



CITY OF SAN DIEGO

PERCENTAGE LEASE

BY AND BETWEEN

THE CITY OF SAN DIEGO,
A CALIFORNIA MUNICIPAL CORPORATION

AND

BH PARTHERSHIP,
A CALIFORNIA LIMITED PARTNERSHIP

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CITY OF SAN DIEGO
PERCENTAGE LEASE

THIS CITY OF SAN DIEGO PERCENTAGE LEASE ("Lease") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY") and BH Partnership, a California limited partnership ("LESSEE"), to be effective as of _____, **2012** (the "Effective Date"), when signed by the parties and approved by the San Diego City Attorney.

FOR VALUABLE CONSIDERATION, the sufficiency of which is acknowledged, the parties agree as follows:

RECITALS

- A. CITY is the owner of that certain real property located in the City of San Diego, County of San Diego, State of California, commonly known as the "Bahia Resort Hotel," located in Mission Bay Park.
- B. William D. Evans and Lucy E. Lamoreaux entered into a Lease Agreement dated March 17, 1966, filed as Document No. 697319 in the Office of the CITY Clerk, as amended and assigned (the "Original Lease") for the construction, operation and maintenance of the Bahia Resort Hotel.
- C. The Original Lease was amended by that certain First Amendment to Lease Agreement dated April 24, 1967, and that certain Second Amendment to Lease Agreement dated November 14, 2002.
- D. LESSEE became the successor in interest to William D. Evans and Lucy E. Lamoreaux under the Original Lease by an assignment to BAHIA HOTELS ASSOCIATES, a California general partnership that was subsequently reconfigured as BH PARTNERSHIP, a California limited partnership. CITY consented to the assignment on June 1, 1994.
- E. The Original Lease expires March 31, 2031.
- F. LESSEE has requested a new Lease for a new forty (40) year term, in part to facilitate LESSEE'S intentions to redevelop the leasehold.
- G. It is expected that any such contemplated future redevelopment of the leasehold by LESSEE ("redevelopment") would increase the value of the leasehold, the improvements thereon, and Mission Bay Park in general to the benefit of tourists, residents, and the CITY, and also would likely reposition the Bahia Resort Hotel to produce increased rents and Transient Occupancy Tax to CITY by improved utilization of the property.
- H. All aspects of any potential future redevelopment would be reflected in comprehensive development and construction plans conforming with all laws, requirements, and conditions in effect at that time, and would be subject to full review by the San Diego

City Council ("City Council"), in its sole discretion, at that later time.

SECTION 1: PREMISES; USES

- 1.1 Leased Premises. CITY leases to LESSEE and LESSEE leases from CITY all of that CITY-owned real property (the "Premises") located at 998 West Mission Bay Drive, San Diego, California 92109, commonly known as the "Bahia Resort Hotel," consisting of approximately 13.053 acres of land and 2.444 acres of water in Mission Bay Park and more particularly described in **Exhibit A: Legal Description of Premises**, and **Exhibit B: Aerial Map of the Premises**, attached hereto.
- 1.2 Supersedes Prior Agreements. By the execution and delivery of this Lease, and subject to the approval and authorization by the City Council, CITY and LESSEE hereby terminate the Original Lease as of the Effective Date of this Lease. It is mutually agreed that this Lease shall supersede any and all prior agreements between the parties, and their predecessors in interest, related to all or any portion of the Premises, including the Original Lease, that certain City of San Diego Permit to operate "Bahia Belle I" (later renamed the "Bahia Belle"), sightseeing excursion boat, dated June 23, 1986, and filed in the Office of the San Diego City Clerk as Document No. RR- 265797, and that certain City of San Diego Permit to operate "Bahia Belle II" (later renamed the "William D. Evans"), sightseeing excursion boat, dated April 24, 1985, and filed in the Office of the San Diego City Clerk as Document No. R-262866. The Original Lease and boat Permits shall be of no further force or effect except as to any rentals and fees that may have accrued thereunder, and any rights and remedies accrued or granted thereunder and which by their nature or by agreement survive such termination.
- 1.3 Allowed Uses. LESSEE may only use the Premises for the following purposes (the "Allowed Uses"): (a) the operation, maintenance and redevelopment of a resort hotel, including hotel rooms; restaurants; convention and conference rooms; banquet rooms and catering facilities; cocktail lounges; coffee shops; gift shops; spa and fitness facilities; snack bars; shops for the sale of clothing, jewelry, novelties and sundries; personal services, including massage and physical training instruction; a marina, boat slips, and boat rentals; and parking for use of LESSEE'S guests, licensees, and the general public in accordance with all approved development plans as approved by CITY; (b) the operation of the "Bahia Belle" and "William D. Evans" as sightseeing and excursion boats and as meeting and banquet facilities on the waters of Mission Bay Park; and (c) other services and uses which are ancillary to and compatible with the foregoing uses, including without limitation pool(s) and whirlpool(s), tennis courts and(or) other recreational amenities, telephone service, in-room movie and game rentals, wireless telecommunications equipment, rentals of audio-visual and other meeting/banquet equipment, activities for children and other guests, beverage and snack vending machines, game machines, bicycle rentals, aquatic equipment rentals, laundry machines, cabana rentals, automated teller machines, catering, and alcoholic beverage service outside of the restaurants and lounges in compliance with all laws, rules and regulations of competent governmental authority. LESSEE is not allowed to use or maintain the Premises for any other purpose whatsoever without CITY's prior written consent in each instance.

- 1.4 Operation of Bahia Belle and William D. Evans. CITY hereby grants LESSEE the right to operate "Bahia Belle" and "William D. Evans" (the "Boats") as sightseeing and excursion boats and as meeting and banquet facilities non-exclusively on the waters of Mission Bay Park, on condition said operation is and remains in compliance with all laws, rules and regulations of competent governmental authority, including without limitation the Coastal Development Permit issued by the California Coastal Commission for the "William D. Evans" (Permit No. 6-85-220). CITY grants permission for the Boats to be used for the operation of a cocktail bar and kitchen for the sale of alcoholic beverages and food items to LESSEE's patrons in compliance with all laws, rules and regulations, and for no other purpose whatsoever without CITY's prior written consent in each instance. The Boats shall be berthed at the Premises' dock while they are not in operation; provided, however, that the Boats may be berthed at the Catamaran Resort and Spa Hotel pier, located at 3999 Mission Boulevard, San Diego, California, 92109, on occasion, subject to separate authorization from the CITY (such authorization currently being provided in that certain Catamaran Pier Lease, document number RR-299832, on file with the City Clerk's Office of CITY. Operation of the Boats shall be in strict compliance with an Operation Plan submitted by LESSEE and approved by CITY'S Fire-Rescue Department, Lifeguard Division, and CITY's Parks and Recreation Department. In addition, LESSEE shall secure all necessary permits and approvals for the Boats' operation from all necessary governmental agents, boards, commissions, and agencies at LESSEE's sole cost and expense, and shall operate the Boats' in accordance with such permits and approvals and shall comply with any conditions and(or) limitations of such permits or approvals. LESSEE shall not modify the Boats' dimensions, colors or designs without CITY's prior written consent in each instance. CITY shall not be responsible for providing or ensuring navigable waters in Mission Bay Park for the Boats or any other vessel operated or rented by LESSEE or its sublessees or permittees. However, LESSEE retains the option to discontinue use of one or both of the Boats should the waters in Mission Bay Park become unnavigable for normal operation of the Boat(s) for more than one-quarter of the days of any given year. In the event of such discontinuation of operation and the complete removal and (or) non-use of the Boats, the Minimum Rent shall be reduced by an amount equal to the portion of the then-current Minimum Rent provided by the Boat(s), as follows: if the use of the "Bahia Belle" is discontinued, then the then-current Minimum Rent shall be reduced by Three Percent (3%); if the use of the "William D. Evans" is discontinued, then the then-current Minimum Rent shall be reduced by Six Percent (6%); in the event use of both Boats is discontinued, then the then-current Minimum Rent shall be reduced by Nine Percent (9%). LESSEE shall, at its expense, operate (which includes payment of energy bills) and maintain the lighting system in the "H" and "T" portions of the Ventura Cove parking area, as shown in the highlighted boundary portions of **Exhibit C: Lighting of Public Parking Lot**, in a manner satisfactory to CITY, so long as LESSEE continues to operate the "William D. Evans" during the Term of this Lease and any extensions thereof. In addition, LESSEE shall maintain a minimum Three Hundred Thirty Five (335) parking spaces on the Premises and Four Hundred Forty Four (444) parking spaces at the Catamaran Resort and Spa Hotel.

- 1.5 Mission Bay Park Master Plan. This Lease is subject to the City of San Diego Mission Bay Park Master Plan Update, adopted August 2, 1994, amended July 9, 2002, and as may be amended from time to time.
- 1.6 Business Objective. LESSEE shall diligently and continually conduct its business on the Premises to reasonably maximize "Gross Revenue," as defined by this Lease.
- 1.7 Superior Interests. This Lease is subject to all liens, encumbrances, covenants, conditions, restrictions, reservations, contracts, permits and licenses, easements, and rights-of-way pertaining to the Premises, whether or not of record. LESSEE shall obtain all licenses, permits and agreements from such third parties as may be or become necessary or reasonably advisable to allow its use of the Premises, relative to any such superior interest. If LESSEE's use of the Premises is or becomes inconsistent or incompatible with a preexisting, superior interest, LESSEE shall take such actions and pay all costs and expenses necessary to remove such inconsistency or incompatibility to the satisfaction of the holder of the superior interest.
- 1.8 Governmental Approvals. By entering into this Lease, neither CITY nor the City Council is obligating itself to LESSEE or to any governmental agent, board, commission, or agency with regard to any other discretionary action relating to LESSEE's occupancy, use, development, maintenance or restoration of the Premises. Discretionary action includes without limitation re-zonings, variances, environmental clearances and all other required governmental approvals. CITY makes no representation or warranty regarding review or approval of LESSEE's development or Redevelopment Plans for the Premises, and failure of the CITY of City Council to approve any plans or grant any required permits for development or redevelopment shall not give rise to any claim, liability, obligation, or cause of action related to this Lease.
- 1.9 CITY's Consent, Approval. CITY's consent or approval under this Lease shall mean the written consent or approval of the Mayor of San Diego, or his or her designee ("Mayor"), unless otherwise expressly provided. CITY's discretionary acts hereunder shall be made in the Mayor's discretion, unless otherwise expressly provided.
- 1.10 Quiet Possession. LESSEE, performing the covenants and agreements in this Lease, shall at all times during the term of this Lease peaceably and quietly have, hold, and enjoy the Premises. If LESSEE is temporarily dispossessed through action or claim of a title superior to CITY's, this Lease shall not be voidable nor shall CITY be liable to LESSEE for any loss or resulting damages.
- 1.11 Reservation of Rights.
- 1.11.1 Mineral Rights. CITY reserves all rights, title and interest in and to any and all subsurface natural gas, oil, minerals and water on or within the Premises.

- 1.11.2 Easements. CITY reserves the right to grant, establish and use easements and rights-of-way over, under, along, across and through the Premises for utilities, thoroughfares or access as it deems advisable for the public good.
- 1.11.3 Repairs. CITY may at all reasonable times enter the Premises for the purpose of making repairs to or developing municipal resources and municipal services.
- 1.11.4 Noninterference. CITY shall not unreasonably interfere with LESSEE's use of the Premises. CITY shall pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.
- 1.12 Competent Management. LESSEE shall provide competent management of the Allowed Uses to CITY's reasonable satisfaction. "Competent management" shall mean management practices generally considered acceptable within LESSEE's industry for the management and operation of activities substantially similar to the Allowed Uses and in compliance with all laws, rules and regulations of competent governmental authority, and in a fiscally responsible manner. "Fiscally responsible manner" shall mean in accordance with generally accepted accounting principles consistently applied and absent of financial malfeasance.
- 1.13 Security. LESSEE shall at all times provide, at LESSEE's sole cost and expense, security measures to use reasonable care to protect persons and property on the Premises, including without limitation maintaining a plan for adequate patrol of all areas of the Premises with the goal of preserving order and preventing theft, vandalism and other improper or unlawful use of the Premises or any of the facilities thereon.
- 1.14 Public Use; No Discrimination. LESSEE shall allow full and continuous public use of the Premises for the benefit of the public. LESSEE shall make all facilities and services on the Premises available to the public without unlawful discrimination, in accordance with Section 12.10 hereof.
- 1.15 Protection of Environment. LESSEE shall, at LESSEE's sole cost and expense:
- (a) Take all reasonable precautions to prevent pollution or littering of the atmosphere, land and water on, from, in or about the Premises, including without limitation the discharge of petroleum products, directly or indirectly into Mission Bay;
 - (b) Maintain noise levels on the Premises to prevent a nuisance to persons and property in and in the vicinity of Mission Bay Park and the Premises; and
 - (c) Maintain levels of light emissions from the Premises to prevent a nuisance to persons and property in and in the vicinity of Mission Bay Park and the Premises, and to prevent negatively affecting automobile, boat and airplane operations in and in the vicinity of Mission Bay Park and the Premises.
- 1.16 Parking. LESSEE shall provide and maintain onsite parking on the Premises, generally in accordance with all development plans as approved by the CITY. Notwithstanding the

foregoing and subject to the terms and conditions of LESSEE's coastal development permit, approved development plans, and applicable laws, rules and regulations, LESSEE shall not, other than temporarily and only then in the ordinary course of business, store or maintain any personal property on or near any parking lot and thereby cause any interference in any way with the ability to park in the parking lots on the Premises.

- 1.17 Operating Plan – Lifeguard Division Approval. At least sixty (60) days prior to each October 1 during the term of this Lease, LESSEE shall, at its sole cost and expense, submit to CITY a written, annual operating plan describing how LESSEE intends to conduct each of the Allowed Uses in the waters of Mission Bay. Each such operating plan shall be in form and contain content reasonably satisfactory to CITY. Except as required by law, LESSEE shall not make any changes to an existing CITY-approved operating plan without CITY's prior written approval in each instance, which may not be unreasonably withheld or delayed. LESSEE shall conduct each Allowed Use in the waters of Mission Bay in accordance with its most recently CITY-approved operating plan. CITY acknowledges that LESSEE has submitted an operating plan for the first Lease year, which has been approved by the CITY.

SECTION 2: TERM

- 2.1 Term. The term of this Lease ("Term") shall be forty (40) years, commencing on the Effective Date. If the Effective Date is other than the first day of a calendar month, the partial month after the Effective Date shall be included in the following full calendar month to comprise the first month of the Term so that the second month of the Term will start on the first day of a calendar month. Lease year ("Lease Year") as used in this Lease shall mean each twelve (12)-month period during the Term, calculated from the Effective Date.
- 2.2 Holdover. Any holding over by LESSEE after the expiration or earlier termination of this Lease shall not be considered a renewal or extension of this Lease. LESSEE's occupancy of the Premises after the expiration or earlier termination of this Lease shall constitute a month-to-month tenancy at will, and all other terms and conditions of this Lease shall continue in full force and effect, except that CITY may then demand and receive from LESSEE rent up to one hundred twenty-five percent (125%) of the then fair market rent for the Premises' highest and best use, as determined by an appraisal prepared by a qualified appraiser chosen by CITY in its sole discretion, which rent shall be effective and due as of the first day of the holdover period, retroactively applied after the appraisal is made.
- 2.3 Surrender of Premises. Upon the expiration or earlier termination of this Lease, LESSEE shall vacate the Premises and surrender it to CITY free and clear of all liens and encumbrances, and in a condition reasonably satisfactory to CITY. After the expiration or earlier termination of this Lease, LESSEE shall execute and deliver to CITY, within thirty (30) days after CITY's request, a valid and recordable quitclaim deed covering all of the Premises. If LESSEE fails or refuses to deliver the required quitclaim deed, CITY

may prepare and record a notice reciting LESSEE's failure to perform this Lease obligation, and the notice shall be deemed conclusive evidence of the termination of this Lease and all of LESSEE's rights in and to the Premises.

SECTION 3: POTENTIAL REDEVELOPMENT AND AGREEMENT REGARDING NEW LEASE TERM

- 3.1 Redevelopment. It is mutually agreed that Lessee is not required by this Lease to undertake any redevelopment. However, if LESSEE elects to and secures the right to redevelop the Premises at any time prior to the end of the tenth (10th) Lease Year, any such redevelopment shall be in compliance with all laws and requirements in effect at the time of application, approval, and execution of said Redevelopment. **LESSEE acknowledges that CITY, other than agreeing to a certain time term for a potential new lease agreement as described below in Section 3.2, has not made, nor now makes, any determinations regarding any aspect, sufficiency, or legality of any redevelopment of the Premises or aspect thereof. Furthermore, CITY does not represent, warrant, or guarantee any future approval by the City Council, nor shall anything in this Lease be interpreted as representing, warranting, or guaranteeing any such future approval.**
- 3.2 New Lease. If, at any time prior to the end of the tenth (10th) Lease Year, and as long as LESSEE is not in breach or default of any term or provision of this Lease, LESSEE obtains formal approval by the City Council for any redevelopment of the Premises, then CITY agrees at that time to enter into negotiations for a new lease ("New Lease") which would supersede this Lease and include a new fifty (50) year term. The New Lease shall be subject to full and formal approval by the City Council, in its sole discretion, at that future time. The City Council in the future may consider whether the proposed redevelopment causes substantial benefit to CITY sufficient to authorize the fifty (50) year term of a New Lease when determining whether to approve the proposed redevelopment. Although the City is presently committing (in order to facilitate financing for Lessee) to offer a New Lease term of fifty (50) years in the event a New Lease is approved, the City is not hereby committing itself to approve any New Lease in the future. **CITY does not presently represent, warrant, or guarantee any future approval by the City Council of any redevelopment and the related new fifty (50) year lease term, nor shall anything in this Lease be interpreted as representing, warranting, or guaranteeing any such future approval.**
- 3.2.1 Contingency. Failure by LESSEE to obtain formal City Council approval by the end of the tenth (10) Lease Year, shall cause the contractual right to negotiate a New Lease as described above to be forfeited. Any time required or reasonably requested by the CITY, CITY's Development Services Department, and or City Council in reviewing, commenting, or calendaring for hearing LESSEE'S Redevelopment Plans shall not toll or otherwise expand the ten (10)-year time limit agreed herein, unless otherwise and expressly agreed-to in writing by CITY.

SECTION 4: OPERATIONS ON THE PREMISES

- 4.1 Operation of Premises. LESSEE shall conduct its business and operate the Premises continuously throughout the Term, except during any period of reasonable and necessary closures including without limitation usual and customary closures for periodic refurbishment of the Bahia Resort Hotel's facilities. LESSEE shall diligently furnish services to the public in a creditable manner in conformity with all applicable laws, rules and regulations. LESSEE shall ensure that the type and quality of food-handling services furnished by LESSEE qualifies for the conditions and requirements of the "A Card" issued by the County of San Diego Department of Environmental Health to operators of food-handling establishments.
- 4.2 Local Coastal Program. If a local coastal program ("Local Coastal Program") is adopted for the Mission Bay Park segment of City of San Diego's Local Coastal Program, and if the Local Coastal Program provides for the collection of a traffic impact mitigation fee from commercial lessees in Mission Bay Park to fund all or a portion of the cost of a beach shuttle or other substantially-similar public-access improvements, LESSEE shall contribute its fair and equitable share, as calculated pursuant to the Local Coastal Program, to such a traffic impact mitigation program, provided the amount payable by LESSEE shall be reasonable and shall not exceed the amount LESSEE would have paid had the entire amount to be funded by traffic impact mitigation fees been reasonably, equitably, and fairly apportioned among all of the commercial lessees in Mission Bay Park. This section shall not be altered or amended without the prior written approval of the California Coastal Commission or an amendment to California Coastal Permit No. 6-93-75/EL.
- 4.3 Trash and Refuse. LESSEE shall, at its sole cost and expense, provide containers on the Premises to receive trash and refuse generated on the Premises. LESSEE shall not locate refuse containers outside the Premises. LESSEE shall ensure that such containers are covered and emptied regularly enough to prevent them from overflowing or creating unhealthful, unsightly or unsanitary conditions. LESSEE shall ensure that the contents of the containers are disposed of at authorized landfills or other garbage reception areas as provided under applicable law at the time of collection.

SECTION 5: RENT

- 5.1 Rent. LESSEE shall pay rent to CITY in the amount of the greater of: (a) a percentage rent (the "Percentage Rent," defined below); and (b) a minimum monthly rent (the "Minimum Monthly Rent," defined below). LESSEE shall also pay the Additional Consideration and the "Supplemental Rent" (defined below) as additional rent. Within thirty (30) days after the end of each month during the Term, LESSEE shall deliver to CITY a schedule of LESSEE's "Gross Revenue" (defined below) for the month, together with a statement of the Percentage Rent payable for that month, prepared using generally accepted accounting principles consistently applied, with revenue categorized by source, and deductions categorized by type. Concurrently with the delivery of such schedule and

statement, LESSEE shall pay to CITY the greater of the Minimum Monthly Rent and the Percentage Rent for that month. Provided, however, in the event that the combined total Percentage Rent payment and Monthly Minimum Rent payments during any Lease Year equal or exceed the required annual Minimum Rent for that Lease year, then for the balance of such Lease Year, LESSEE shall discontinue paying Monthly Minimum Rent and shall continue paying only Percentage Rent until the beginning of the ensuing Lease Year. Provided further, in the event Minimum Rent paid plus Percentage Rent paid exceed the annual Minimum Rent and also exceed the rent which would have been paid if the Percentage Rent had been paid on total Gross Revenues for that Lease Year, the excess over the annual Percentage Rent shall be credited against the next payable rent as it becomes due. It is the intent of this provision that LESSEE shall pay Monthly Minimum Rent as a guarantee against the Percentage Rent requirement and that the greater of the two requirements, Minimum Rent or Percentage Rent, shall prevail on an annual basis.

- 5.2 Gross Revenue. "Gross Revenue" shall mean all revenue derived from all CITY-approved uses of the Premises, including without limitation all revenue derived from sublessees or licensees. Possessory interest taxes or other property taxes shall not be deducted in computing Gross Revenue. Notwithstanding the foregoing, Gross Revenue shall not include: (a) federal, state or municipal taxes collected from consumers (regardless of whether such amount is stated to the consumer as a separate charge) and paid periodically by LESSEE to a governmental agency and accompanied by a tax return or statement as required by law; or (b) refunds for goods returned for resale on the Premises or refunds of deposits. LESSEE shall clearly indicate the amount of all such taxes and refunds on its books and records.

- 5.3 Minimum Monthly Rent. The minimum monthly rent ("Minimum Monthly Rent") for the first five (5) Lease Years shall be Ninety Thousand Dollars (\$90,000) per month.

- 5.3.1 Minimum Monthly Rent Adjustment. The minimum monthly rent shall be adjusted every five (5) years. Effective as of the first day of the sixth (6th) Lease Year, and as of the first day of each sixth (6th) Lease Year thereafter, the Minimum Monthly Rent shall be recalculated to equal one-twelfth (1/12) of eighty percent (80%) of the annual average of all rents paid and payable (i.e., "earned") during the preceding three (3) Lease Years, including without limitation the Minimum Rent, Percentage Rent and Supplemental Rent. The rent credit amounts defined under Section 5.5 shall not be included in the formula to calculate the Minimum Monthly Rent Adjustments. Notwithstanding the foregoing, no such recalculation of the Minimum Monthly Rent shall reduce the Minimum Monthly Rent in effect immediately prior to the recalculation. LESSEE acknowledges that such adjustments shall be calculated by CITY after receipt of all applicable Gross Revenue schedules and Percentage Rent statements. Until such calculations are completed, LESSEE shall continue paying the most recent Minimum Monthly Rent. LESSEE further acknowledges that any adjustment shall apply retroactively and shall be payable by LESSEE as in effect of the first day of the Lease year in which the adjustment is made. Within thirty

(30) days after CITY notifies LESSEE of the new Minimum Monthly Rent, LESSEE shall pay to CITY any and all rent deficiencies between the previous Minimum Monthly Rent and the retroactive, adjusted Minimum Monthly Rent.

- 5.3.2 Reduction during any redevelopment. The Minimum Monthly Rent shall be reduced during any periods of construction, including without limitation during any improvement activities during any future redevelopment, if hotel rooms or other revenue-producing facilities are necessarily taken out of service. The reduction shall be in an amount proportionate to the percentage of hotel rooms and(or) other revenue-producing facilities taken out of service, and only for the time the number of hotel rooms and(or) square footage of revenue-producing facilities in service is below the number of hotel rooms and(or) square footage of revenue-producing facilities available before the Redevelopment construction.
- 5.3.3 LESSEE has the right, but not the obligation, to discontinue operation of one or more of the Boats during the Term of this Lease. In such event, LESSEE's Minimum Monthly Rent will be reduced in accordance with Section 1.4 hereof.
- 5.4 Additional Consideration. Until the first day of the eleventh (11th) Lease Year, LESSEE shall pay to CITY the Additional Consideration in monthly installments of Six Thousand Two Hundred Fifty Dollars (\$6,250) as additional rent. After the first day of the eleventh (11th) Lease Year, LESSEE shall pay to CITY the Additional Consideration in monthly installments of Sixteen Thousand Eight Hundred Sixty Two Dollars (\$16,862), which includes accrued interest and principal thereon of the amortized underpayments agreed-to above, calculated at six percent (6%) per annum from the Effective Date of this Lease through the first day of the eleventh (11th) Lease Year. LESSEE shall pay the Additional Consideration at the specified schedule and pursuant to the specified formula regardless of whether LESSEE undertakes or completes any redevelopment of the Premises; provided, however, that if LESSEE is eligible for the Rent Credit noted in Section 5.5 below, the requirement to pay the Additional Consideration shall immediately cease.
- 5.5 Rent Credit. In the event of completion of any redevelopment of the Premises approved as described in Section 3.2 of this Lease, and only in such event as consideration for completion of any such redevelopment, CITY shall allow LESSEE a rent credit ("Rent Credit") up to the amount of Two Million One Hundred Eight Thousand Seven Hundred Thirty Five Dollars (\$2,108,735). The Rent Credit shall be applied to LESSEE's monthly rent payable as of the first day of the first month following completion of the Redevelopment. The Rent Credit shall be applied to fifty percent (50%) of LESSEE's monthly rent payable until all amounts of Additional Consideration actually paid (principal only, not including interest thereon) have been fully credited against LESSEE's rent. No fees, interest or adjustments based on financing shall be applied to Rent Credit calculations.

- 5.6 Percentage Rent. “Percentage Rent” shall mean rent in an amount equal to the sum of the percentages of Gross Revenue derived from certain designated business activities, applied as follows:

<u>Percentage of Gross Revenue</u>	<u>Business Activities</u>
Seven Percent (7%)	Rental of rooms, cottages or other living accommodations. Provided, however, LESSEE may deduct from such gross income before computing the rent due CITY, any commission or fee paid to a travel agent as a result of procurement or attempted procurement by said agent, bureau or agency for said rooms, cottages, and other living accommodations; provided further, that such deduction shall not exceed ten percent (10%) of such gross income; and provided further, that no deductions shall be allowed with respect to fees paid to any such agency or bureau if LESSEE has any financial interest therein. The percentage rate for this activity will increase to seven and one-half percent (7.5%) at the beginning of the sixth (6 th) Lease Year of the Term. At the beginning of the sixteen (16 th) lease year, the percentage rate will be adjusted based upon fair market rent as described in Section 5.7 below.
Six Percent (6%)	Operation of cocktail lounges and any bar dispensing alcoholic beverages, or from any other operation, concession or facility engaged in the sale of alcoholic beverages, including without limitation alcohol dispensed at or on the Boats.
Three Percent (3%)	Operations involving the serving of meals or dispensing of food or non-alcoholic beverages, including without limitation coffee shops, restaurants, cocktail lounges and the Boats.
Twenty Five Percent (25%)	Boat slips rentals and boat storage.
Ten Percent (10%)	Any boat rentals or fares in conjunction with the operation of any excursion, sightseeing or shuttle boat (if said operation is first approved in writing by CITY in each instance). CITY acknowledges that operation of the “Bahia Belle” and “William D. Evans” is approved under this Lease.

Seven Percent (7%)	Operation of a health club, spa, or other similar facility.
Seven Percent (7%)	Operation of a gift shop or other similar facility.
Ten Percent (10%)	Any other source resulting from use or occupancy of the Premises; provided, however, that all revenues arising from telephone and telegraph charges by LESSEE to patrons on said premises shall not be subject to rent.
Three Percent (3%)	Mandatory gratuities or service charges, including without limitation mandatory gratuities or service charges collected as result of operation of the Boats.
Thirty-three & 1/3 Percent (33-1/3%)	Wireless telecommunication equipment installed or operated on or from the Premises. The percentage rate for this activity will increase to fifty percent (50%) at the beginning of the sixth (6 th) Lease Year of the Term.
Ten Percent (10%)	All in-room entertainment, including without limitation pay-per-view movies and games.
Ten Percent (10%)	Rental of audio-visual equipment
Ten Percent (10%)	Markup, if any, on exchange account items, defined as those products or services purchased from a third party by LESSEE as an accommodation to an individual or group guest of hotel that are then provided to that guest of the hotel and for which LESSEE in turn charges that guest.

If LESSEE requests a use of the Premises in addition to the Allowed Uses, CITY and LESSEE shall determine by agreement the Percentage Rent calculation applicable to such use prior to CITY's approval of the use. Without express, written consent to the proposed use and an express, written agreement regarding the applicable Percentage Rent for said use, the use shall be deemed an unauthorized use and all Gross Revenue therefrom shall be payable to CITY.

- 5.7 Percentage Rent Adjustments. Upon at least one hundred eighty (180) days prior written notice to LESSEE, CITY may, but shall not be obligated to, adjust the Percentage Rent in the sixth (6th), sixteenth (16th), twenty-sixth (26th), thirty-sixth (36th), and the forty-sixth (46th) Lease Years to reflect the then-current fair market rent for the Premises and the Allowed Uses, as evidenced by then-recent leases for similar premises similarly

improved, operated and located within the region comprised of Ventura County, Los Angeles County, Orange County, and San Diego County, California. The new Percentage Rent shall be determined by mutual consent or through appraisal as hereinafter set forth. In the event that such adjustment has not been arrived at by mutual consent by ninety (90) days prior to the start of the applicable Lease Year, then the parties hereto will have the premises appraised under the terms hereinafter set forth.

In the event the parties do not agree upon the amount of adjustment to said percentage rates as provided for in the previous section, then the adjustment shall be determined by a qualified professional independent real estate appraiser selected by mutual consent of the parties to this Lease from the list of appraisers approved by CITY within ten (10) days of receipt of the list of appraisers. CITY and LESSEE agree to equally share the cost of the mutually-selected appraiser. In the event the parties do not reach agreement as to selection of a mutually-acceptable appraiser, then CITY and LESSEE shall each select a qualified professional independent real estate appraiser who in turn will select a third qualified professional independent real estate appraiser, which third appraiser will be employed to set the percentage rates to be applied to LESSEE'S percentage rate adjustment. In the event a mutually acceptable third appraiser is not agreed upon between the two selected appraisers within ten (10) days, then the third appraiser will be appointed by the presiding judge of the Superior Court of the State of California, County of San Diego, acting in his or her individual capacity, upon application by either CITY or LESSEE with prior notice thereof to the other party. In the event that the Superior Court judge declines to make the appointment, the parties hereto agree that the third appraiser shall be promptly determined in accordance with the rules of the American Arbitration Association. Said third appraiser, however appointed, shall complete the assignment within sixty (60) days of appointment. Each party shall pay the cost of its own selected appraiser, and both CITY and LESSEE agree to equally share the cost of the third appraiser, however appointed. CITY and LESSEE agree to accept and be bound by the percentage rates determined by the appraiser selected or appointed to complete the assignment.

In establishing the percentage rates for categories set forth in this Lease, the appraiser shall consider CITY'S interest in the property as a fee simple absolute estate, and as vacant and available on the open market for the authorized purposes of this Lease at the commencement of the rental period under review. The appraiser will be guided by prevailing market percentage rates for similar operations primarily within the Southern California communities as listed above, if available.

The new Percentage Rent shall be effective and due as of the first day of the applicable Lease Year, regardless of when the appraisal is completed. In the event the appraisal is not completed in time to permit the percentage adjustment to be made upon the applicable commencement of the appropriate Lease Year of adjustment, LESSEE agrees to continue to pay rent in accordance with the then-existing lease rates, and the adjustment, when determined, will be retroactive to said effective date of rental adjustment as hereinabove established. If any Percentage Rent deficiencies are created by the adjustment process set forth in this section, LESSEE shall pay to CITY any and all

such rent deficiencies within ninety (90) days after CITY's notice of the Percentage Rent adjustment.

In no event shall the adjusted percentage rate be less than the percentage rate in existence at the time of the adjustment. The adjusted rates will not, as a result of the process, be increased by more than one-half of one percentage point (0.5%) for any specific adjustment period.

- 5.8 Supplemental Rent. "Supplemental Rent" shall mean rent in an amount equal to the percentages of Gross Revenue set forth in this section. LESSEE shall pay to CITY Supplemental Rent within thirty (30) days after the end of each Lease Year.

5.8.1 If a Lease Year's Gross Revenue is greater than Ten Million Eight Hundred Seventeen Thousand Dollars (\$10,817,000) and less than or equal to Fourteen Million Four Hundred Twenty-Two Thousand Seven Hundred Dollars (\$14,422,700), then LESSEE shall pay to CITY Supplemental Rent equal to One Half of One Percent (.5%) of the portion of the Gross Revenue that exceeds \$10,817,000.

5.8.2 If a Lease Year's Gross Revenue is greater than Fourteen Million Four Hundred Twenty-Two Thousand Seven Hundred Dollars (\$14,422,700), then LESSEE shall pay to CITY Supplemental Rent equal to One Percent (1%) of the portion of the Gross Revenue that exceeds \$14,422,700, in addition to the One Half of One Percent Supplemental Rent amount above.

5.8.3 Effective as of the first day of the sixth (6th) Lease Year (simultaneous to the Percentage Rent adjustment noted in Section 5.7 above), this requirement to pay Supplemental Rent shall terminate.

- 5.9 Unauthorized-Use Charge. LESSEE shall pay CITY one hundred (100%) of the gross receipts from any use of the Premises that is not allowed by this Lease, regardless of any related penalties charged LESSEE by competent governmental authorities. Such unauthorized use charge shall be payable to CITY within thirty (30) days after LESSEE receives such gross receipts. No unauthorized use charges shall satisfy or credit against any other rent obligations of LESSEE under this Lease. The unauthorized use charge shall otherwise be considered "rent" under this Lease, and shall be subject to all costs and penalties for delinquent payments hereunder. The existence of such unauthorized use charge and CITY's acceptance thereof shall not constitute authorization for the use in question, and shall not waive any of CITY's rights under this Lease.

- 5.10 Time and Place of Payment. All rent payments shall be made payable to "City Treasurer" and mailed to:

The Office of the City Treasurer
City of San Diego
P.O. Box 129030
San Diego, California 92112-9030

or hand-delivered to:

The Office of the City Treasurer
Civic Center Plaza
1200 Third Avenue, First Floor
San Diego, California 92101

CITY may change the place of payment at any time upon thirty (30) days written notice to LESSEE. Mailed payments shall be deemed paid upon the date the payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed received only upon actual receipt.

- 5.11 Records. LESSEE shall keep or cause to be kept true, accurate and complete books, records and accounts of all financial transactions in the operation of LESSEE's business and all other business activities conducted on the Premises, and all financial transactions resulting from LESSEE's use of the Premises. The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices or other documents (which may be in electronic form) as necessary to allow CITY to easily determine Gross Revenue. All retail sales or charges shall be recorded by means of cash registers or other comparable devices which display to the customer the amount of the transaction and automatically issue a receipt. Such registers or other devices shall record sales totals and other transaction numbers and sales details, and shall not be re-settable. Registered totals shall be read and recorded at the beginning and end of each business day. All sales and charges may be recorded by a system other than cash registers or other comparable devices, provided such system is approved by CITY.

- 5.11.1 Financial Statements. Within sixty (60) days after the end of each Lease Year, LESSEE shall, at its sole cost and expense, deliver to CITY a statement of annual Gross Revenue for the Lease Year, prepared using generally accepted accounting principles consistently applied, with revenue categorized by source, and deductions categorized by type. Each such statement shall be signed by an officer, general partner or principal of LESSEE attesting to the accuracy and completeness thereof, which shall be legally binding upon LESSEE. LESSEE shall comply with all reasonable requests by CITY to modify the form and content of such financial statements. LESSEE shall provide such additional information reasonably requested by CITY regarding the operation of LESSEE's business and all other business activities conducted on the Premises, and all financial transactions resulting from LESSEE's use of the Premises. If LESSEE submits any statements or information clearly marked confidential or proprietary, CITY shall protect and treat the same with confidentiality to the extent permitted by law and in conformity with the California Public Records Act ("Act"). Should LESSEE request confidentiality and non-disclosure regarding any statement or information, LESSEE shall provide CITY with specific and detailed legal grounds, including any applicable case law, upon which CITY may rely for withholding any information in the event CITY receives a request under the Act. CITY shall determine, in its sole discretion, whether information provided to

CITY by LESSEE pursuant to this Lease is or is not a public record subject to disclosure under the Act. In the event CITY elects to withhold any requested information based on LESSEE's request to withhold such requested information, LESSEE shall defend, at LESSEE's sole expense, any legal actions or challenges seeking to obtain from CITY any information requested under the Act that CITY may have withheld at LESSEE's request. Furthermore, LESSEE shall release, indemnify, and hold CITY, and its elected officials, officers and employees, harmless for or from any claim or liability, and defend any action brought against CITY, resulting from CITY's disclosure or non-disclosure of any information requested pursuant to the Act.

- 5.11.2 CITY's Right to Inspect and Audit. LESSEE shall keep all of its books of account, records and supporting documentation throughout the Term, plus five (5) years. LESSEE shall make such books, records and documentation available for inspection and audit by CITY in one location within the County of San Diego. LESSEE shall maintain separate books and records related to LESSEE's use of the Premises. Upon reasonable prior notice, CITY may inspect and audit the operation of LESSEE's business and all other business activities conducted on the Premises, and all financial transactions resulting from LESSEE's use of the Premises, as CITY may deem necessary, in its sole discretion, to protect CITY's rights under this Lease. If required by competent governmental authority, LESSEE shall promptly deliver to CITY, at CITY's reasonable request and at LESSEE's sole cost and expense, any and all data reasonably needed to fully comply with such authority's requirements related to the operation of LESSEE's business and all other business activities conducted on the Premises, and all financial transactions resulting from LESSEE's use of the Premises. Notwithstanding anything to the contrary contained herein, CITY's right to audit the books and operations shall expire for each Lease Year on the date five (5) years from the end of that Lease Year.
- 5.11.3 Audit Cost. The full cost of each CITY audit shall be borne by CITY, unless one or both of the following conditions exists, in which case LESSEE shall reimburse CITY for all costs of the audit:

- (a) For any given Lease Year, if an audit reveals an underpayment of rent of more than five percent (5%), calculated as the difference between the rent reported as payable by LESSEE and the rent payable as determined by the audit; or
- (b) LESSEE failed to maintain true, accurate and complete books, records, accounts and supporting source documents as required by this Lease.

Any rent deficiency determined by the audit shall be delinquent rent, subject to all penalties and remedies provided to CITY for delinquent rent under this Lease. CITY shall credit any overpayment determined by the audit, without interest, against future rents due under this Lease. If no future rents are then due under

this Lease, CITY shall refund to LESSEE any overpayment determined by the audit, without interest, within sixty (60) days after CITY's certification of the audit.

- 5.12 Delinquent Payments. If LESSEE fails to make any payment under this Lease when due, LESSEE shall pay to CITY, in addition to the unpaid amount, five percent (5%) of the unpaid amount, which shall be additional rent. If any amount of such payment remains unpaid after fifteen (15) days past due, LESSEE shall pay to CITY an additional five percent (5%) of the unpaid amount [being a total of ten percent (10%)], which shall be additional rent. Notwithstanding the foregoing, in no event shall the charge for late payment of rent be less than Twenty-Five Dollars (\$25). After thirty (30) days past due, unpaid amounts due CITY under this Lease may be referred to the San Diego City Treasurer for collection, and shall be subject to San Diego Municipal Code section 22.1707, as may be amended from time to time. LESSEE shall pay to CITY any collection-referral fee and all other fees and charges plus interest as may then be charged by the San Diego City Treasurer under authority of the San Diego Municipal Code. Acceptance of late charges and any portion of the late payment by CITY shall neither constitute a waiver of LESSEE's breach or default with respect to the late payment nor prevent CITY from exercising any other rights and remedies available at law or in equity. As required by law, LESSEE is hereby notified that a negative credit report may be submitted to a credit reporting agency if amounts due CITY are not paid when due.

SECTION 6: ENCUMBRANCES; ASSIGNMENT & SUBLETTING

- 6.1 Leasehold Encumbrances. Subject to CITY's prior written consent, LESSEE may encumber LESSEE's leasehold estate by deed of trust or other security instrument to assure the payment of LESSEE's debts, upon the express condition that the proceeds of such loan or loans be devoted exclusively to capital expenditures for the purpose of improving, repairing or maintaining the Premises; provided, however, that a reasonable portion of the loan proceeds may be disbursed for payment of incidental costs of construction and development, including without limitation the following: off-site improvements for service of the premises, payment of fees and exactions, escrow charges, premiums for insurance or bonds, title insurance, loan-related costs, and all other expenses incidental to designing, approving, and constructing such resort hotel facilities. Each such encumbrance shall be subject to all of the terms, covenants and conditions of this Lease, shall not be deemed to amend or alter any of the terms, covenants or conditions of this Lease, and shall be subordinate to CITY's fee interest in the Premises and any and all CITY encumbrances on that fee interest. Proceeds from refinancing may also be used for the internal capital restructuring of LESSEE and/or to reduce LESSEE's equity on condition use of all proceeds causes substantial benefit to CITY's interest in the property, including without limitation capital investment in and (or) Redevelopment of the Premises. Such encumbrances shall not exceed seventy-five percent (75%) of the value of the leasehold at the time of encumbrance.

In the event any such approved deed of trust or mortgage or other security-type instrument should at any time be in default and be foreclosed or transferred in lieu of foreclosure, CITY will accept the approved mortgagee or beneficiary thereof as its new tenant under this Lease with all the rights, privileges, and duties granted and imposed in this Lease, on condition and subject to prior written subordination, non-disturbance, and attornment agreement to the benefit of CITY from any said mortgagee or beneficiary.

Upon prior written approval by CITY, said mortgagee or beneficiary may assign this lease to its nominee, if nominee is a reputable, qualified, and financially responsible person or entity in the reasonable opinion of CITY. Any deed of trust, mortgage, or other security instrument shall be subject to all of the terms, covenants, and conditions of this Lease and shall not be deemed to amend or alter any of the terms, covenants, or conditions hereof. Pursuant to San Diego City Charter section 225, all mortgagees, beneficiaries, and nominees shall make a full and complete disclosure of the name and identity of any and all persons or entities proposed to be directly or indirectly involved in this Lease and the precise nature of all interests of all persons or entities therein. Every person or entity which will have an interest in this Lease must be reviewed and approved by CITY. The CITY's approval will not be unreasonably withheld, provided all such persons and entities are of good character and reputation in the community and such persons or entities are able, in CITY's reasonable opinion, to comply with Section 1.12 of this Lease and have financial capability equal or greater than LESSEE and possess or engage management skills equal to or greater than LESSEE.

- 6.2 Assignment and Subletting. LESSEE shall not assign this Lease or any interest in this Lease, and shall not sublet the Premises or any part of the Premises, or grant any license or other right or appurtenant privilege to the Premises, or permit any other person, except LESSEE's employees, agents and guests, to use or occupy the Premises or any part of the Premises without CITY's prior written consent. Any such consent shall not be deemed consent to any subsequent assignment, subletting, occupation or use by another person. Neither this Lease nor any interest in it shall be assignable, as to LESSEE's interest, by operation of law, without CITY's written consent. "Assignment" shall include without limitation the transfer of any interest in this Lease and, if LESSEE is other than a natural person, the transfer of a controlling interest in LESSEE or any of LESSEE's general partners, principals or controlling shareholders. Provided, however, that "Assignment" shall not include an "Allowed Assignment," defined as (i) any transfer of any ownership interest in LESSEE among existing partners of LESSEE or the spouse of any existing partner of LESSEE at the time of such transfer, (ii) any transfer of any ownership interest in LESSEE upon the death or disability of any partner to any first- or second-generation (one degree or two degrees of sanguinity) descendant of Anne Ledford Evans who, in the case of a first-generation descendant of Anne Ledford Evans, is an existing partner of LESSEE at the time of such transfer or the spouse of such person, or who, in the case of a second-generation descendant of Anne Ledford Evans, is also a first-generation descendant of an existing partner of LESSEE at the time of such transfer or the spouse of such person, or a trust created for the benefit of any such individual(s), or (iii) the transfer of this Lease to any entity where a majority-in-interest of the ownership is held by Anne Ledford Evans, any descendant within one degree or two degrees of sanguinity of Anne

Ledford Evans and who, in the case of a first-generation descendant of Anne Ledford Evans, is an existing partner of LESSEE at the time of such transfer, or who, in the case of a second-generation descendant of Anne Ledford Evans, is also a first-generation descendant of an existing partner of LESSEE at the time of such transfer, and(or) a trust or trusts created for the benefit of any such individuals.

6.2.1 Consent Conditions. CITY may require, as a condition to consenting to any assignment, sublease or other grant of rights related to the use and occupancy of the Premises, that this Lease be revised to comply with then-current CITY lease provisions, and that the sublease be subject and subordinate to each and every provision of this Lease.

6.2.2 Charter Section 225. Pursuant to San Diego City Charter section 225, LESSEE and each of its subtenants and assignees shall make a full and complete disclosure of the name and identity of any and all persons directly or indirectly involved or interested in this Lease, and in any sublease or assignment, and the precise nature of all interests of all such persons. Every person or entity proposed to have an interest in this Lease must be reviewed and approved by CITY, in its sole discretion.

6.3 Additional Consideration to CITY. In the event of an Assignment (as defined in Section 6.2); in the event of a subletting of the majority portion of the leasehold; or in the event of a refinancing creating an encumbrance against the leasehold after the completion of any redevelopment approved as described in Section 3.2 of this Lease, LESSEE shall pay to CITY one percent (1%) of the gross amount paid for the leasehold in connection with an approved Assignment of the lease, one percent (1%) of any amount paid LESSEE in consideration of a sublease of all or a majority portion of the leasehold, or one percent (1%) of the amount of any new loan or encumbrance against the property over and above the amount of the encumbrance then in place plus, if applicable, the cost of the new improvements constructed on the Premises as required or allowed under this Lease. The amount upon which the one percent (1%) shall be based shall be the total consideration resulting from the transaction including total cash payments and the market value of noncash consideration, including but not limited to stocks, bonds, deferred payments, secured and unsecured notes, and forbearances regarding claims and judgments, less the amount listed in LESSEE'S most recent federal tax return as the current depreciated value of the hotel improvements upon the premises. Said hotel improvements are defined as only consisting of buildings, building improvements, leasehold improvements (landscape, hardscape, etc.), and furniture, fixtures, and equipment (FF&E). Prior to CITY'S consent to any assignment, majority subletting, or refinancing, LESSEE shall deliver to CITY a written statement of all sums due and owing to CITY from LESSEE pursuant to the provisions of this paragraph, together with an acknowledgment from the proposed assignee, sublessee, or refinancing agency as to the amount due CITY. The sum due CITY shall be payable in full to CITY concurrent with the completion of the transaction, be it an assignment, a sublease, or a refinancing. For majority subleases, such additional consideration shall be payable to CITY when accrued regardless of actual receipt by LESSEE. Any assignment, subletting, or refinancing in violation of the terms and

conditions of this paragraph shall be void. The provisions of this paragraph shall not apply to:

- (a) an Allowed Assignment as defined in Section 6.2, Assignment and Subletting;
- (b) such other assignment deemed by CITY, in its sole reasonable discretion, not to materially affect the legal and equitable ownership interests in the leasehold, such as a change in the legal or fictitious name of the LESSEE without any other change in the equity in beneficial use of, or legal title to, the leasehold as an asset or the income produced thereby; or
- (c) a financing or refinancing occurring at any time prior to any redevelopment of the Premises approved as described in Section 3.2 of this Lease, where such loan amount is less than seventy-five percent (75%) of the value of the leasehold at the time of the encumbrance.

SECTION 7: DEFAULT AND REMEDIES

7.1 Default. LESSEE shall be in default of this Lease if any of the following occurs:

- (a) LESSEE fails to make any payment required under this Lease when due and fails to cure the breach within five (5) days following written notice thereof from CITY;
- (b) LESSEE breaches any of its obligations under this Lease, other than those requiring payment to CITY, and fails to cure the breach within thirty (30) days following written notice thereof from CITY, or if not curable within thirty (30) days, fails to commence to cure the breach within thirty (30) days and diligently pursue the cure to completion;
- (c) LESSEE voluntarily files or involuntarily has filed against it any petition under any bankruptcy or insolvency act or law and, in the case of an involuntary bankruptcy only, where such petition is not dismissed within sixty (60) days;
- (d) LESSEE is adjudicated a bankrupt; or
- (e) LESSEE makes a general assignment for the benefit of creditors.

7.2 Remedies. Upon LESSEE's default, CITY may, at its option, give LESSEE, or any person claiming rights through LESSEE, a written "Three Day Notice to Pay or Quit," or CITY may terminate the Lease and all rights of LESSEE, and all persons claiming rights through LESSEE, to the Premises or to possession of the Premises. Upon termination, CITY may enter and take possession of the Premises, and may recover from LESSEE the sum of:

- (a) the worth at the time of award of any unpaid rent that was due at the time of termination;
- (b) the worth at the time of award of the amount by which the unpaid rent that would have been earned after termination until the time of award exceeds the amount of rental loss, if any, that LESSEE affirmatively proves could have been reasonably avoided;
- (c) the worth at the time of award of the amount by which the unpaid rent for the balance of the Term after the time of award exceeds the amount of rental loss, if any, that LESSEE affirmatively proves could be reasonably avoided;
- (d) any other amount necessary to compensate CITY for all the detriment proximately caused by LESSEE's breach and default, or that in the ordinary course of things, would be likely to result; and
- (e) all other amounts in addition to or in lieu of those previously stated as may be permitted at law or in equity.

As used in clauses (a) and (b), above, the "worth at the time of award" is computed by allowing interest at the rate of the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus two percent (2%). As used in clause (c), above, the "worth at the time of award" is computed by discounting that amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus two percent (2%). As used in this section, the term "rent" shall include rent and any and all other amounts payable by LESSEE under this Lease.

7.3 Default if Leasehold is Encumbered. If there is a CITY-approved encumbrance on LESSEE's leasehold interest, CITY shall give the mortgagee or beneficiary written notice of LESSEE's default under this Lease, and the same mortgagee or beneficiary shall have thirty (30) days from the notice to cure the default, or, if the default is not curable within thirty (30) days, to commence to cure the default and diligently pursue the cure to completion. CITY may extend the cure period if the mortgagee or beneficiary uses reasonable diligence to pursue a cure, as determined in CITY'S sole discretion. If the mortgagee or beneficiary chooses to cure the default through litigation or foreclosure, then CITY may exercise any of the following options:

- (a) CITY may correct the default and charge the costs to the account of LESSEE, which charge shall be due and payable on the date that the rent is next due after CITY's notice of such costs to LESSEE, and mortgagee or beneficiary;
- (b) CITY may correct the default and pay the costs from the proceeds of any insurance fund held by CITY, CITY and LESSEE, or by CITY and mortgagee or beneficiary, or CITY may use the funds of any faithful performance or cash bond on deposit with CITY, or CITY may call on the bonding agent to correct the default or to pay the costs of correction performed by or at the direction of CITY; and

- (c) CITY may terminate this Lease as to the rights of LESSEE by assuming or causing the assumption of liability for any trust deed or mortgage. LESSEE shall assume and pay any and all penalties or bonuses required by the beneficiaries, trustees or mortgagees as a condition of early payoff of the related obligations by CITY. CITY may, as an alternative, substitute the terminated LESSEE with a new lessee reasonably satisfactory to the mortgagee or beneficiary. LESSEE shall pay to CITY all reasonable costs incurred by CITY in re-leasing to a new lessee.

If the default is non-curable by LESSEE, then any lender holding a beneficial interest in the Premises, whose qualifications as an assignee have been approved by CITY, shall have the absolute right to substitute itself to the estate of LESSEE hereunder and to commence performance of this Lease. If the mortgagee or beneficiary gives notice in writing of its election to substitute itself within the thirty (30) day period after receiving CITY's written notice of a default, and the default, if curable, is cured by the mortgagee or beneficiary, then this Lease will not terminate pursuant to the default. In that event, CITY consents to the substitution and authorizes the mortgagee or beneficiary to perform under this Lease with all the rights and obligations of LESSEE, subject to the curing of the default, if possible, by mortgagee or beneficiary. In that event, LESSEE shall assign to mortgagee or beneficiary all of its interest in and to the leasehold estate under this Lease.

- 7.4 Abandonment by LESSEE. If LESSEE abandons the Premises, this Lease shall continue in effect as long as CITY does not terminate this Lease, and CITY may enforce all of its rights and remedies under this Lease, including without limitation the right to recover rent as it becomes due, plus damages.

- 7.5 Waiver. Any waiver by CITY of a breach or default by LESSEE shall not be a waiver of any other breach or default. No waiver shall be valid and binding unless in writing and executed by CITY. CITY's delay or failure to enforce a right or remedy shall not be a waiver of that or any other right or remedy under this Lease. The enforcement of a particular right or remedy for a breach or default shall not waive any other right or remedy for the same breach or default, or for any other or later breach or default. CITY's acceptance of any rents shall not be a waiver of any default preceding such payment. LESSEE acknowledges that the Premises are a part of publicly-owned property held in trust for the benefit of the citizens of the City of San Diego, and that any failure by CITY to discover a breach or default, or take prompt action to require the cure of any breach or default, shall not result in an equitable estoppel, but CITY shall at all times have the legal right to require the cure of any breach or default. CITY's acceptance of a partial payment of rent shall not constitute a waiver of the balance of the rent payment due.

SECTION 8: EMINENT DOMAIN

- 8.1 Eminent Domain. If all or part of the Premises are taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of CITY and LESSEE (or beneficiary or mortgagee) shall

be as follows:

- 8.1.1 Full Taking. If the entire Premises are taken, this Lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- 8.1.2 Partial Taking - Remainder Unusable. If a partial taking of the Premises occurs, and in the opinion of CITY, the remaining part of the Premises are unsuitable for continued Lease operation, this Lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- 8.1.3 Partial Taking - Remainder Usable. If a partial taking of the Premises occurs, and in the opinion of CITY, the remaining part of the Premises are suitable for continued Lease operation, this Lease shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken. The rent shall be equitably reduced to reflect the portion of the Premises taken, only to the extent that LESSEE's operations are reduced or impaired.
- 8.1.4 Award. All monies awarded in any taking shall belong to CITY, whether the taking results in diminution in value of the leasehold or the fee or both. LESSEE shall be entitled to any award attributable to the taking of, or damages to, LESSEE's then-remaining leasehold interest in installations or improvements owned by LESSEE. CITY shall have no liability to LESSEE for any award not provided by the condemning authority.
- 8.1.5 Transfer. CITY has the right to transfer CITY's interests in the Premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, LESSEE shall retain whatever interest it may have in the fair market value of any LESSEE-owned improvements on the Premises in accordance with this Lease.
- 8.2 No Inverse Condemnation. The exercise of any CITY right under this Lease shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for condemnation or inverse condemnation.

SECTION 9: INDEMNITY; HOLD HARMLESS; INSURANCE

- 9.1 Indemnification & Hold Harmless. LESSEE shall protect, defend, indemnify, and hold CITY and its elected officials, officers, employees, representatives, and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to LESSEE's officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with LESSEE's acts or omissions in the performance of its obligations under this Lease, and all expenses of investigating and defending against

same, including without limitation reasonable attorneys' fees and costs; provided, however, that LESSEE's duty to indemnify and hold CITY harmless shall not include any established liability arising from the gross negligence or intentional misconduct of CITY and its elected officials, officers, employees, representatives, and agents.

9.2 Insurance. LESSEE shall deliver to CITY's Real Estate Assets Department a current certificate or certificates of insurance for:

- (1) Commercial General Liability Insurance, providing coverage on the Premises, for bodily injury, including death, personal injury, and property damage with limits of at least Two Million Dollars (\$2,000,000) per occurrence, subject to an annual aggregate of at least Four Million Dollars (\$4,000,000);
- (2) Automobile Liability Insurance, providing coverage on the Premises for all bodily injury and property damage, with a limit of at least One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of any vehicle (including owned, hired, and non-owned vehicles) operated in performing any and all work pursuant to this Lease. Coverage shall be written on *ISO form CA 00 01 12 90*, or a substitute form providing equivalent liability coverage; and
- (3) Workers' Compensation Insurance, as required by the laws of the State of California for all of LESSEE's employees who are subject to this Lease, with Employers' Liability coverage with a limit of at least One Million Dollars (\$1,000,000).
- (4) Protection and Indemnity Insurance, providing coverage for the operation of the Boats, for bodily injury, including death, personal injury, and property damage with limits of at least Two Million Dollars (\$2,000,000) per occurrence, subject to an annual aggregate of at least Four Million Dollars (\$4,000,000).

9.2.1 Additional Insureds. Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form;], "The City of San Diego, its elected officials, officers, employees, representatives and agents" shall be named as additional insureds in all policies.

9.2.2 Primary & Non-Contributory. Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by CITY.

9.2.3 Qualified Insurer(s). All insurance required by the terms of this Lease must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to CITY. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet CITY requirements.

- 9.2.4 Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of LESSEE and must be disclosed and acceptable to CITY at the time evidence of insurance is provided.
- 9.2.5 Continuity of Coverage. All policies shall be in effect on or before the first day of the Term, except "course of construction fire insurance" shall be in force on commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. The policies shall be kept in force for the duration of the Term. At least thirty (30) days prior to the expiration of each insurance policy, LESSEE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Lease. LESSEE shall provide proof of continuing insurance at least annually during the Term and otherwise upon CITY's request. If insurance lapses or is discontinued for any reason, LESSEE shall immediately notify CITY and obtain replacement insurance as soon as possible.
- 9.2.6 Modification. To assure protection from and against the kind and extent of risk existing with the Allowed Uses or any other CITY-approved uses, CITY, at its discretion, may require the revision of amounts and coverage at any time by giving LESSEE thirty (30) days prior written notice. LESSEE shall also obtain any additional insurance required by CITY for new improvements, changed circumstances, or CITY's reasonable re-evaluation of risk levels related to the Allowed Uses or approved uses.
- 9.2.7 Accident Reports. LESSEE shall immediately report to CITY any accident causing substantial property damage or injury to persons on the Premises. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.
- 9.2.8 Causes of Loss - Special Form Property Insurance. LESSEE shall obtain and maintain, at its sole cost, Causes of Loss - Special Form Property Insurance on all of LESSEE's insurable property related to the Allowed Uses on the Premises under this Lease or the Premises, in an amount to cover 100 percent (100%) of the replacement cost. . LESSEE shall deliver a certificate or certificates of such insurance to CITY's Real Estate Assets Department.

SECTION 10: IMPROVEMENTS; ALTERATIONS; REPAIRS; MAINTENANCE

- 10.1 Waste, Damage, or Destruction. LESSEE shall not commit or allow to be committed any waste or any public or private nuisance on the Premises, shall keep the Premises clean and clear of refuse and obstructions, and shall dispose of all garbage, trash and rubbish in a manner satisfactory to CITY. If the Premises are put into a condition which is not decent, safe, healthy and sanitary, LESSEE shall restore the Premises to a decent, safe,

healthy and sanitary condition within a reasonable time and to CITY's reasonable satisfaction.

- 10.2 Acceptance of Premises. LESSEE acknowledges that the Premises are in good order and condition and shall take possession of the Premises "as is." CITY has not made and makes no representation or warranty as to the condition or suitability of the Premises for LESSEE's intended use, and assumes no obligation to alter or improve the Premises. LESSEE has relied solely on its own independent investigations of the condition and suitability of the Premises, and is satisfied with the condition thereof.
- 10.3 Entry and Inspection. CITY may at all times enter and inspect the Premises and the operations conducted on the Premises. Provided, however, that CITY recognizes that registered guests of the hotel have a reasonable expectation of privacy in their hotel room during the period of their stay and that, in such case, LESSEE is not able to grant access to such portions of the Premises in the absence of an emergency or other proper authorization. Provided further that CITY's right to entry and inspection, in the absence of any emergency or other proper authorization, shall require reasonable notice and be limited to reasonable business hours.
- 10.4 Maintenance. LESSEE shall maintain the Premises in a decent, safe, healthy and sanitary condition reasonably satisfactory to CITY, including without limitation performing all regular building and grounds maintenance and repair, and all maintenance, repair, and services to the structural components of improvements on the Premises, such as interior wall supports, exterior wall supports, the roof, floor supports, and building-wide mechanical systems. LESSEE shall, at its sole cost and expense, obtain and maintain trash receptacles and trash-removal service. CITY shall have no obligation or responsibility to remove debris, or to maintain, repair or replace improvements on the Premises.
- 10.5 No Dredging of Mission Bay. CITY shall have no obligation to dredge Mission Bay or any part of the Premises. LESSEE shall hold CITY harmless from any responsibility or liability related to any real or perceived need for such dredging. LESSEE has the right, but not the obligation, to discontinue operation of one or more of the Boats during the Term of this Lease. In such event, LESSEE's Minimum Monthly Rent will be reduced in accordance with Section 1.4 hereof.
- 10.6 Improvements/Alterations. No improvements, structures or installations shall be constructed on the Premises, and the Premises may not be altered, by LESSEE without CITY's prior written approval. LESSEE shall not make any structural or architectural design alterations to approved improvements, structures or installations on the Premises without CITY's prior written approval, which shall not be unreasonably withheld. However, LESSEE may make decorative interior changes without prior CITY approval, as long as all applicable permits otherwise required under applicable laws are properly obtained. This provision shall not relieve LESSEE of any maintenance or repair obligation under this Lease. CITY shall not be obligated by this Lease to make or assume any expense for any improvements or alterations to the Premises.

- 10.7 Utilities. LESSEE shall order, obtain and pay for all water, utilities, and service and installation charges in connection with the operation of the Premises. All utilities shall be installed underground.
- 10.8 Construction Bond. If LESSEE constructs improvements on the Premises for which CITY approval is required and which are estimated to cost in excess of one hundred thousand dollars (\$100,000), which amount shall be subject to increase by the percentage increase in the Consumer Price Index from the Effective Date of this Lease, CITY may require LESSEE to deposit with CITY, prior to commencement of the construction, a faithful performance bond in the amount of one hundred percent (100%) of the estimated construction cost of the work to be performed. The bond may be in cash or may be a corporate surety bond or other security satisfactory to CITY. The bond shall insure that the construction commenced by LESSEE shall be completed in accordance with the plans approved by CITY or, at the option of CITY, that the uncompleted construction shall be removed and the Premises restored to a condition satisfactory to CITY. The bond or cash shall be held in trust by CITY for the purpose specified above, or at CITY's option may be placed in an escrow approved by CITY.
- 10.9 Liens. LESSEE shall protect, defend, indemnify and hold CITY harmless from and against all claims for labor or materials in connection with operations, improvements, alterations or repairs on or to the Premises and the costs of defending against such claims, including without limitation reasonable attorney fees. If LESSEE causes improvements, alterations or repairs to be made to the Premises, and a lien or notice of lien is filed against the Premises, LESSEE shall notify CITY of the lien within five (5) days after LESSEE first becomes aware of the existence of the lien, and within thirty (30) days after the filing either: (a) take all actions necessary to record a valid release of the lien; or (b) file with CITY a bond, cash or other security acceptable to CITY sufficient to pay in full all claims of all persons seeking relief under the lien.
- 10.10 Taxes. Subject to the provisions of Article XIII, Section 3(d) of the California Constitution and Section 202.2 of the California Revenue and Taxation Code, LESSEE shall pay, before delinquency, all taxes, assessments and fees assessed or levied upon the Premises or upon LESSEE's use and occupancy of the Premises, including without limitation taxes upon licenses and permits, and including taxes upon the land and any improvements or fixtures installed or maintained by LESSEE thereon. LESSEE acknowledges that this Lease may create a possessory interest subject to property taxation and that LESSEE may be subject to the payment of taxes levied on that possessory interest. LESSEE alone shall pay all such possessory interest taxes. LESSEE's payment of taxes, fees and assessments shall not reduce any rent due to the CITY. CITY shall not incur or assume any responsibility for any taxes whatsoever resulting from LESSEE's possession, use or occupancy of the Premises.
- 10.11 Signs. LESSEE shall not erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings or similar devices or advertising without CITY's written consent. If any such unauthorized item is found on the Premises, LESSEE shall remove the item at its expense within twenty-four (24) hours after notice by CITY, or CITY may

thereafter remove the item at LESSEE's cost. CITY acknowledges that all such items covered by this section and existing as of the Effective Date of this Lease are authorized.

- 10.12 Ownership of Improvements and Personal Property. LESSEE shall own all improvements, fixtures, structures and installations or additions to the Premises constructed or installed on the Premises by LESSEE. Upon expiration or termination of this Lease, all such improvements, fixtures, structures and installations or additions shall be deemed a part of the Premises and owned by CITY. Notwithstanding the foregoing, CITY may, upon notice to LESSEE upon termination or at any time prior to the expiration of this Lease, elect to have part or all of such improvements, fixtures, structures and installations or additions removed by LESSEE. In that case, LESSEE shall, at LESSEE's sole cost and expense, remove those items designated for removal in CITY's notice and restore the Premises to CITY's reasonable satisfaction as soon as practicable, but in no event later than one hundred eighty (180) days after the expiration or earlier termination of this Lease. LESSEE, at its sole cost and expense, shall be responsible for the repair of any and all damage resulting from the removal of such items. If LESSEE fails to remove the items as required in this section, CITY may, at its option, remove them at LESSEE's sole cost and expense.
- 10.13 Personal Property. LESSEE shall remove LESSEE-owned machines, appliances, equipment, trade fixtures and other items of personal property upon the expiration of this Lease, or as soon as practicable after termination of this Lease. Any such items which LESSEE fails to remove shall be deemed abandoned and become CITY's property free of all claims and liens, or CITY may, at its option, remove such items at LESSEE's sole cost and expense. LESSEE, at its sole cost and expense, shall be responsible for the repair of any and all damage resulting from the removal of its personal property from the Premises.
- 10.14 Late Removal. Notwithstanding any provision of this Lease to the contrary, LESSEE shall pay rent to CITY for any period of time needed after the expiration or termination of this Lease to remove improvements or personal property as required by this Lease, whether removal is done by CITY or LESSEE. Such rent shall be calculated on a per diem basis using the then-current fair market rental rate as determined by an appraisal prepared by a qualified appraiser.
- 10.15 CITY's Right to Acquire Personal Property. If LESSEE wants to dispose of any of its personal property used in its operations on the Premises upon expiration or termination of this Lease, CITY shall have the first right to acquire such personal property.
- 10.16 Unavoidable Delay. If the performance of an act required by this Lease is directly prevented or delayed by a cause beyond the reasonable control of the party required to perform the act, that party shall be excused from performing the act for a period equal to the period of the prevention or delay. This provision shall not apply to obligations to pay rent. The party claiming a delay shall notify the other party in writing within ten (10) days after the beginning of any claimed delay.

10.17 Hazardous Substances. LESSEE shall not allow the installation or release of hazardous substances in, on, under, or from the Premises, except for those substances that are customarily and regularly used in the operation of LESSEE's business, and are stored and utilized in accordance with all manufacturer's instructions and applicable laws and regulations. LESSEE and LESSEE'S sublessees, agents and contractors shall not store, utilize, or sell any hazardous substance on the Premises without CITY'S prior written consent. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State of California's list of hazardous substances. "Hazardous substances" shall include wastes of hazardous substances, and all types of petroleum-related substances and their chemical constituents. A copy of the presently effective EPA and the State lists is on file in the Office of the City Clerk as Document 769704 and by this reference is incorporated into this Lease.

- a. Remediation. If LESSEE'S occupancy, use, development, maintenance, or restoration of the Permit Area (LESSEE'S Operations) results in a release of a hazardous substance, LESSEE shall pay all costs of remediation and removal of the hazardous substance in accordance with all applicable laws, rules and regulations of governmental authorities.
- b. Indemnity. LESSEE shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from LESSEE'S Operations on the Premises or area surrounding the Premises, including but not limited to costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.
- c. Removal. If LESSEE or LESSEE's contractor, agent or sublessee has received approval and permits to store, utilize, generate or install, or otherwise bring hazardous substances to the Premises, LESSEE and/or LESSEE's contractor, agent or sublessee shall remove all hazardous substances in all containers, equipment or devices from the Premises immediately upon or prior to the expiration or earlier termination of this Lease. CITY reserves the right to conduct inspections of the Premises and/or request documentation demonstrating the legal removal and/or disposal of the hazardous substances or containers, equipment or devices containing hazardous substances from the Premises. LESSEE shall pay any and all costs incurred by CITY to remove any container, equipment or device requiring disposal or removal as required by this provision.
- d. Notice of Release. If LESSEE knows or has reasonable cause to believe that a hazardous substance has been released on, under, or from the

Premises, LESSEE shall immediately notify CITY and any appropriate regulatory or reporting agency pursuant to Title 19 of the California Code of Regulations, and deliver a written report thereof to CITY within three (3) days of receipt of the knowledge or cause for belief and submit any required written reports to regulatory or reporting agencies as required by regulation or law. If LESSEE knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, LESSEE shall take all actions necessary to alleviate the danger. LESSEE shall notify CITY immediately of any notice of violation received or initiation of environmental actions or private suits related to the Premises.

- e. Environmental Assessment. Upon reasonable cause to believe that LESSEE'S Operations resulted in any hazardous substance being released on or beneath the Premises or area surrounding the Premises, CITY may cause an environmental assessment to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be obtained at PERMITTEES' sole cost and expense, and shall establish what, if any, hazardous substances have more likely than not been caused by LESSEE'S Operations on, in, or under the Premises or the area surrounding the Premises, and in what quantities. If any such hazardous substances exist in quantities greater than allowed by CITY, county, state, or federal laws, statutes, ordinances, or regulations, or require restricted use of the Premises, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes and to effect unrestricted and lawful re-use of the Premises, and estimates of the cost of such remediation or removal. LESSEE shall cause, or if LESSEE fails to do so within a reasonable period of time, CITY may cause, the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved, and LESSEE shall pay all costs and expenses therefor.

- 10.18 Restriction on Food Containers. LESSEE shall not provide to its customers any prepared food or takeout food in polystyrene foam packaging. LESSEE's food packaging for prepared food and takeout food shall be biodegradable, and LESSEE shall deliver to CITY upon request evidence in the form of paid invoices for the purchase of biodegradable containers in amounts sufficient to indicate compliance with this section. If biodegradable food packaging materials are not available for purchase in the quantities required by LESSEE, LESSEE shall use biodegradable food packaging materials to the extent such items are available, and to the extent they are not, LESSEE may use other food packaging materials, subject to CITY's prior approval. "Prepared food" means food or beverage prepared on the Premises for immediate consumption. "Takeout food" means food or beverage to be consumed off the Premises. "Food packaging" means all

bags, sacks, wrapping, containers, bowls, plates, trays, cartons, cups, straws and lids which are not intended for reuse, and on or in which any prepared food or takeout food is provided on or from the Premises.

SECTION 11: DEVELOPMENT PLAN

- 11.1 Development Plan. LESSEE developed the Premises in accordance with the Development Plans approved by the CITY, which plan is incorporated by this reference. If LESSEE elects to redevelop the Premises, LESSEE shall redevelop the Premises in accordance with plans to be approved by the City Council. CITY may authorize changes to any approved plans, provided that the principal components as defined in the approved plans may not be modified without City Council approval. Documentation evidencing any approved changes shall be filed in the Office of the San Diego City Clerk.
- 11.2 Coastal Commission; Permits. LESSEE shall, at its sole cost and expense, seek and obtain from the California Coastal Commission and all other competent governmental authorities all necessary permits for any development or redevelopment of the Premises, or for any changes to any applicable permit now in effect for the Premises.

SECTION 12: GENERAL PROVISIONS

- 12.1 City Council Action Required. This Lease is expressly conditioned on City Council approval and authorization, which may or may not be granted. CITY shall not be obligated for any loss, financial or otherwise, incurred by LESSEE as a result of the City Council's failure to grant such approval and authorization. LESSEE expressly waives any claim for expense or loss which LESSEE incurs as a result of the failure to obtain the City Council's approval and authorization.
- 12.2 Notices. Any notice required or permitted to be given under this Lease shall be in writing and may be served personally or by United States Postal Service, postage prepaid and addressed as follows:

If to LESSEE:

ATTN: Anne L. Evans, Managing General Partner
BH PARTNERSHIP
998 West Mission Bay Drive
San Diego, California 92109

If to CITY:

THE CITY OF SAN DIEGO
Attention: Director, Real Estate Assets Department
1200 Third Avenue, Suite 1700 (MS 51A)
San Diego, California 92101

- 12.3 Compliance with Law. LESSEE shall at all times in the construction, maintenance, occupancy, restoration and operation of the Premises comply with all applicable laws, rules and regulations of competent legal authority, at LESSEE's sole cost and expense. LESSEE shall promptly, upon request by CITY, deliver to CITY copies of all documentary evidence of such compliance received by or otherwise available to LESSEE (e.g., validation of periodic inspection of LESSEE fire-suppression equipment).
- 12.4 Equal Opportunity. LESSEE shall comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; the California Fair Employment Practices Act; and all other laws, rules and regulations of competent governmental authority. LESSEE shall not discriminate against any employee or applicant for employment based on race, religion, color, ancestry, age, gender, sexual orientation, disability, medical condition or place of birth. LESSEE shall cause the foregoing provisions to be inserted in all subleases and all contracts for any work covered by this Lease so that such provisions will be binding upon each sublessee and contractor. Upon CITY's request, LESSEE shall submit a current Workforce Report and, if authorized by law and required by CITY, an Equal Opportunity Plan which set forth the actions LESSEE will take to achieve the City of San Diego's goals for the employment of African Americans, Native Americans, Asians, Latinos, women and people with disabilities. LESSEE acknowledges that failure to comply with the requirements of this section and/or submitting false information in response to these requirements may result in termination of this Lease and debarment from participating in CITY contracts for a period of not less than one (1) year.
- 12.5 Equal Benefits. LESSEE shall comply with San Diego Municipal Code sections 22.4301-22.4308, as may be amended from time to time, which require lessees of CITY-owned property to offer the same employment benefits to employees with spouses and employees with registered domestic partners. LESSEE shall certify that it will maintain such equal benefits throughout the term of this Lease. LESSEE's failure to maintain equal benefits shall be a default of this Lease.
- 12.6 Disabled Access Compliance. LESSEE shall, as applicable to the Premises and LESSEE's possession, use and occupancy thereof, comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 ("ADA"); and all other applicable laws, rules and regulations of competent governmental authority protecting the rights of people with disabilities. LESSEE's compliance shall include without limitation the following:
- 12.6.1 LESSEE shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs and termination of employment.
- 12.6.2 No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs or

activities of LESSEE.

- 12.6.3 LESSEE shall include language in each sublease agreement which indicates the sublessee's agreement to abide by the foregoing provisions. LESSEE and sublessees shall be individually responsible for their own ADA employment programs.
- 12.6.4 Where required by law, any improvements made to the Premises by LESSEE shall comply with municipal disabled-access requirements by bringing up to code and making accessible any areas of the Premises which deny access to disabled persons. All improvements and alterations shall be at the sole cost of LESSEE.
- 12.6.5 LESSEE shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
- 12.6.6 LESSEE understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall be a default of this Lease.
- 12.7 Drug-free Workplace. LESSEE shall abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:
- (a) Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of controlled substances are prohibited on the Premises and specifying the actions that will be taken against employees for violations of the prohibition; and
 - (b) Establish a drug-free awareness program to inform employees about all of the following:
 - (1) The dangers of drug abuse in the workplace;
 - (2) LESSEE's policy of maintaining a drug-free workplace;
 - (3) Any available drug counseling, rehabilitation, and employee assistance programs; and
 - (4) The penalties that may be imposed upon employees for drug abuse.

LESSEE shall include in each of its sublicenses and contracts related to this Lease language obligating each sublicensee and contractor to comply with the provisions of this section to maintain a drug-free workplace. LESSEE, and each of its sub-licensees and contractors, shall be individually responsible for their own drug-free workplace program.

- 12.8 CITY Employee Participation Policy. CITY may unilaterally and immediately terminate this Lease if LESSEE employs an individual who, within the twelve (12) months immediately preceding such employment did, in their capacity as a City of San Diego officer or employee, participate in negotiations with or otherwise have an influence on a recommendation made to the City Council related to the selection of LESSEE for this Lease. It is not the intent of this policy that these provisions apply to members of the City Council.
- 12.9 Local Business and Employment. LESSEE acknowledges that CITY seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. For work associated with this Lease and to the extent legally possible, LESSEE shall use its best efforts to solicit applications for employment and bids and proposals for contracts from local residents and firms as opportunities occur. LESSEE shall use its best efforts to hire qualified local residents and firms whenever practicable.
- 12.10 Water Quality Assurances. LESSEE shall, at its sole cost and expense, comply with all laws, rules, regulations and direction of competent governmental authority (such as the San Diego Regional Water Quality Control Board) relating to water quality assurance and storm water management. LESSEE acknowledges and agrees that such legal requirements may change at any time and from time to time.
- 12.10.1 NPDES. LESSEE shall comply with all applicable requirements of the National Pollutant Discharge Elimination System ("NPDES") permit in force on the Effective Date of this Lease (i.e., Permit No. R9-2007-0001), and any and all amendments thereto and all applicable succeeding NPDES permits.
- 12.10.2 Municipal Code. LESSEE shall comply with San Diego Municipal Code Chapter 4, Article 3, Division 3: Stormwater Management and Discharge Control (the "Stormwater Code"), as may be amended from time to time, and employ "Best Management Practices" including a "Storm Water Pollution Prevention Plan" as those terms are defined by the Stormwater Code (collectively, "Prevention Plan") and as approved by the CITY under its Stormwater Management Program.
- 12.10.2.1 Within the first ninety (90) days of the Effective Date, LESSEE shall submit a Prevention Plan satisfactory to CITY that will control erosion and reduce the amount of "Pollutants," as defined by the Stormwater Code, and other sediments discharged from the Premises. LESSEE shall inform its employees, contractors, subcontractors, agents and vendors of the Prevention Plan and ensure their compliance therewith. CITY may review the Prevention Plan periodically.
- 12.10.2.2 Within ninety (90) days after written notice from CITY requesting an update of the Prevention Plan, LESSEE shall submit an updated Prevention Plan to CITY's satisfaction. LESSEE shall implement all changes to the Prevention Plan as required by CITY and to ensure compliance with all applicable laws, rules and regulations of competent

governmental authority.

12.10.2.3 LESSEE shall at all times keep and maintain “Best Management Practices” as required by the Prevention Plan in a manner which controls and prevents discharge of Pollutants to the “Maximum Extent Practicable” (as defined in the Stormwater Code).

- 12.11 Nondiscrimination. This Lease is made and accepted upon and subject to the covenant and condition, which shall run with the land, that LESSEE or any person claiming under or through LESSEE shall not establish or allow any discrimination against or segregation of any person or group of persons on account of race, color, religion, gender, disability, sexual orientation, marital status, national origin, ancestry, familial status or source of income in the possession, use or occupancy of the Premises or in the selection, location, number, use or occupancy of tenants, subtenants or vendees in the Premises.
- 12.12 Cumulative Remedies. CITY’s rights and remedies under this Lease are cumulative and shall not limit or otherwise waive or deny any of CITY’s rights or remedies at law or in equity.
- 12.13 Survival. Any obligation which accrues under this Lease prior to its expiration or termination shall survive such expiration or termination.
- 12.14 Joint and Several Liability. If LESSEE is comprised of more than one person or legal entity, such persons and entities, and each of them, shall be jointly and severally liable for the performance of each and every obligation of LESSEE under this Lease.
- 12.15 No Affiliation. Nothing contained in this Lease shall be deemed or construed to create a partnership, joint venture or other affiliation between CITY and LESSEE or between CITY and any other entity or party, or cause CITY to be responsible in any way for the debts or obligations of LESSEE or any other party or entity.
- 12.16 Entire Agreement. This Lease constitutes the entire agreement between the parties and supersedes any and all prior understandings, representations, warranties and agreements between them pertaining to this Lease and LESSEE’s occupancy, use, development, maintenance and restoration of the Premises. Any modification, alteration or amendment of this Lease shall be in writing and signed by all the parties hereto.
- 12.17 Partial Invalidity. If any term, covenant, condition or provision of this Lease is found invalid, void or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.
- 12.18 Authority to Contract. Each individual executing this Lease on behalf of another person or legal entity represents and warrants that they are authorized to execute and deliver this Lease on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity’s articles, charter, bylaws or other written rules of conduct or governing agreement, and

that this Lease is binding upon such person or entity in accordance with its terms. Each person executing this Lease on behalf of another person or legal entity represents and warrants such entity is a valid, qualified corporation, limited liability company, partnership or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

IN WITNESS WHEREOF, this Lease is executed to be effective as of the Effective Date.

Date: Nov 6, 2012

BH Partnership, a California limited partnership

By: Anne L. Evans
Anne L. Evans, Trustee of The Anne L. Evans
Family Trust, dated July 22, 1999
Managing General Partner

THE CITY OF SAN DIEGO, a California
municipal corporation

Date: _____

By: _____
James F. Barwick, CCIM
Director, Real Estate Assets Department

Approved as to form and legality:

JAN I. GOLDSMITH, CITY ATTORNEY

By: _____
Name: _____
Title: _____

Exhibit A: Legal Description of Premises
Exhibit B: Aerial Map of the Premises
Exhibit C: Lighting of Public Parking Lot

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Exhibit A: Legal Description of Premises

That portion of the tidelands and submerged or filled lands of Mission Bay, formerly False Bay, according to Map thereof made by James Pascoe in 1870, a copy of which Map was filed in the Office of the County Recorder of San Diego, November 14, 1921, and is known as Miscellaneous Map No. 36, all being in the City of San Diego, County of San Diego, State of California, described as follows:

PARCEL I

Beginning at the Southeast corner of Lot 24 in Block 10 of Resubdivision of Blocks 7, 8 and 10 and a portion of Block 9 and Lot "A", Inspiration Heights, according to Map thereof No. 1700, filed in the office of the County Recorder of San Diego County, December 27, 1917; thence along the Southerly line of said Lot 24, South $89^{\circ}55'56''$ West, (Record North $89^{\circ}59'$ West) 25.00 feet to a point of tangent curve in the boundary of said Lot 24; thence South $00^{\circ}04'04''$ East, 2.00 feet to an intersection with a line which is parallel with and 2.00 feet Southerly at right angles to the Southerly line of said Block 10; thence along said parallel line North $89^{\circ}55'56''$ East, 249.70 feet; thence North $05^{\circ}30'00''$ West 104.06 feet to the United States Coast and Geodetic Survey Triangulation Station "Old Town", (The Lambert Grid Co-ordinates, California Zone 6, for said Station "Old Town" are $X = 1,712,415.17$ - East and $Y = 213,819.22$ - North) and said Triangulation Station is located at Latitude $32^{\circ}45'02.845''$ North and Longitude $117^{\circ}11'07.200''$ West, being also the point of origin for the San Diego City Engineer's Mission Bay Park Co-ordinate System; thence North 7,745.14 feet and West 19,146.93 feet to the TRUE POINT OF BEGINNING, the Mission Bay Park Co-ordinates of said TRUE POINT OF BEGINNING being North 7,745.14 feet and West 19,146.93 feet; thence North $15^{\circ}33'49''$ East, 91.02 feet to Mission Bay Park Co-ordinates North 7,832.82 feet and West 19,122.51 feet, being also a point

on the Mean High Tide Line of Mission Bay, as established on Miscellaneous Map No. 198 recorded in the Office of the County Recorder of San Diego County on June 17, 1948; thence continuing along said mean High Tide Line as follows: South. $76^{\circ}42'39''$ East, 20.00 feet to Mission Bay Park Co-ordinates North 7,828.23 feet and West 19,103.05 feet; thence North $75^{\circ}27'18''$ East 205.98 feet to Mission Bay Park Co-ordinates North 7,879.95 feet and West 18,903.67 feet; thence North $80^{\circ}32'22''$ East 201.56 feet to Mission Bay Park Co-ordinates North 7,913.09 feet and West 18,704.85 feet; thence North $51^{\circ}26'35''$ East 53.10 feet, thence North $37^{\circ}18'49''$ East 100.98 feet; thence North $8^{\circ}51'34''$ East 162.01 feet to a point hereby designated as Station "17" on said Mean High Tide Line; thence North $4^{\circ}30'49''$ West, 203.19 feet to Mission Bay Park Co-ordinates North 8,389.13 feet and West 18,593.16 feet; thence north $16^{\circ}54'27''$ West, 64.06 feet; thence North $25^{\circ}25'48''$ West, 100.02 feet; thence North $29^{\circ}25'37''$ West, 100.40 feet; thence North $36^{\circ}08'47''$ West, 102.17 feet to Mission Bay Park Co-ordinates North 8,710.70 feet and West 18,764.33 feet; thence leaving said Mean High Tide Line, North $65^{\circ}52'30''$ East, a distance of 435.62 feet; thence South $25^{\circ}16'00''$ East, 305.31 feet to a point on the arc of a tangent curve concave Westerly, having a radius of 705.0 feet; thence Southerly along the arc of said curve, through a central angle of $65^{\circ}16'$, a distance of 803.08 feet to Mission Bay Park Co-ordinates North 7,858.57 feet and West 18,333.94 feet; thence South $40^{\circ}00'00''$ West, tangent to said curve, 496.60 feet; thence North $50^{\circ}00'21''$ West, 28.76 feet to the point of tangency of a curve concave Southwesterly, having a radius of 1260.0 feet; thence Northwesterly along the arc of said curve, through a central angle of $24^{\circ}25'50''$, a distance of 536.01 feet to the TRUE POINT OF BEGINNING of this Parcel I.

Bahia legal description - Parcel I.wpd

PARCEL II

BEING A PORTION OF THE TIDELANDS AND SUBMERGED LANDS OF MISSION BAY (FALSE BAY) AND A PORTION OF ISLAND NO. 2 AS SHOWN PER MISCELLANEOUS MAP NO. 72 ON FILE WITH THE RECORDER OF SAN DIEGO COUNTY, IN THE CITY OF SAN DIEGO, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, MORE PARTICULARLY DESCRIBED AS FOLLOWS :

COMMENCING AT A LEAD AND DISC STAMPED LS 6641, BEING THE MOST NORTHERLY CORNER OF THE B. H. PARTNERSHIP BAHIA HOTEL LEASE NO. 26, PARCEL 1, PER RECORD OF SURVEY NO. 16891, FILED IN THE OFFICE OF THE RECORDER OF SAID COUNTY AS FILE NO. 2001-0113422 ON FEBRUARY 28, 2001, SAID LEAD AND DISC BEARS SOUTH 78° 31' 13" EAST FROM A LEAD AND DISC STAMPED "CITY ENG", BEING STATION "BAHIA" PER SAID RECORD OF SURVEY NO. 16891; THENCE ALONG A RANDOM LINE SOUTH 15° 46' 46" WEST, 893.83 FEET TO AN ANGLE POINT ON THE WESTERLY LINE OF SAID LEASE PARCEL 1; THENCE ALONG SAID WESTERLY LINE OF SAID LEASE PARCEL 1, SOUTH 37° 49' 39" WEST, A DISTANCE OF 5.39 FEET; SAID POINT BEING THE **TRUE POINT OF BEGINNING**; THENCE LEAVING SAID LINE ALONG THE FOLLOWING LISTED COURSES:

1. NORTH 55° 26' 47" WEST, 19.07 FEET; THENCE
2. NORTH 68° 22' 39" WEST, 86.46 FEET; THENCE
3. NORTH 29° 17' 14" EAST, 37.49 FEET; THENCE
4. NORTH 15° 17' 21" WEST, 166.13 FEET; THENCE
5. SOUTH 74° 42' 39" WEST, 414.13 FEET; THENCE
6. SOUTH 15° 17' 21" EAST, 258.32 FEET; THENCE
7. NORTH 74° 42' 39" EAST, 323.29 FEET; THENCE
8. NORTH 29° 17' 14" EAST, 56.11 FEET; THENCE
9. SOUTH 68° 22' 39" EAST, 87.21 FEET; THENCE
10. SOUTH 55° 26' 47" EAST, 13.01 FEET TO A POINT ON THE WESTERLY LINE OF SAID LEASE PARCEL 1; THENCE
11. NORTH 37° 49' 39" EAST, 35.56 FEET ALONG SAID WESTERLY LINE OF SAID LEASE PARCEL 1 TO THE **TRUE POINT OF BEGINNING**.

CONTAINING 2.444 ACRES, MORE OR LESS.

THE BEARINGS AND DISTANCES HEREIN ARE IN TERMS OF THE CALIFORNIA
COORDINATE SYSTEM, NAD83, AND ARE BASED ON SAID RECORD OF SURVEY
NO. 16891.



Scott F. Fitch 10/9/2012
SCOTT F. FITCH DATE
LS 5284
EXPIRATION DATE 12/31/2013

W.O. NO. _____

DWG. NO. _____

Exhibit B: Aerial Map of the Premises



Exhibit C: Lighting of Public Parking Lot

