexican, Puerto Rican, Dominican, Cuban or Central or South American culture or origin, regardless of race);

Asian and Pacific Islander (individuals having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands); and

Native American or Alaskan Native (individuals having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

For the purposes hereof, Women-owned Business Enterprise (**WBE**) shall mean any business enterprise which is at least fifty—one percent (51%) owned by, or in the case of a publicly owned business at least fifty-one percent (51%) of the stock of which is owned by, one or more women and whose management and daily business operations are controlled by one or more women. “**Meaningful Participation**” shall mean that at least seventeen percent (17% of the total value of the contracts is for the participation of Minority Business Enterprises (“MBEs”) and Women—owned Business Enterprises (“WBEs”), with a minimum of twelve (12%) participation by MBEs, and a minimum of five (5%) participation by WBEs in all purchasing, subcontracts and services. Good faith efforts to include meaningful participation by MBEs and WBEs shall include at least the following:

(1) actively and affirmatively soliciting bids and proposals for contracts or subcontracts from MBEs and WBEs, including circulation of solicitations to MBEs and WBEs;

(2) providing prospective MBEs and WBEs with plans, specifications and other necessary background materials in sufficient time for review;

(3) utilizing the lists of certified MBEs and WBEs maintained by the Port Authority, the City, the State of New York or the State of New York or seeking minorities, women and local business people from other sources for the purpose of soliciting contractors, subcontractors and suppliers;

(4) utilizing the services of available minority and women’s community organizations, contractor’s groups, local, State and Federal business assistance/development offices and other organizations that provide assistance to MBE/WBEs;

(5) insuring that provision is made to provide progress payments to MBEs and WBEs on a timely basis, where appropriate, in the same manner that progress payments are made to other contractors or subcontractors; and

(6) not requiring bonds from and/or providing bonds for MBEs and WBEs for contracts or subcontracts of less than $100,000.00.

## (b) *Certified MBEs and WBEs*.

(1) List. The Port Authority has compiled a list, which may be supplemented and revised from time to time by the Port Authority, of the firms the Port Authority has determined satisfy the criteria for MBE and WBE certification. Such list shall be made available to the Lessee upon request. The Port Authority makes no representation as to the financial responsibility of such firms, their technical competence to perform or any other performance-related qualifications. Only listed MBEs and WBEs and such firms as are not so listed but as are certified by the Port Authority, the State of New York or the State of New York as MBEs and WBEs hereunder and the MBEs and WBEs listed on Schedule annexed hereto will count toward the MBE and WBE goals.

(2) Certification*.* Certification of MBEs and WBEs hereunder shall be made by the Office of Business and Job Opportunity of the Port Authority. If the Lessee wishes to utilize a firm not listed with the Port Authority but which the Lessee believes should be certified as an MBE or WBE, the Lessee may encourage such firm to complete an application for certification by completing and forwarding such forms as may be required by the Port Authority from time to time. All such applications shall be submitted to the Office of Business and Job Opportunity, the Port Authority of New York and New Jersey, 233 Park Avenue South, New York, NY 10003. If any such firm is determined eligible for certification it shall only be by a writing over the name of the Director in charge of such Office. The determination of the Port Authority shall be final and binding on the Lessee.

## (c) *Replacement of Cancelled MBEs and WBEs*.

In the event that the participation of any MBE or WBE selected by the Lessee to participate in any construction contracts entered into with respect to the development of the Premises is cancelled or terminated for any reason, the Lessee agrees to make every good faith effort, to the maximum extent feasible, and consistent with the Lessee’s exercise of good business judgment, including, without limitation, the consideration of cost competitiveness, to utilize other MBEs and WBEs so as to maintain appropriate participation by Minority Business Enterprises (MBEs) and Women-owned Business Enterprises (WBEs) in such contracts.

## (d) *Goals For Minority and Female Participation*.

Without limiting the provisions of the previous Sections of this Agreement, and without limiting any of the other terms and conditions of this Agreement, the Lessee agrees, and agrees to require its construction contractors and subcontractors at each tier of any construction undertaken pursuant to the provisions of this Agreement, to make good faith efforts to achieve the goals for minority and female participation set forth below. The Lessee agrees to appoint a project representative as a contact person for the implementation of the contractors’ good faith efforts to achieve minority and female participation in the work force. The goals for minority and female participation, expressed in percentage terms for the aggregate workforce on an average basis for all trades on all construction work, are as follows:

Journey Level Trade Workers

Minority participation: 30%

Female participation: 6.9%

Laborers and other unskilled workers

Minority participation: 40%

Female participation: 6.9%

These goals are applicable to all the Lessee’s construction work performed in and for the Premises. Compliance with such goals will be measured against the total work hours performed.

## (e) *Notification of Contract Awards*.

The Lessee agrees to require its contractors and subcontractors to provide written notification to the Lessee and the Lessee agrees to provide written notification to the Office of Business and Job Opportunity of the Port Authority within ten (10) working days of the award of any construction contract or subcontract in excess of One Hundred Thousand Dollars ($100,000.00) at any tier for Construction Work. The notification shall list the name, address, telephone number and employer identification number of the contractor or subcontractor and the estimated starting and completion dates of the contract or subcontract. As used herein, “employer identification number” shall mean the Federal Employer Identification Number used on the Employer’s Quarterly Federal Tax Return, U.S. Treasury Department Form 941.

## (f) *Inclusion of Goals in Subcontracts*.

The Lessee agrees to require its contractors and subcontractors, at any tier, whenever they subcontract a portion of the construction work involving any construction trade, to physically include in each subcontract in excess of One Hundred Thousand Dollars ($100,000.00) those provisions which include the applicable goals for minority and female participation.

## (g) *Implementation of Affirmative Action Standards*.

The Lessee agrees to require its contractors and subcontractors to implement the specific affirmative action standards provided in subparagraphs (1) through (16) of paragraph (j) below. The goals set forth above are expressed as percentages of the total hours of employment and training of minority and female utilization the Lessee’s contractors and subcontractors should reasonably be able to achieve in each construction trade in which it has employees on the Premises. The Lessee agrees, and agrees to require its contractors and subcontractors, to use good faith efforts to make substantially uniform progress toward such goals in each craft during the period specified.

## (h) *Non-Effect of Union Contracts*.

The Lessee agrees to provide in its construction contracts that neither the provisions of any collective bargaining agreement, nor the failure by a union with which any contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the contractor’s obligations thereunder unless the union itself has made good-faith efforts to achieve the goals set forth herein in its membership ranks.

(i) *Apprentices and Trainees*.

The Lessee further agrees to provide in its agreements with its contractors that in order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals set forth herein, such apprentices and trainees shall be employed by the contractors during the training period, and the contractors shall have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees shall be trained pursuant to training programs approved by the U. S. Department of Labor or by or other appropriate governmental agency.

## (j) *Affirmative Action Standards*.

The Lessee agrees to require its contractors and subcontractors to take specific affirmative actions to ensure equal employment opportunity (“**EEO**”). The Lessee’s evaluation of the contractor’s compliance with these provisions shall be based upon a contractor’s good faith effort to achieve maximum results from its actions. The Lessee agrees to require its contractors and subcontractors to document these efforts fully, and to implement affirmative action steps at least as extensive as the following:

(1) Ensure and maintain a working environment free of harassment, intimidation and coercion at all portions of the Premises at which the contractor’s employees are assigned to work. The contractor, where possible, will assign two or more women to each phase of the construction project. The contractor shall specifically ensure that all foremen, superintendents and other supervisory personnel at the Premises are aware of and carry out the contractor’s obligation to maintain such a working environment, with specific attention to minority or female individuals working at the Premises.

(2) Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the contractor or its unions have employment opportunities available, and maintain a record of the organizations’ responses.

(3) Maintain a current file of the names, addresses and telephone numbers of each minority and female off—the—street applicant and minority or female referral from a union, a recruitment source or community organization.

(4) Provide immediate written notification to the Lessee when any union or unions with which the contractor has a collective bargaining agreement has not referred to the contractor a minority person or woman sent by the contractor, or when the contractor has other information that the union referral process has impeded the contractor’s efforts to meet its obligations.

(5) Develop maximum job opportunities for apprentices appropriate to the conditions of the work, subject to applicable collective bargaining agreements, in conjunction with training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the contractor’s employment needs, especially those programs funded or approved by the Department of Labor. The contractor shall provide notice of these programs to the sources compiled under subparagraph (2) above.

(6) Disseminate the contractor’s EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the contractor’s newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the contractor’s EEO policy on bulletin boards accessible to all employees at each location where the construction work is performed.

(7) Review, at least every six (6) months, the contractor’s EEO policy and affirmative action obligations hereunder with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions, including specific review of these items with on—area supervisory personnel such as superintendents, general foremen, etc., prior to the initiation of construction work at the Premises. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed and disposition of the subject matter.

(8) Disseminate the contractor’s EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the contractor’s EEO policy with other contractors and subcontractors with whom the contractor does or anticipates doing business.

(9) Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students, to minority and female recruitment and training organizations and to State certified minority referral agencies serving the contractor’s recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the contractor shall send written notification to organizations such as the above describing the openings, screening procedures and tests to be used in the selection process.

(10) Encourage present minority and female employees to recruit other minority persons and women.

(11) Comply with 41 CFR Part 60—3 with respect to tests and other selection requirements.

(12) Conduct, at least every six (6) months, an inventory and evaluation of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

(13) Ensure that seniority practices, job classifications, work assignments and other personnel practices do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the contractor’s obligations hereunder are being carried out.

(14) Ensure that all facilities and company activities are nonsegregated except that separate or single—user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

(15) Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

(16) Conduct a review, at least every six (6) months, of all supervisors’ adherence to and performance under the contractor’s EEO policies and affirmative action obligations.

## (k) *Contractor Participation in Associations*.

The Lessee shall encourage its contractors to participate in voluntary associations which assist in fulfilling subparagraphs (1)-(16) of Section 21.3(j). The efforts of a contractor association, joint contractor-union, contractor—community or other similar group of which the contractor is a member and participant may be asserted by such contractor as fulfilling any one or more of its obligations under Section 21.3(j), provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, encourages that the concrete benefits of the program are reflected in the contractor’s minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the contractor. The requirement for good faith efforts to comply, however, shall remain with the contractor and the Lessee shall provide in its agreements with the contractor that failure of such a group to fulfill an obligation shall not be a defense for the contractor’ s non-compliance.

## (l) *Affirmative Action for All Minority Groups*.

Goals for minorities and a separate single goal for women have been established. The Lessee, however, agrees to require its contractors and subcontractors to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority, and to provide that, consequently, the contractor may be in violation of its agreement with the Lessee if a particular group is employed in a substantially disparate manner (for example, even though the contractor has achieved its goals for women generally, the contractor may be in violation if a specific minority group of women is under-utilized).

## (m) *No Discrimination*.

The Lessee agrees to provide that the contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.

## (n) *No Contracts with Debarred Persons*.

The Lessee agrees that it will not enter into any contract with any Person debarred from U.S. Government contracts pursuant to Executive Order 11246.

## (o) *Further Requirements*.

The Lessee agrees to require its contractors and subcontractors, in fulfilling their obligations to the Lessee, to implement specific affirmative action steps at least as extensive as those standards prescribed in Section 21.12 hereof so as to achieve maximum results from their efforts to ensure equal employment opportunity.

## (p) *Maintenance of Records*.

The Lessee agrees to designate a responsible official to monitor all employment related activity to ensure that EEO policy is being carried out, to submit reports relating to the contractor’s EEO obligations as may be required, and to keep records. The Lessee agrees to require that records shall at least include for each employee the name, address, telephone number, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g. mechanic, apprentice, trainee, helper or laborer), date of changes in status, hours worked per week in the indicated trade, rate of pay and location at which the work was performed. The Lessee further agrees to provide that records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors need not be required to maintain separate records.

## (q) *Effect of Other Laws*.

Nothing herein provided shall be construed as a limitation upon the application of any applicable laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program, if applicable).

## (r) *Cooperation*.

Without limiting any other term or provision of this Agreement, the Lessee agrees, and agrees to require its contractors and subcontractors, to cooperate with all federal, state or local agencies established for the purpose of implementing affirmative action compliance programs and the Lessee agrees, and agrees to require its contractors and subcontractors, to comply with all procedures which may be agreed to by and between the Port Authority and the Lessee.

## (s) *Additional Required Contract Provisions*.

In addition to and without limiting any of the terms and provisions of this Agreement, the Lessee agrees to provide in its contracts and all subcontracts covering construction work, or any portion thereof, that:

(1) The contractor shall not discriminate against employees or applicants for employment because of race, creed, color, religion, national origin, ancestry, sex, age, liability for military service, disability or marital status, and shall undertake or continue existing programs of affirmative action to ensure that applicants are employed and employees are treated during employment without such discrimination. Such programs shall include, but not be limited to, recruitment or recruitment advertising, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, termination, rates of pay or other forms of compensation, and selections for training or retraining, including apprenticeships and on the job training.

(2) At the request of either the Port Authority or the Lessee, the contractor shall request such employment agency, labor union or authorized representative of workers with which it has a collective bargaining or other agreement or understanding and which is involved in the performance of the contract with the Lessee to furnish a written statement that such employment agency, labor union or representative shall not discriminate because of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will cooperate in the implementation of the contractor’s obligations hereunder.

(3) The contractor will state, in all solicitations or advertisements for employees placed by or on behalf of the contractor in the performance of the contract, that all qualified applicants will be afforded equal employment opportunity without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

(4) The contractor will include the provisions of subparagraphs (1) through (3) of this Section in every subcontract or purchase order in such a manner that such provisions will be binding upon each subcontractor or vendor as to its work in connection with the contract.

“Contractor” as used in subparagraphs (1) through (4) of this Section shall include each contractor and subcontractor at any tier of construction.

## (t) *Clarifying Provisions*.

Notwithstanding any provision of this Article 21 to the contrary, it is understood that the Lessee’s obligations pursuant to this Article 21 are to make good faith efforts to perform the obligations set forth herein and to include in its direct construction contracts provisions requiring its contractors to do the same and provisions requiring such contractors to include in its direct subcontracts provisions requiring its subcontractors to do the same. Whenever the word “ensure”, “require” or words of similar meaning are used in Article 21, it shall be deemed to mean to make good faith efforts to achieve the stated goals of this Article. The provisions of this Article 21 shall apply only to the initial construction of the Building and shall not apply to “fit out” of interior tenant spaces or to subsequent alterations. The requirements set forth in this Article 21 shall apply to direct contractors of the Lessee and to subcontractors of said direct contractors, but not to subcontractors of any further tier; *provided, however,* that the hiring of MBEs and/or WBEs by any subcontractors at any such further tier shall be counted towards the achievement of the goals set forth herein.

## Section 21.4 The Lessee’s Local Business Enterprise Commitment**.**

In addition to the foregoing provisions of Section 21.3, the Lessee in connection with any construction work on the Premises, or any portion thereof, shall throughout the Term commit itself to and use good faith efforts to implement an extensive program to utilize Local Business Enterprises in accordance with and as set forth in Schedule F.

## Section 21.5 Airport Concession Disadvantaged Business Enterprise (ACDBE) Participation.

The Lessee agrees that it will not discriminate against any business owner because of the owner’s race, color, national origin, or sex in connection with the award or performance of any concession agreement or any management contract, or subcontract, purchase or lease agreement or other agreement covered by 49 CFR Part 23. The Lessee agrees to include the above statements in any concession agreement or contract covered by 49 CFR Part 23 that it enters and cause those businesses to similarly include the statements in any further agreement. Further, the Lessee agrees to comply with the terms and provisions of Schedule G, attached hereto and hereto made a part hereof.

# ARTICLE 22. LESSEE’S REPRESENTATIONS

## Section 22.1 Lessee’s Due Formation and Ownership Structure.

The Lessee hereby represents that (x) it is a limited liability company, duly organized and existing under the laws of the State of Delaware and (y) the members of the Lessee and their respective interests in the Lessee, as well as the Persons owning interests in such and their respective ownership percentages, are correctly and completely shown on the diagram attached hereto as Exhibit O.

## Section 22.2 Certain Certifications.

(a) *Indictments, etc.* The Lessee hereby certifies as to the truth and accuracy of the following statements:

(i) neither the Lessee, nor any of its officers, directors, general partners, members , management employees or significant equity participants has (x) been indicted for, or convicted of, a crime in any jurisdiction, or been the target of a grand jury investigation therefor, or (y) been suspended or otherwise disqualified from entering into contracts with any governmental agency; and

(ii) neither the Lessee, nor any Affiliate, has (x) had a development agreement between itself and the Port Authority terminated by the Port Authority due to its willful breach or default, or (y) had a contract terminated by a governmental agency of the States of New York or New Jersey for willful breach or default, or (z) had a contract terminated for any cause relating to an indictment or conviction of itself or its principals.

1. *Prior Representations.* The Lessee hereby certifies and affirms, as of the date of this Agreement, the representations that it made in the documents set forth below:

RFP issued [ ], 2014:

Lessee’s Submission: [ ], 2014  
Applicable documents:

[ ]

## Section 22.3 Brokerage.

The Lessee represents and warrants that no broker, finder or similar agent has been involved in the negotiation of this Agreement and the letting hereunder, and that there is no broker, finder or similar agent who is or may be entitled to be paid a commission or other compensation in connection therewith, as a result of dealings or other acts of the representing party. The Lessee shall indemnify and save harmless the Port Authority from any claims for commissions, brokerage fees or other compensation made by any Person for services in connection with the negotiation or execution of this Agreement, together with all expenses (including without limitation attorneys’ fees and disbursements) incurred by the Port Authority in resisting any such claim.

# ARTICLE 23. PAYMENTS; RECORDKEEPING AND AUDITS

Section 23.1 Payments.

(a) *Payment of Rental.* Except as otherwise specifically provided herein, all Rental shall be paid without notice or demand. All Rental (except Impositions, if the rules and regulations of the City governing such payment are to the contrary) shall be paid by good checks drawn on an account at a bank that is a member of the New York Clearing House Association (or any successor body of similar function) or in currency that at the time of payment is legal tender for public and private debts in the United States of America.

## (b) *Nature of Payments; No Waiver*. No payment by the Lessee, or receipt by the Port Authority, of a lesser amount than that which is due and payable under the provisions of this Agreement at the time of such payment shall be deemed to be other than a payment on account of the earliest amount then due, nor shall any endorsement or statement on any check or in any letter accompanying any check or payment be deemed an accord and satisfaction, and the Port Authority may accept such check or payment without prejudicing in any way its right to recover the balance of such amount or to pursue any other remedy provided in this Agreement or by law.

## (c) *Address for Payments*. All payments to be made by the Lessee under or pursuant to this Agreement shall be sent to the following address:

THE PORT AUTHORITY OF NEW YORK  
AND NEW JERSEY  
P.O. BOX 95000-1517  
PHILADELPHIA, PENNSYLVANIA 19195-0001

or made via the following wire transfer instructions:

CREDIT BANK NAME: TD BANK  
CREDIT BANK ADDRESS: 6000 Atrium Way, Mount Laurel NJ 08054  
CREDIT BANK ABA #: 031201360  
BENEFICIARY ACCT/ID #: 5950011618  
BENEFICIARY NAME: THE PORT AUTHORITY OF NY & NJ

or sent to such other address, or pursuant to such other wire transfer instructions, as may hereafter be substituted therefor by the Port Authority, from time to time, by notice to the Lessee. All payments should reference the agreement number of this Agreement, AYE-232.

Section 23.2 *Recordkeeping.* The Lessee (and any Subtenant which is an Affiliate receiving Gross Revenues) shall keep and maintain at an office located in the Port of New York District complete and accurate books and records of account reflecting all Gross Revenues from which the Port Authority may verify the amounts reported on each statement furnished by the Lessee to the Port Authority. Notwithstanding the foregoing, the Lessee (and any such Subtenant) shall not be required to keep or maintain such books or records of account for any Payment Period subsequent to seven (7) years after the expiration of such Payment Period unless the Port Authority is engaged in an audit of such books and records pursuant to the following Section 23.3, in which event such books and records shall be kept and maintained by the Lessee (or such Subtenant) until such audit has been completed and any amounts due as a result thereof have been paid.

## Section 23.3 Audits by the Port Authority.

(a) *Right to Inspect Records.*

The Port Authority or its designated agent shall have the right at any time and from time to time during regular business hours, upon at least five (5) Business Days’ notice to the Lessee, at the expense of the Port Authority, to inspect and audit the Lessee’s books and records of account (x) for any Payment Period or Periods for the purpose of verifying the amount due as Percentage Rental for such Payment Period or Periods, (y) for any period for the purpose of verifying the amount of the Adjusted Gross Proceeds (including any component thereof) under Article 15 hereof, entitled “*Capital Transaction Payments*”, and (z) for any period for the purpose of verifying any other amount payable pursuant to this Agreement. Each such inspection and audit shall be conducted at the place where the Lessee then regularly maintains its books and records in accordance with the foregoing Section 23.2. The Port Authority will, to the extent it is lawfully able to do so, use reasonable efforts to keep confidential and not disclose to others any information it obtains as a result of any inspection or audit conducted by the Port Authority pursuant to this Section 23.3.

(b) *Underpayments and Overpayments*.

Should any audit performed by the Port Authority or its designated agent disclose that the payment of Percentage Rental for any Payment Period or Periods has been understated, the Port Authority shall notify the Lessee of the amount of the underpayment, which notification shall include a statement showing the basis for the Port Authority’s determination. Within ten (10) days after the Lessee has received such notice of underpayment from the Port Authority, the Lessee shall promptly pay to the Port Authority the amount of such underpayment. In the event an audit discloses an overpayment, a credit in the amount of the overpayment will be given against the next installment of Basic Rental and/or Percentage Rental due, and if no further installments of Basic Rental and/or Percentage Rental are due, the Port Authority shall promptly refund to the Lessee the amount of any such overpayment.

(c) *Costs of Audit*.

If it is determined pursuant to this Section 23.3 that any payment of Percentage Rental or other Rental was understated by more than five percent (5%), the Lessee shall pay the cost of the Port Authority’s audit within ten (10) days of the submission to the Lessee of a statement of such audit costs, and such payment shall constitute additional Rental hereunder; otherwise, the Port Authority shall pay the cost of the audit. For the purposes of this paragraph (c), the costs of any audit by the Port Authority shall mean the fees and expenses of any outside certified public accountant engaged by the Port Authority to conduct such audit and/or the allocated payroll costs of the Port Authority personnel who perform such audit.

## Section 23.4 Late and Service Charges.

(a) *Late Charges.*

If the Lessee should fail to pay, after all applicable notice and grace periods, any amount required under this Agreement when due to the Port Authority, including but not limited to, any payment of basic, percentage or other rental or any payment of utility or other charges, or if any such amount is found to be due as the result of an audit, then, in such event, the Port Authority may impose (by statement, bill or otherwise) a late charge with respect to each such unpaid amount for each late charge period hereinbelow described) during the entirety of which such amount remains unpaid, each such late charge not to exceed an amount equal to eight-tenths of one percent of such unpaid amount for each late charge period. There shall be twenty-four late charge periods during each calendar year; each late charge period shall be for a period of at least fifteen (15) calendar days except one late charge period each calendar year may be for a period of less than fifteen (but not less than thirteen) calendar days. Without limiting the generality of the foregoing, late charge periods in the case of amounts found to have been owing to the Port Authority as the result of Port Authority audit findings shall consist of each late charge period following the date the unpaid amount should have been paid under this Agreement.

(b) *Service Charge.*

In the event that upon conducting an examination and audit the Port Authority determines that unpaid amounts are due to the Port Authority by the Lessee, then, for each unpaid amount that represents an underpayment of three percent (3%) or more of the total sum payable, the Lessee shall be obligated, and hereby agrees to pay to the Port Authority a service charge in the amount of five percent (5%) of the amount of each such underpayment. Each such service charge shall be payable immediately upon demand (by notice, bill or otherwise) made at any time therefor by the Port Authority. Such service charge(s) shall be exclusive of, and in addition to, any and all other moneys or amounts due to the Port Authority by the Lessee under this Agreement or otherwise.

## (c) *No Waiver.*

## Each late charge and service charge shall be payable immediately upon demand made at any time therefor by the Port Authority, as the case may be. No acceptance by the Port Authority of payment of any unpaid amount shall be deemed a waiver of the right of the Port Authority, respectively, to payment of any late charge or service charge payable under the provisions of this Section with respect to such unpaid amount. Each late charge and service charge shall constitute additional Rental and shall be recoverable in the same manner and with like remedies as if it were originally a part of the Basic Rental or other Rentals as set forth in the Article of this Agreement entitled “*Rental*”. Nothing in this Section is intended to, or shall be deemed to, affect, alter, modify or diminish in any way (x) any rights of the Port Authority under this Agreement, including without limitation the rights of the Port Authority set forth in the Article of this Agreement entitled “*Termination*” or (y) any obligations of the Lessee under this Agreement. In the event that any late charge imposed pursuant to this Section shall exceed a legal maximum applicable to such late charge, then, in such event, each such late charge payable under this Agreement shall be payable instead at such legal maximum.

# ARTICLE 24. NOTICES

## Section 24.1 Delivery of Notices.

(a) *Notices to be in Writing.*

Notices, requests, permissions, consents, approvals and other communications (all of the foregoing being hereinafter referred to singularly as a “**Notice**” and collectively as “**Notices**”), including changes to the address designated by any party hereto for the delivery of Notices (the “**designated address**”), given or required to be given to any party under this Agreement shall not be effective unless they are given in writing.

(b) *Delivery.*

All Notices shall be (x) personally delivered to such party or a duly designated officer or representative of such party at such party’s designated address during regular business hours; (y) delivered by reliable overnight delivery service to such party’s designated address; or (z) mailed to such party, officer or representative by registered or certified mail with return receipt at such party’s designated address, to the attention of the representative designated by such party from time to time.

(c) *Designated Representative.*

Until further notice, the Port Authority hereby designates its Executive Director and the Lessee hereby designates the Person named as representative on the first page hereof as their respective officers or representatives upon whom Notices may be served and the Port Authority and the Lessee hereby designate their addresses stated on the first page hereof, as their respective designated addresses.

(d) *Copies*.

Each party may request the other party, as a courtesy, to transmit a copy or copies of Notices to others at any time, *provided, however,* that such transmittal shall be for convenience only and a failure to transmit such copy(ies) of a Notice(s) to others shall have no effect whatsoever on the completeness or effectiveness of service of such Notice on the party requesting the copy.

Section 24.2 When Notices Deemed Given.

Each Notice shall be deemed given and effective upon receipt, or, in the event of a refusal by the addressee, on the first tender of such Notice to the addressee at the designated address.

# ARTICLE 25. INTELLECTUAL PROPERTY RIGHTS; USE OF NAMES

Section 25.1 Flight Center IP Rights.

The Port Authority makes no representation or warranty as to the ownership of the copyright, trademark and service mark rights, and all other intellectual property or proprietary rights of any kind or description relating to the design and image of the TWA Flight Center and the Premises (collectively, the “**Flight Center IP Rights**”). Subject to the foregoing, however, the Port Authority hereby grants to the Lessee during the Term the right and license to use, publish, copy, perform publicly, distribute, display, modify, and create derivative works of the Flight Center IP Rights (to the extent of the Port Authority’s proprietary interest therein, if any), including, without limitation, in connection with the marketing, advertising, and promotion of [X Brand] Hotels and products or services related to the foregoing.

Section 25.2 Use of Names.

(a) The Lessee agrees that unless the Port Authority otherwise consents in advance in writing, the Lessee shall use at the premises the “[X Brand]” name, designation and service or trade mark throughout the Term. Notwithstanding the foregoing, however, if at any time during the Term the Lessee (or the Lessee and/or its Affiliates which are using the name “[X Brand]”) ceases using the name ““[X Brand]” in connection with its (or its and/or their) other hotels which are in quality and type at least equivalent to that existing in the [X Brand] Hotels that are owned and/or managed by Affiliates of the Lessee at the time of execution of this Agreement, and utilizes a different name for such hotels, then upon the Port Authority’s direction (or consent) the Lessee shall change the name of the Hotel to such other name, designation or service mark.

(b) The Lessee shall not use or make any reference, by advertising or otherwise, to the names “JFK International Airport”, “John F. Kennedy International Airport” or any variant thereof (except to designate the location of the Hotel, and then only in a conventional manner and without emphasis or display), “The Port Authority of New York and New Jersey”, “Port Authority” or any simulation or abbreviation of any such names, for any purpose whatsoever. Furthermore, the Lessee shall not make use of or originate any material intended for publication or visual or oral presentation that may tend to impair the reputation of the Port Authority.

(c) The Lessee acknowledges that the name and image of the TWA Flight Center are and have been inextricably associated with the Airport. Accordingly, in order to avoid confusion among the public, the Lessee agrees that so long as the use of the Premises continues to be as a hotel (irrespective of whether at any particular time a hotel is actually open for business), the Lessee and its Affiliates shall not develop, own, operate or manage a hotel within five (5) miles of the Airport that uses the words “TWA Flight Center” or “Flight Center” in its name. The foregoing covenant shall be personal to the Lessee, and shall continue to be binding upon the Person that is the Lessee hereunder irrespective of any assignment or termination of this Agreement and/or any termination of the landlord-tenant relationship of the Port Authority and such Person.

# ARTICLE 26. MISCELLANEOUS

## Section 26.1 Limitation on Representations.

Except as may be expressly set forth in this Agreement, the Lessee acknowledges that it has not relied upon any representation or statement of the Port Authority or any of its Commissioners, officers, employees or agents as to the condition of the Premises or the suitability thereof for the operations permitted on the Premises by this Agreement. The Lessee also acknowledges that prior to the execution of this Agreement it was given access to the Premises to conduct such tests as it thought appropriate to determine the Environmental Condition of the Premises, and the Lessee hereby agrees to take the Premises in their “as is” condition.

## Section 26.2 Signs.

Except with the prior approval of the Port Authority, the Lessee shall not erect, maintain or display any signs, lettering, advertising, posters, displays or similar devices on the exterior of the Premises or the Building or elsewhere at the Airport. The Lessee may, without prior Port Authority consent, install signs, lettering, advertising, posters, displays or similar devices in the interior portions of the Building. Any signs, lettering, advertising, posters, displays or similar devices erected, maintained or displayed anywhere on the exterior of the Premises or the Building pursuant to the provisions of this Article shall conform to such standards with respect to design, material, lettering and size as have been approved by the Port Authority. The Lessee shall keep all exterior signs, lettering, advertising, posters, displays or similar devices at all times in a clean, first-class condition and appearance and shall perform all required maintenance, repairs and replacements thereto and thereof.

Section 26.3 OFAC Compliance.

(a) The Lessee hereby represents and warrants to the Port Authority that the Lessee is not, and shall not become, a person or entity with whom the Port Authority is restricted from doing business under the regulations of the Office of Foreign Asset Control (“**OFAC**”) of the United States Department of the Treasury (including, but not limited to, those named on OFAC’s Specially Designated and Blocked Persons list) or under any statute, executive order (including, but not limited to, the September 24, 2001 Executive Order on Terrorist Financing Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit or Support Terrorism), or other governmental action and is not engaging, and shall not engage, in any dealings or transactions or be otherwise associated with such persons or entities. Lessee acknowledges that the Port Authority is entering into this Agreement in reliance on the foregoing representations and warranties and that such representations and warranties are a material element of the consideration inducing the Port Authority to enter into and execute this Agreement. In the event of any breach of any of the foregoing representations and warranties by Lessee, the Port Authority shall have the right, in addition to any and all other remedies provided under this Agreement or at law or in equity, to immediately terminate this Agreement upon written notice to Lessee. Lessee further acknowledges that there shall be no cure for such a breach. In the event of any such termination by the Port Authority, Lessee shall, immediately on receipt of the Port Authority’s termination notice, cease all use of and operations permitted under this Agreement and surrender possession of the Premises to the Port Authority without the Port Authority being required to resort to any other legal process. Termination on the afore-described basis shall be deemed a termination for cause.

(b) The Lessee shall indemnify and hold harmless the Indemnified Parties from and against any and all claims, damages, losses, risks, liabilities and expenses (including, without limitation, attorney’s fees and disbursements) arising out of, relating to, or in connection with the Lessee’s breach of any of its representations and warranties made under this paragraph. Upon the request of the Port Authority, the Lessee shall at its own expense defend any suit based upon any such claim or demand (even if such suit, claim or demand is groundless, false or fraudulent) and in handling such it shall not, without obtaining express advance permission from the General Counsel of the Port Authority, raise any defense involving in any way the jurisdiction of the tribunal over the person of the Port Authority, the immunity of the Port Authority, its Commissioners, officers, agents or employees, the governmental nature of the Port Authority, or the provision of any statutes respecting suits against the Port Authority.

(c) *Survival.* The provisions of this Section shall survive the expiration or earlier termination of the Term.

## Section 26.4 Nonliability of Individuals.

No Commissioner, officer, agent or employee of the Port Authority or member, shareholder, constituent owner, officer, agent or employee of the Lessee, to the extent any of the foregoing are natural persons, shall be charged personally with any liability or held personally liable under any term or provision of this Agreement or because of acts or omissions of any such individual or because of any breach or attempted or alleged breach of any of the provisions of this Agreement, it being understood that all such liability, if any, shall be that of the Port Authority, on the one hand, and the Lessee and its owners and/or constituent entities that are not natural persons, on the other.

## Section 26.5 Force Majeure.

(a) *Definitions*.

“**Force Majeure**” or “**causes or conditions beyond its control**”, or words of similar import, shall mean acts of God, the elements, weather conditions, tides, earthquakes, settlement, fire, acts of any Governmental Authority (other than the Port Authority with respect to obligations to be performed by it under this Agreement), war, shortage of labor or materials, acts or omissions of third parties for which the Port Authority or the Lessee, as the case may be, is not responsible, injunctions, labor troubles or disputes of every kind (including those affecting the Port Authority or the Lessee, or its or their contractors, suppliers or subcontractors) or any other conditions or circumstances, whether similar to or different from the foregoing (it being agreed that the foregoing enumeration shall not limit or be characteristic of such conditions or circumstances) which are beyond the control of the Port Authority or the Lessee, as the case may be, and which could not be prevented or remedied by reasonable effort and at reasonable expense. Notwithstanding the foregoing, in no event shall lack of financial resources required in any circumstances constitute Force Majeure or causes or conditions beyond the control of either party hereto.

(b) *No Liability for Force Majeure Delays.*

Neither party to this Agreement shall be liable for any failure, delay or interruption in performing its obligations hereunder due to Force Majeure unless the failure, delay or interruption shall result from failure on the part of such party to use reasonable care to prevent or reasonable efforts to remedy or end such failure, delay or interruption.

(c) *No Default as a Result of Force Majeure.*

If the Lessee shall be delayed in performing any of its obligations under this Agreement (other than monetary obligations) by reason of Force Majeure, the time for the performance of the obligation in question shall be extended by the period of delay resulting from Force Majeure and the Lessee shall not be in default under this Agreement by reason of such delay in the performance by it of such obligation.

(d) *Application of this Section.*

The provisions of this Section shall apply to each and every obligation (other than monetary obligations) of each of the parties hereto under this Agreement, whether or not reference to Force Majeure or conditions beyond the control of the party in question is set forth in the provision of this Agreement which gives rise to such obligation. The fact that references to Force Majeure or conditions beyond the control of a party hereto may be included in only certain of the provisions of this Agreement shall not be construed as making the provisions of this Section inapplicable to those provisions of this Agreement which do not contain such references. Notwithstanding the foregoing, however, and notwithstanding anything else in this Agreement, Force Majeure shall not constitute a defense or excuse with respect to the Events of Default numbered (1) through (11) in Section 17.1 hereof.

## Section 26.6 Quiet Enjoyment.

The Lessee, so long as it pays all Rentals hereunder and performs all of the covenants, conditions and provisions of this Agreement on its part to be performed, shall and may peacefully and quietly have, hold and enjoy the Premises throughout the term of the letting hereunder.

## Section 26.7 No Subordination.

The interest of the Port Authority in the Premises and in this Agreement, as the same may be modified, amended or renewed, shall not be subject or subordinate to (x) any Mortgage now or hereafter existing, (y) any other liens or encumbrances hereafter affecting the Lessee’s interest in this Agreement and the leasehold estate created hereby or (z) any Sublease or any mortgages, liens or encumbrances now or hereafter placed on any Subtenant’s interest in the Premises.

## Section 26.8 Relationship of the Parties.

This Agreement does not constitute the Lessee the agent or representative of the Port Authority for any purpose whatsoever. Neither a partnership nor any joint venture is hereby created.

## Section 26.9 Severability.

If any term or provision of this Agreement or the application thereof to any Person or circumstances shall to any extent be held invalid and unenforceable, the remainder of this Agreement, or the application of such term or provision to Persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and shall be enforced to the extent permitted by law.

## Section 26.10 Remedies to be Non-Exclusive.

All remedies provided in this Agreement shall be deemed cumulative and additional and not in lieu of or exclusive of each other or of any other remedy available to the Port Authority or the Lessee at law or in equity, and the exercise of any remedy, or the existence herein of other remedies or indemnities, shall not prevent the exercise of any other remedy.

## Section 26.11 Construction and Application of Terms.

(a) *Headings*.

The use of article, section and paragraph headings and a table of contents, and the organization of the various provisions of this Agreement thereunder, are for convenience of reference only and in no way define, limit or describe the scope or intent of any provision hereof.

(b) *Ambiguities*.

Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applicable to the interpretation of this Agreement or any amendments, addendums or supplements hereto or any exhibits or schedules hereto.

(c) *Survival.*

The fact that certain of the terms and provisions hereunder are expressly stated to survive the expiration or termination of the letting hereunder shall not mean that those provisions hereunder which are not expressly stated to survive shall terminate or expire on the expiration or termination of the letting hereunder and do not survive such termination or expiration.

(d) *Gender and Number*.

Wherever in this Agreement a third person singular neuter pronoun or adjective is used, referring to the Lessee or Port Authority, the same shall be taken and understood to refer to the Lessee or the Port Authority, regardless of the actual gender or number thereof.

(e) *Time Designations*.

All designations of time herein contained shall refer to the time-system then officially in effect in the municipality wherein the Premises are located.

(f) *Exhibits and Schedules*.

The provisions and obligations contained in any Exhibits or Schedules attached hereto shall have the same force and effect as if herein set forth in full.

(g) *Governing Law*.

This Agreement and any claim, controversy or dispute arising under or related to this Agreement and the letting hereunder shall be governed by, and be construed in accordance with, the laws of the State of New York applicable to contracts made, and to be performed solely within, such state, without regard to choice of law principles.

(h) *Successors and Assigns*.

The covenants, agreements, terms, provisions and conditions contained in this Agreement shall be binding upon and inure to the benefit of the Port Authority and the Lessee and their respective successors and permitted assigns, except as otherwise expressly set forth herein.

## Section 26.12 Memorandum of Lease.

Simultaneously with the execution of this Agreement, the Port Authority and the Lessee shall execute a Memorandum of Lease in the form attached as Exhibit H, which shall be recorded in the Office of the City Register of the City of New York.

## Section 26.13 Entire Agreement.

(a) *Entire Agreement.*

This Agreement consists of the following: Articles 1-26, inclusive, Schedules 1 through \_, and Exhibits A through \_. This Agreement, together with the attachments hereto, contains all of the promises, agreements, conditions, inducements and understandings between the Port Authority and the Lessee concerning the Premises, and there are no promises, agreements, conditions, understandings, inducements, warranties or representations, oral or written, express or implied, between them other than as expressly set forth herein and therein or as may be expressly contained in any enforceable written agreements or instruments executed simultaneously herewith by the parties hereto.

(b) *Modifications to be in Writing.*

No covenant, agreement, term or condition of this Agreement shall be changed, modified, altered, waived or terminated except by a written instrument of change, modification, alteration, waiver or termination executed by the Lessee and the Port Authority.

(c) *No Waiver.*

No failure by the Port Authority to insist upon the strict performance of any agreement, covenant, term or condition of this Agreement or to exercise any right or remedy consequent upon the breach or default of any agreement, covenant, term, or condition of this Agreement, and no extension, supplement or amendment or this Agreement during or after such breach or default, unless expressly stated to be a waiver, and no acceptance by the Port Authority of any Rental after or during the continuance of any such breach or default, shall constitute the waiver of such breach or default. No waiver of any default shall affect or alter this Agreement, but each and every agreement, covenant, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent default thereof.

(d) *Counterparts*.

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

IN WITNESS WHEREOF, the parties hereto have executed these presents as of the day and year first above written.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| ATTEST: | | | | THE PORT AUTHORITY OF NEW YORK  AND NEW JERSEY |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Secretary | | | | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name) (title) |
|  | | | |  |
| ATTEST: | | | | [LESSEE] |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name) (title) | | | | By  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name) (title) |
|  | | | |  |
| **Port Authority Use Only**: | |
| Approval as to Terms: | Approval as to Form: |
|  |  |

1. If applicable. [↑](#footnote-ref-1)
2. To be determined after Lessee submits financial statements for most recent two years. [↑](#footnote-ref-2)