

NINTH AMENDMENT TO AGREEMENT

THIS NINTH AMENDMENT TO AGREEMENT ("Amendment") is made and entered into as of the date set forth on the City's signature page by and between **the CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado, for and on behalf of its Department of Aviation (the "City") and **SKYPORT DEVELOPMENT COMPANY, LLC**, a Colorado limited liability company ("Tenant").

RECITALS

WHEREAS, the City owns and operates Denver International Airport ("DIA" or "Airport") located in the City and County of Denver, Colorado; and

WHEREAS, following a competitive proposal process, the parties hereto entered into an Agreement (AC-69004) dated June 17, 1997 which has been amended by a First Amendment dated September 1, 1998, a Second Amendment dated July 11, 2003, a Third Amendment dated May 17, 2004, a Fourth Amendment dated July 6, 2006, a Fifth Amendment dated February 13, 2007, an Amended and Restated Mezzanine Lease Amendment (Sixth Amendment to Agreement) dated April 11, 2007, a Seventh Amendment dated October 31, 2008, and an Eighth Amendment dated October 29, 2013 (collectively, hereinafter, the "Original Agreement", or together with this Amendment, the "Lease"), implementing Tenant's B Mezzanine Development Project, by granting Tenant the right to develop, operate, sublease and manage various retail and food & beverage establishments on the Mezzanine level of Concourse B ("B Mezzanine") and granting Tenant a license to use the Mezzanine Commons Area of Concourse B ("Mezzanine Commons Area") at DIA for specified purposes in support of the foregoing; and

WHEREAS, in late 2012 continuing into early 2013, Tenant was in discussions with a prospective subtenants to sublease space in a portion of the B Mezzanine for a duty free store (the "Duty Free Store Location") and in the course of those discussions, Tenant became aware that the City planned to solicit proposals for a duty free store for another location at the B Concourse; and

WHEREAS, after several discussions, Tenant and the City agreed that it would be better for DIA's tenant mix to only have one duty free store in the B Concourse and that it made the most sense to locate it on the Mezzanine level with the City to handle the solicitation and leasing of the space directly without the involvement of the Tenant; and

WHEREAS, pursuant to the Eighth Amendment Tenant agreed to return and did return the Duty Free Shop Location to the City in the condition required by the Eighth Amendment and the City accepted the return of the space; and

WHEREAS, the City had agreed to adjust Tenant's rent to reflect the reduction of space governed by the Lease by deleting the Duty Free Store Location but due to an oversight, the rent adjustment concerning the Duty Free Store Location has not occurred and Tenant has continued to pay as if the Duty Free Store Location had not been returned to the City, as a result the City has agreed to provide Tenant with a Rent Credit in the amount of \$224,471.50 and effective November 1, 2014, Tenant will pay the City rent at a rate which reflects the return of the Duty Free Store Location (Tenant will file monthly rental statements and will subtract Rent Credit (defined below) from the rent that is payable until the full amount of the Rent Credit has been recovered); and

WHEREAS, in the Eighth Amendment, the Tenant agreed to make various improvements to the B Mezzanine Commons Area including carpet, tile, and signage upgrades described in and consistent with Tenant's design package submitted to the DRC on May 13, 2013 ("Common Area Improvements"), the cost of which would be difficult for Tenant to recover over the remaining term of the Lease and the City agreed to permit the Tenant to recover the Actual Cost of improvements not to exceed \$500,000 through rent credits; and

WHEREAS, the Common Area Improvements were to be completed on or before ninety days (90) days after Tenant received an NTP with respect to such improvements, which hasn't been issued as of the date of this Amendment, but the City and Tenant believe that completion of the Common Area Improvements is still desirable and the parties have agreed that Tenant will apply for an NTP on or about ten days after the City executes and delivers this Amendment to the Tenant (the "Effective Date"), the City will issue the NTP within ten (10) days thereafter, and Tenant will complete the Common Area Improvements on or before ninety (90) days after Tenant receives the NTP, all as otherwise provided in the Eighth Amendment; and

WHEREAS, in the Eighth Amendment, the Tenant was obligated to enter into signed subleases with Subtenants acceptable to DIA in DIA's sole discretion, with such Subleases to be executed on or before December 31, 2013 (the "New Concepts") and the New Concepts were to be open for business on or before July 1, 2014 (subject to extension due to delays to the extent caused by the City); and

WHEREAS, as required by the Eighth Amendment, on or before December 31, 2013, Tenant entered into a sublease with the DFASS Partnership Group to provide five concepts in satisfaction of Tenant's obligations concerning the New Concepts and delivered that Sublease to the City (in those Sublease documents, the Subtenant proposed 5 concepts but also offered to substitute other concepts subject to the City and the Tenant approving the substitute concepts); and

WHEREAS, for reasons explained below, Tenant, Subtenant and the City have continued to have discussions concerning the best tenant mix for DIA from the concepts proposed by the Subtenant (i.e., the five described in the Sublease plus the list of alternative concepts) and those discussions led the City to hold off on giving its consent to the Sublease, which consent will be given by the City once this Ninth Amendment has been signed; and

WHEREAS, the delays referenced above prevented the New Concepts from starting construction and opening for business on or before July 1, 2014, as required by the Eighth Amendment; and

WHEREAS, subject to the terms of the Eighth Amendment, as modified herein, the Tenant agrees to pay fixed rent for the New Concepts plus one other concept (the "Fixed Rent") starting July 1, 2015 (i.e., one year after the date specified in the Eighth Amendment) based on having the New Concepts opened on or before that same date, with the Tenant taking the risk of the Sublease rent being less than the Fixed Rent and the Tenant retaining any rent paid by the Subtenant in excess of the Fixed Rent, provided, however that the parties have also agreed that if the Effective Date of this Amendment is later than December 4, 2014, the deadlines for completion of construction, opening for business and the start date for the Fixed Rent will be extended by the number of days that the Effective Date is after December 4, 2014; and

WHEREAS, the delays described above and below prevented the opening the New Concepts as contemplated by the Eighth Amendment;

WHEREAS, following execution of the Eighth Amendment, the following unanticipated events occurred (the “Unanticipated Events”):

- (a) the execution, delivery and return by the City of the Eighth Amendment took in excess of 90 days rather than the typical six to eight weeks;
- (b) the award of the specialty retail RFP and prompt opening of the related concession took 484 rather than the typical 323 days;
- (c) the award of the “duty free” concession RFP and prompt opening of the related concession has been significantly delayed. The duty free concession should have been awarded no later than June, 2013 and opened by December 2013, but the original RFP was withdrawn, a second RFP was issued November 2013, and after several delays the award pursuant to the second RFP did not occur until June 9, 2014, but due to disputes and appeals, the Concession Agreement wasn’t signed until July 11, 2014, and construction of the duty free space hasn’t commenced as of the date of this Amendment); and
- (d) DIA has held off on giving its consent and delivering the Sublease for the New Concepts pending award of the specialty retail concession and a re-evaluation of the best tenant mix after the award of the specialty retail concession.

WHEREAS, the specialty retail RFP process took longer than expected which caused unforeseeable delays in resolving which of the New Concepts would be best for the tenant mix at DIA and delayed the City’s execution of the Subleases for the five (5) operations contemplated by the Eighth Amendment (e.g., one concept elected not to sign a sublease with Tenant because the concept was awarded the specialty retail space on the concourse level of the B Concourse, center core, and two locations did not make sense to all concerned); and

WHEREAS, the parties agree that notwithstanding the continuous communication between them and steadfast effort expended by the parties to minimize the effect of the unforeseen delays, those delays negatively affected Tenant's ability to complete improvements to the Common Area, adversely affected Tenant’s ability to attract subtenants, reduced the compensation that the subtenants were willing to pay Tenant, delayed the execution by the City of the subleases for the B Mezzanine, and reduced foot traffic on the B Mezzanine, all of which has harmed the Tenant and caused Tenant to miss certain deadlines that are critical to the expeditious and timely development of Lease Premises; and

WHEREAS, in light of the above described occurrence, the parties have met, negotiated and agreed to revise the term of the Lease to mitigate the adverse effects of the foregoing and to push back many of the Eighth Amendment deadlines for a period of one year;

NOW THEREFORE, in consideration of the foregoing, the terms and conditions set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties have agreed to amend the Original Agreement, as follows:

1. RENT CREDIT. Although the Duty Free Store Location was returned as contemplated by the Eighth Amendment, Tenant continued to pay rent as though it had not been returned. This continued for a period of approximately one year and the City hereby agrees that the Tenant may take a Rent Credit against the next due rent payments until

recovered, in the amount of \$224,471.50, with Tenant filing monthly rental statements subtracting the Rent Credit from the amount due, until the Rent Credit has been recovered. Effective November 1, 2014, Tenant's rent will reflect the return of the Duty Free Store Location.

2. COMMON AREA IMPROVEMENTS. The City and Tenant believe that completion of the Common Area Improvements including carpet, tile, and signage upgrades described in and consistent with Tenant's design package submitted to the DRC on May 13, 2013 ("Common Area Improvements") is still desirable and the parties have agreed that the Tenant will apply for an NTP on or about ten (10) days after the Effective Date, the City will issue the NTP within ten (10) days thereafter, and Tenant will complete the Common Area Improvements on or before ninety (90) days after Tenant receives the NTP, as otherwise provided in the Eighth Amendment. Further, Tenant has agreed that it will spend at least \$250,000 more than the amount required by the Eighth Amendment (i.e., at least \$750,000), but there will be no change to the City's agreement to permit the Tenant to recover the Actual Cost of improvements not to exceed \$500,000.

3. EXTENSION OF CERTAIN EIGHTH AMENDMENT DEADLINES.

a. Revised Opening Schedule. The timetable for opening the businesses of the remaining New Tenants (InMotion is already open) and the deadlines in Section 2.b. of the Eighth Amendment will be as follows:

Event	Completion Date
Submission of Sublease(s) and Attornment Agreement(s) to City as required by the Eighth Amendment	Previously Completed (this was completed prior to the December 31, 2013 deadline)
Submission of Amendment No. 1 to the Subleases and Attornment Agreements	10 business days after the Effective Date
Completion of Construction	210 days after Effective Date
Date on or before which all the New Tenants must have opened for Business	211 Days after Effective Date

4. COMPENSATION. Section 3 of the Eighth Amendment, referencing the addition of a new Section 5.01.E. to the Lease is modified to change the date "July 1, 2014" to "209 days after the Effective Date of the Ninth Amendment" (i.e., July 1, 2015, if the Effective Date is December 4, 2014). The Attachment A-1 described in and attached to the Eighth Amendment is replaced by the corrected Attachment A-1 which is attached hereto and by this reference incorporated herein (the square footage is essentially the same as the prior version, but the spaces were reconfigured by agreement between the City and the Tenant and other minor errors are corrected). With these corrections, the spaces subject to the new Section 5.01.E. are Spaces BM-2B, 2E and 2F, 4A, 4B, 4C, 4D and 4E and 4G.

5. TERM. The Original Agreement is amended to provide that the Term shall expire at noon on May 31, 2019, unless sooner terminated as provided in the Lease. With respect to any Sublease currently scheduled to terminate on October 31, 2017, if the Subtenant and the City have entered into a Non-Disturbance, Attornment and Concession Agreement that permits the Subtenant to occupy the Subtenant Space beyond the presently scheduled Sublease Termination Date, Tenant and the City shall use their best efforts to have the Subtenant agree to amend the Sublease so that it expires no later than May 31, 2019 and to make a conforming

change to the Attornment Agreement so that the concession provisions described therein will commence on June 1, 2019 if the Sublease is presently scheduled to extend beyond that date.

6. ADDITIONAL OBLIGATIONS. The parties to this Amendment agree as follows:

- a. Coordination with Premium Value Concessions Program. If a Subtenant is awarded the PVC Benefit under the City's Premium Value Concessions Program, Tenant agrees that it will offer the Benefit Eligible Subtenant a new sublease (i) for the same or a different location, (ii) for the same or a different concept within the Service Contract's major merchandise category and (iii) in accordance with the Airport's policies then in effect for Concession Agreements, and as may be reasonably required by the City. Any sublease term offered to the Benefit Eligible Subtenant that extends beyond the term of the Lease will be described in a Non-Disturbance, Attornment and Concession Agreement to be executed by and among Tenant, Subtenant and the City.
- b. Tenant's Development Plan. After the Premium Value Concession Benefit Eligibility for the subtenants of the B Mezzanine has been determined, in consultation with DIA's Airport Property Office, Tenant shall update its master plan for the B Mezzanine space ("Tenant's Development Plan"). As updated, Tenant's Development Plan will be compatible with DIA's updated Concession Master Plan so that the overall concession mix will help DIA achieve its goals of meeting the needs of its passengers. Tenant's Development Plan will be updated from time to time as Tenant deems appropriate and will be made available to the public on the Concessions page of the Airport's web site.
- c. Subleasing of Vacant Space. Tenant will continue to develop, lease and use the Lease Premises for retail, service and food and beverage purposes consistent with the needs and requirements of the Airport, subject to the terms, conditions, covenants, and provisions of the Lease. Tenant shall use commercially reasonable efforts to sublease any vacant space included within the Leased Premises prior to the expiration of the Term of the Lease, with any new concepts and subtenants being previously approved by the Airport. Tenant agrees that it will continue its policies of encouraging maximum participation by Airport Concessions Disadvantaged Business Enterprises (ADCBEs) as well as opportunities for small and local businesses, while also striving to attract quality food and beverage, retail and service subtenants emphasizing local, regional, and national brands, consistent with the goals of DIA's concession program. To that end, Tenant agrees to limit its participation to no more than a minority ownership interest in any Subtenant executing and delivering a Sublease after the date of this Ninth Amendment, (excluding any sublease executed in connection with a Premium Value Concessions Program award to a current subtenant and any agreement concerning providing services approved by DIA from the common area to subtenants or the public).
- i. Subleasing Opportunities. Tenant and the Airport will coordinate public advertising of subleasing opportunities on the B Mezzanine and will work together to increase public awareness of any such opportunities. Such coordination may include describing the desired concepts, the space location, size, and configuration of each concession opportunity on the web page of the Airport. Anyone interested in these opportunities may submit a proposal to the

Tenant to the sublease any space that becomes available prior to the expiration of the term of the Lease. Although Tenant has never been required to follow DIA's formal process for soliciting competitive proposals for concession opportunities, Tenant will introduce new efficiencies (e.g., accepting letters of assurance rather than executed franchise agreements, only requiring a bank letter indicating the ability to finance, etc.) in order to streamline its process so that proposals can be submitted and evaluated quickly and fairly and at lower cost. Tenant believes this may level the playing field and encourage ADCBEs as well as small and local businesses to submit proposals.

- ii. *Subleasing Incentives.* In addition to the incentives described in the Eighth Amendment, the parties have agreed that attracting subtenants to the B Mezzanine development requires more incentives than is required on the main level of the same concourse. Two enticements that the City and Tenant have agreed to offer are (i) improvement allowances and (ii) ten year occupancy terms. New subtenants may receive subtenant improvement incentives from Tenant (as determined by the Tenant and approved by the City, each in its reasonable discretion). The cost of such incentives will be recovered over the life of the Subtenant's occupancy including occupancy under a Non-Disturbance, Attornment and Concession Agreement, which will extend beyond the scheduled termination of the Lease. The parties have agreed to share the cost of these incentives based on the length of time that each will be receiving rent from each such subtenant by determining the number of months of the Sublease term (excluding any free rent and/or construction period) (the "Cost Recovery Term"). The cost of the incentives shall include: the Actual Costs incurred by Tenant, including, but not limited to costs incurred with affiliates of Tenant to the extent such costs do not exceed the cost of similar services from a third party ("Sublease Incentive Costs"). The Sublease Incentive Costs will be divided by the Cost Recovery Term and the result will be multiplied times the number of months after the date the Term of the Lease expires and the result is the obligation of the City ("DIA Incentive Contribution") and the balance shall be the obligation of the Tenant. Tenant shall recover the DIA Incentive Contribution through Rent Credits.
- iii. *Selection of a Winning Sublease Proposal.* For each concession opportunity Tenant will fairly evaluate and rank proposals it receives, using Tenant's own methodology. In consultation with the Airport, Tenant will select and document the winning proposal. As part of the documentation process, Tenant will require the successful Subtenant to complete any forms that the City deems necessary or appropriate.
- iv. *Liquidated Damages for Vacant Space.* Should Tenant fail to sublease any vacant space in the Leased Premises, the parties agree that it is and will be impracticable and extremely difficult to determine the actual damages suffered by the City. The parties have agreed that in order to compensate the City for any losses it may incur, commencing on the 121st day after a space (excluding the Guaranteed Rent Spaces as defined in the Eighth Amendment) becomes vacant (subject to extension due to delays to the extent caused by the City), upon written notification from the City of the expiration of the 120 day time period (subject to extension due to delays to the extent caused by the City) and demand

for payment by the City, Tenant shall pay Liquidated Damages to the City as Additional Rent for each day thereafter that such space remains vacant (i.e., not open to the public pursuant to an executed Sublease). For the purposes of the preceding sentence, the term Liquidated Damages shall mean the amount, if any, by which the percentage compensation paid by the prior subtenant for the twelve (12) month period prior to the expiration of other termination of such prior subtenant's sublease, exceeds the Minimum Annual Guarantee, with the excess, if any, being divided by (iii) 365. This remedy shall be the sole and exclusive remedy for six (6) months after Tenant's failure to sublease a vacant, and not thereafter. The amount has been determined based upon numerous considerations including the fact that the City has foregone other proposed revenue-producing uses of the Lease Premises and expended money in reliance upon and based upon Tenant's ability to perform its obligations described herein.

- d. Rent Credits. Any amounts that the Tenant is entitled to recover through Rent Credits shall be used by Tenant to offset the Rent (including Percentage Rent, Additional Rent, and Guaranteed Rent) payments next due from Tenant under the Lease until the full amount of the Rent Credit has been used. Any Rent Credit remaining as of the termination or expiration of the Lease shall be paid by the City to Tenant in cash within thirty (30) days after any such termination or expiration of the Lease.

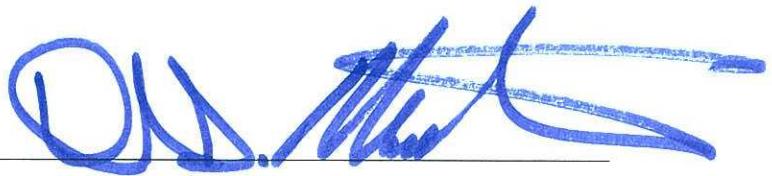
7. **MISCELLANEOUS**. Section 5 of the Eighth Amendment concerning termination of the Amendment is hereby deleted in its entirety.

8. **EFFECT OF AMENDMENT**. To the extent that the provisions contained in this Amendment conflict with or add to the terms of the Original Agreement, the terms contained herein shall prevail and control. In all other respects the terms of the Original Agreement are hereby ratified and confirmed.

[SIGNATURE PAGES FOLLOW]

Contract Control Number: PLANE-AC69004-10

Contractor Name: Skyport Development, LLC

By: 

Name: David S. Mosteller
(please print)

Title: Member
(please print)

ATTEST: [if required]

By: N/A

Name: _____
(please print)

Title: _____
(please print)



Contract Control Number:

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

CITY AND COUNTY OF DENVER

ATTEST:

By _____

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

By _____

By _____

By _____

