

**STAFF REPORT FOR CALENDAR ITEM NO.: 8.3
FOR THE MEETING OF: March 9, 2023**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Authorize the Executive Director to execute a first amendment to the lease agreement with PD Transbay LLC, a California limited liability company (dba Per Diem) for commercial/retail space in Suite 131 on the first floor of the transit center.

EXPLANATION:

Original Lease

On September 13, 2018, the TJPA Board of Directors authorized the Executive Director to complete negotiations and execute a lease agreement with PD Transbay LLC, dba Per Diem (“Tenant”) for commercial/retail space on the first level of the transit center (Space 131) for a 15-year term with two five-year options to renew at full market value. The lease for 3,256 square feet of space was fully executed on November 27, 2018 (“Lease”). The initial year stated base rent of the Lease is \$170,940 (\$52.90 per square foot) and escalates at 3% every year. The lease stipulated a Tenant Improvement Allowance of \$976,800 or \$300.00 per square foot.

Tenant Request to Amend Original Lease

Tenant requested certain relief from its obligations due to delays related to unforeseen base building work, involving kitchen exhaust and fire life safety systems, which delayed Tenant from opening as scheduled.

TJPA staff, with the assistance of Lincoln Property Company, Colliers, and retail legal counsel, engaged due diligence review and negotiations with Tenant. Due diligence included, among other things, a review of proposed tenant improvements, and consultations with our brokerage firm as well as other brokers as to status of market conditions. As a result of that due diligence review and negotiations, a proposed First Amendment to the Lease has been developed and executed by Tenant, enclosed herewith.

Under the negotiated First Amendment to Lease, the Tenant shall be granted four (4) months abated rent following Commencement Date, and the Tenant Improvement Allowance shall increase from \$976,800 (\$300 per square foot) to \$1,031,357 (\$316.75 per square foot).

The value of approving the terms and conditions of the First Amendment is estimated at \$111,537 (four months abated rent totaling \$56,980 and increased Tenant Improvement Allowance of \$54,557). The fiscal impact of the increased tenant improvement allowance can be accommodated from contingency within the overall Tenant Improvement budget, and fiscal impact of rent abatement extension can be accommodated within the adopted Fiscal Year 22-23 budget.

RECOMMENDATION:

Authorize the Executive Director to execute a lease amendment with PD Transbay LLC, dba Per Diem, consistent with the attached documents.

ENCLOSURES:

1. Resolution
2. First Amendment to Lease

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, On September 13, 2018, the Transbay Joint Powers Authority (TJPA) Board of Directors authorized the TJPA’s Executive Director to finalize negotiations and execute a lease agreement with PD Transbay LLC, dba Per Diem (“Tenant”) for commercial/retail space on the first level of the transit center (Space 131) for a 15-year term with two five-year options to renew at full market value. A lease was fully executed on November 27, 2018 (“Lease”); and

WHEREAS, Tenant requested certain relief from its obligations due to delays related to unforeseen base building work, which delayed Tenant from opening; and

WHEREAS, TJPA staff has negotiated a First Amendment to the Lease, granting four months abated rent and an increase in the Tenant Improvement Allowance, collectively valued at \$111,537; and

WHEREAS, The adopted budget for Fiscal Year 2022-2023 accommodates the fiscal impact of accepting this First Amendment to the Lease; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the Executive Director to execute the First Amendment to Lease with PD Transbay LLC, dba Per Diem, for Suite 131 in the form presented herein.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of March 9, 2023.

Secretary, Transbay Joint Powers Authority

FIRST AMENDMENT TO LEASE

This FIRST AMENDMENT TO LEASE (this “**Amendment**”) is made and entered into as of the ___ day of March, 2023, by and among TRANSBAY JOINT POWERS AUTHORITY, a joint exercise of powers agency duly created and existing under the Joint Exercise of Powers Act of the State of California, California Government Code Sections 6500 et seq. (“**Landlord**”), and PD TRANSBAY LLC, a California limited liability company, dba Per Diem (“**Tenant**”), with reference to the following facts and understandings:

RECITALS

A. Landlord and Tenant entered into that certain “Salesforce Transit Center Lease” dated as of November 6, 2018 (together with all exhibits and addenda attached thereto, the “**Existing Lease**”), whereby Tenant leased from Landlord approximately 3,256 usable square feet of retail space (the “**Premises**”) known as Space Number 131, located in the retail usage area on the ground floor of the Salesforce Transit Center in San Francisco, California (the “**Center**”). Capitalized terms used but not specifically defined herein shall be deemed to have the meanings ascribed to such terms in the Existing Lease.

B. Landlord and Tenant now desire to amend the Lease, all on and subject to the terms and conditions set forth in this Amendment.

NOW THEREFORE, in consideration of the mutual promises and covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

AGREEMENT

1. References. All references to the “Lease” or “lease” appearing in this Amendment or in the Existing Lease shall mean, collectively, this Amendment and the Existing Lease, as amended by this Amendment.

2. Abatement of Base Rent. Notwithstanding anything to the contrary contained in the Lease, so long as Tenant is not then in default of its obligations under the Lease, Tenant shall be entitled to receive an abatement of the Base Rent due during the first four (4) months immediately following the Commencement Date (the “**Abatement Period**”) subject to the provisions of this Section 2. During the Abatement Period, Tenant shall still be responsible for the payment of all of its other monetary obligations under the Lease (including, without limitation, all Percentage Rent and other Additional Rent accruing during such period). If an Event of Default by Tenant occurs under the terms of the Lease and the same results in a termination of the Lease pursuant to the provisions of Article 19 thereof then, as part of the recovery set forth in Article 19 of the Lease, Landlord shall be entitled to the recovery of the Base Rent that was abated under the provisions of this Section 2.

3. Additional Improvement Allowance.

(a) General. In addition to the Improvement Allowance provided to Tenant under Section 2.1 of the Work Letter attached as Exhibit B to the Existing Lease, Tenant shall be

entitled to a one-time additional improvement allowance (the “**Additional Improvement Allowance**”) in an amount not to exceed Fifty-Four Thousand Five Hundred Fifty-Seven and No/100 Dollars (\$54,557.00) for the costs relating to the initial design and construction of the Tenant Improvements and for the other Improvement Allowance Items relating to the same described in Section 2.2 of the Work Letter attached as Exhibit B to the Existing Lease which are in excess of the Improvement Allowance provided to Tenant under Section 2.1 of the Work Letter attached as Exhibit B to the Existing Lease.

(b) Disbursement of the Additional Improvement Allowance. Promptly following completion of the Tenant Improvements, Tenant shall deliver to Landlord: (i) a request for payment of the Contractor, approved by Tenant, in a form to be provided by Landlord, which request shall include a certification from Tenant as to the amount of costs relating to the initial design and construction of the Tenant Improvements and for the other Improvement Allowance Items relating to the same described in Section 2.2 of the Work Letter attached as Exhibit B to the Existing Lease which are in excess of the Improvement Allowance provided to Tenant under Section 2.1 of the Work Letter attached as Exhibit B to the Existing Lease (as applicable, the “**Excess Amount**”); (ii) invoices from all of Tenant’s Agents for labor rendered and materials delivered to the Premises; (iii) executed unconditional mechanic’s lien releases from all of Tenant’s Agents which shall comply with the appropriate provisions of California Civil Code Section 8136 and Section 8138; and (iv) all other information reasonably requested by Landlord. Tenant’s request for payment shall be deemed Tenant’s acceptance and approval (with the exception of latent conditions) of the work furnished and/or the materials supplied as set forth in Tenant’s payment request. Thereafter, provided that Tenant has opened for business in the Premises and is continuously operating its business at the Premises, subject to the terms and provisions of the Lease, Landlord shall deliver a check to Tenant in payment of the lesser of (A) the Excess Amount so requested by Tenant, and (B) the remaining available portion of the Additional Improvement Allowance, provided that Landlord does not dispute any request for payment based on non-compliance of any work with the Approved Working Drawings, or due to any substandard work, or for any other reason. Landlord’s payment of such amounts shall not be deemed Landlord’s approval or acceptance of the work furnished or materials supplied as set forth in Tenant’s payment request.

(c) Other Terms. Landlord shall only be obligated to make disbursements from the Additional Improvement Allowance to the extent of the Excess Amount incurred by Tenant for Improvement Allowance Items. If the total estimated cost of all Improvement Allowance Items exceeds the sum of the Improvement Allowance provided to Tenant under Section 2.1 of the Work Letter attached as Exhibit B to the Existing Lease and the Additional Improvement Allowance provided under this Section 2, Tenant shall be required to first fund such excess prior to Landlord’s obligation to fund the Additional Improvement Allowance and Landlord may require reasonable evidence that Tenant has funded such excess prior to Landlord’s disbursement of the Additional Improvement Allowance in accordance with this Section 2. Tenant shall pay for all costs and expenses associated with the Tenant Improvements when and as required by Tenant’s Contractor (subject to Landlord’s payment of the Improvement Allowance provided to Tenant under Section 2.1 of the Work Letter attached as Exhibit B to the Existing Lease when and as required under the terms of the Work Letter attached as Exhibit B to the Existing Lease and Landlord’s payment of the Additional Improvement Allowance provided to Tenant under this Section 2 when and as required under the

terms of this Section 2). In no event shall Landlord be obligated to make disbursements pursuant to this Section 2 in a total amount which exceeds the Additional Improvement Allowance and in no event shall Tenant be entitled to any credit for any unused portion of the Additional Improvement Allowance not used by Tenant prior to the first (1st) anniversary of the Commencement Date.

4. Miscellaneous.

(a) Severability. If any provision of this Amendment or the application of any provision of this Amendment to any person or circumstance is, to any extent, held to be invalid or unenforceable, the remainder of this Amendment or the application of that provision to persons or circumstances other than those as to which it is held invalid or unenforceable, will not be affected, and each provision of this Amendment will be valid and be enforced to the fullest extent permitted by law.

(b) Entire Agreement/Modification. This Amendment contains all of the agreements of the parties hereto with respect to the matters contained herein, and no prior agreement, arrangement or understanding pertaining to any such matters shall be effective for any purpose. Except for any subsequent amendments or modifications to the Lease made in accordance with the terms thereof, any agreement made after the date of this Amendment is ineffective to modify or amend the terms of this Amendment, in whole or in part, unless that agreement is in writing, is signed by the parties to this Amendment, and specifically states that that agreement modifies this Amendment.

(c) No Third-Party Beneficiary. This Amendment is for the sole benefit of the parties hereto and their respective successors and permitted assigns. Nothing in this Amendment, express or implied, is intended to or shall confer upon any other person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Amendment.

(d) Counterparts. This Amendment may be executed in any number of counterparts and each counterpart shall be deemed to be an original document. All executed counterparts together shall constitute one and the same document, and any counterpart signature pages may be detached and assembled to form a single original document.

(e) Heirs and Successors. This Amendment shall be binding upon the heirs, legal representatives, successors and permitted assigns of the parties hereto.

(f) Authority. Each individual executing this Amendment on behalf of his or her respective party represents and warrants that he or she is duly authorized to execute and deliver this Amendment on behalf of said entity in accordance with the governing documents of such entity, and that upon full execution and delivery this Amendment is binding upon said entity in accordance with its terms.

(g) Drafting. In the event of a dispute between any of the parties hereto over the meaning of this Amendment, both parties shall be deemed to have been the drafter hereof, and any applicable law that states that contracts are construed against the drafter shall not apply.

(h) Headings. Captions used herein are for convenience and reference only, and shall in no way be deemed to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Amendment.

(i) Ratification. Except as modified by this Amendment, the Existing Lease shall continue in full force and effect and Landlord and Tenant do hereby ratify and confirm all of the terms and provisions of the Existing Lease, subject to the modifications contained herein.

(Signature Page to Follow)


IN WITNESS WHEREOF, the parties have caused this Amendment to be executed as of the dates below their respective signatures.

LANDLORD:
TRANSBAY JOINT POWERS AUTHORITY

By: _____
Name: _____
Its: _____

Date: _____, 2023

TENANT:
PD TRANSBAY LLC, a California limited liability company

By: 
Name: Darren Matte
Its: Managing Member

Date: Feb 8, 2023

APPROVED AS TO FORM.

By: _____
Legal counsel, TJPA

Transbay Joint Powers Authority Board of Directors


Resolution No.: _____

Adopted: _____

Attest: _____
Secretary, TJPA Board

The undersigned Guarantor hereby acknowledges and consents to the terms, conditions and provisions of this Amendment and the transactions contemplated thereby. Guarantor hereby ratifies and reaffirms the full force and effectiveness of the Guaranty and hereby confirms the continuing obligations of Guarantor under the Guaranty.

GUARANTOR:



Darren Matte

Date: Feb 8, 2023