

Attachment D to Agenda File No. 2016-0476

AGREEMENT FOR AMENDMENT OF LEASE AMENDMENT NO. 1

THIS AGREEMENT FOR AMENDMENT OF LEASE AMENDMENT NO. 1 ("AMENDMENT"), made and entered into this _____ day of _____, 2016, by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, hereinafter called "Lessor," and WESTGROUP KONA KAI, LLC, a Delaware limited liability company, dba Kona Kai Resort, hereinafter called "Lessee," WITNESSETH:

WHEREAS, Lessor and Lessee, on the 1st day of May, 2014, entered into a Lease of certain tidelands in the city of San Diego, California, which Lease was filed on April 30, 2014 in the Office of the Clerk of Lessor bearing Document No. 61760 ("Lease"); and

WHEREAS, Lessor and Lessee are mutually desirous of amending said Lease;

NOW THEREFORE, for valuable consideration, said Lease is hereby amended in the following respects and no others, and except as expressly amended, all terms, covenants and conditions of said Lease shall remain in full force and effect:

- A. Paragraph 2 is hereby deleted in its entirety and replaced with the following Paragraph 2 in its place. For clarity purposes, Paragraphs 2.1 and 2.2 will remain unchanged:

2. USE:

Lessee agrees that the Leased Premises shall be used only and exclusively for an approximately 170-guestroom hotel providing for the following related operations and businesses conducted on or from the Leased Premises:

- (a) Rental of guest rooms;
- (b) Rental of banquet and conference rooms;
- (c) Full service restaurant of approximately 121-seats;
- (d) Room service to guest rooms and food and beverage service to banquet and conference rooms;

- (e) Parking for hotel customers and guests and, pursuant to the Reciprocal Easement Agreement (“REA”) reference in Paragraph 50 below, parking for customers and guests of the adjacent marina, with the number of parking spaces on the Leased Premises totaling not less than 456;
- (f) Retail shop(s);
- (g) Barber and beauty shop;
- (h) Sale of new and used boats;
- (i) Vending machines; including telephones;
- (j) Office and counter areas for hotel management;
- (k) Offices for operations and businesses listed herein;
- (l) Bicycle rentals for hotel customers and guest only;
- (m) Health and recreational facilities, including recreational lessons for hotel customers and guests only;
- (n) Office, storage, bathrooms, showers and laundry facilities for the adjacent marina;
- (o) Installation of telecommunications equipment with prior written approval of Lessor in each instance.

Except as expressly provided herein, Lessee shall not use or permit the Leased Premises to be used for any other uses or purposes whatsoever. This restriction on use of the Leased Premises absolutely prohibits a change in use.

Lessee further agrees to comply with all project conditions and any mitigation measures contained in the: (i) Addendum to the Final Mitigated Negative Declaration (Lessor Clerk’s Document No. 60670) and/or the resolution adopting said Addendum to the Final Mitigated Negative Declaration, Resolution No. 2013-140, adopted by the Board of Port Commissioners on August 13, 2013; and (ii) Final Mitigated Negative Declaration (Lessor Clerk’s Document No. 51132) and/or the resolution adopting said Final Mitigated Negative Declaration, Resolution No. 2006-163, adopted by the Board of Port Commissioners on October 10, 2006.

B. Paragraphs 3(c)(2) and 3(c)(14) are hereby deleted in their entirety and replaced with the following 3(c)(2) and 3(c)(14) in their place:

(2) Seven and One-Half Percent (7.5%) of the gross income from rental of conference and banquet rooms and sale of related merchandise and services provided to conference and banquet room users (including gross income from recovery charges for materials, utilities, security, and similarity related accommodations, sales and services);

(14) Fifteen Percent (15%) of the gross income from sale of parking services or rental of parking spaces;

C. Paragraph 3.2(a) is hereby deleted in its entirety and replaced with the following 3.2(a) in its place:

3.2 RENT REVIEW:

(a) At least two hundred seventy (270) days prior to the beginning of the Rental Period which commences May 1, 2024 and at least two hundred seventy (270) days prior to the beginning of each Rental Period thereafter as described in Paragraph 3(a) herein, Lessor and Lessee shall attempt to reach mutual agreement on the rent as specified in Paragraphs 3(b) and 3(c) herein; provided, however, that the rent shall not be less than the "Rent Requirements" set forth in Paragraph 3.2(c) below.

D. Paragraph 3.2(c) is hereby deleted in its entirety and replaced with the following 3.2(c) in its place:

(c) The following "Rent Requirements" shall apply to all rent adjustments and In no event shall the Minimum Annual Rent or any percentage rent category be adjusted to less than any of the following "Rent Requirements": (i) the Minimum Annual Rent at the commencement of each Rental Period shall not be less than the greater of (A) exactly 80% of the average total percentage rents payable during the last three accounting years of the immediately preceding Rental Period, or (B) the Minimum Annual Rent in effect for the immediately preceding Rental Period (as increased by any increase in the CPI from the immediately prior CPI Adjustment Date); and (ii) no percentage rent category described in Paragraph 3(c), as adjusted, shall be less than the then current percentage rent category rate most recently adopted by the Board of Port Commissioners. However, in no event shall the percentage rent rate for any percentage rent category increase by more than the greater of (i) two hundred fifty (250) basis points from the relevant percentage rent category originally set forth in Paragraph 3(c) of this Lease, or (ii) the percentage change in the CPI from the calendar month which is three months prior to the Commencement Date as compared to the CPI for the calendar month which is three months prior to the commencement of the relevant

Rental Period. LESSEE ACKNOWLEDGES THAT THE TERMS OF THIS PARAGRAPH HAVE BEEN SPECIFICALLY REVIEWED BY LESSEE AND LESSEE ACCEPTS THE PARAMETERS FOR CHANGE IN THE PERCENTAGE RENT RATES SET FORTH IN THIS PARAGRAPH AND AGREES THAT SUCH PARAMETERS REFLECT COMMERCIALY REASONABLE TERMS FOR THE ADJUSTMENT OF PERCENTAGE RENT RATES AND CATEGORIES BY THE BOARD OF PORT COMMISSIONERS FROM TIME TO TIME DURING THE TERM OF THIS LEASE.

E. Paragraph 4(h) is hereby deleted in its entirety and replaced with the following 4(h) in its place:

(h) For tenant development projects pursuant to Board of Port Commissioners' Policy No. 357 – Policy For Approval of Tenant Project Plans with a project cost of \$5,000,000 or more, Lessee shall allocate no less than one percent of the Lessee improvement's total project cost on artwork for the project pursuant to Board of Port Commissioners' Policy No. 608 – Tenant Percent for Art. All commissions or purchases of artwork in fulfillment of the tenant percent for art requirement or otherwise must be approved in writing by Lessor before installation on the Leased Premises. Lessee acknowledges and understands that all commissions or purchases of artwork or otherwise in fulfillment of the tenant percent for art requirement or installed on the Leased Premises shall comply with Board of Port Commissioners' Policy No. 608 – Tenant Percent for Art and Board of Port Commissioners' Policy No. 609 – Public Art, respectively, in effect at the time the Tenant Project Plan is deemed complete by the District.

Lessee shall enter into a tenant art agreement with the District to outline the parties' responsibilities related to fulfilling the requirement in compliance with Board of Port Commissioners' Policy No. 608 – Tenant Percent for Art, including but not limited to: artist, artist concept proposal, final design, artwork, representations and warranties, ownership and rights, Lessee obligations, public safety, maintenance and conservation, removal, disposition, signage and time schedule. Alternatively, Lessee shall deposit into the public art fund, payment of an in-lieu contribution in accordance with Board of Port Commissioners' Policy No. 608 – Tenant Percent for Art.

F. Paragraph 4(i) is hereby deleted in its entirety.

G. Paragraph 5 is hereby deleted in its entirety and replaced with the following Paragraph 5 in its place:

5. CONSTRUCTION OF IMPROVEMENTS:

(a) On or before June 1, 2014, Lessee shall commence the construction of and diligently proceed to completion, a project which consists of: (i) the renovation of all existing guestrooms and corridors; (ii) the renovation of and addition of marina support buildings, (iii) renovation and reconfiguration of the pool area including the addition of a pool bar; (iv) renovation of the existing fitness

center with new spa, lockers and fitness area; (v) enhanced point of arrival with new fire and lobby; (vii) renovation & enhancement of the existing restaurant; (viii) renovation & enhancement of the existing conference space; (ix) the existing beach area will be enhanced with new cabanas, chaises & a water feature, hereinafter "Project 1." The Project 1 shall be substantially in accordance with plans and specifications, including but not limited to working drawings, hereinafter "Plans," previously approved in writing by Lessor, subject to changes thereto as may be approved by Lessor, in Lessor's sole discretion. Said Plans, and any approved changes thereto, are by this reference made a part hereof. Construction of the Project shall be completed by no later than May 1, 2016. Provided, however, the commencement and completion dates may be extended pursuant to Paragraph 5(g) herein. In the event of any inconsistency between the Plans and the terms and conditions of this Lease, the terms and conditions of this Lease shall prevail.

- (b) Lessee shall, as a condition of this Lease, make an investment in the Project 1 improvements in an amount which shall exceed Five Million Two Hundred Thousand Dollars (\$5,200,000). Such investment is qualification for the term of this Lease and is not a portion of the rent obligations provided in Paragraph 3 herein. Further, neither such investment, nor such improvements, nor any other Lessee investment or improvement shall be considered by the parties hereto or any arbitrator (in the event of arbitration) in determining any rent during the term of this Lease.
- (c) By no later than May 1, 2019, Lessee shall commence the construction of and diligently proceed to completion, (i) the construction of two new two-story buildings containing 41 guest rooms; (ii) upgrade and enhance the existing landscaping; (iii) resurface and restripe the parking lot; and (iv) upgrade the existing seawall, collectively hereinafter "Project 2." Project 2 shall be substantially in accordance with plans and specifications, including but not limited to concept drawings, hereinafter "Plans," previously approved in writing by Lessor, subject to changes thereto as may be approved by Lessor, in Lessor's sole discretion. Said Plans, and any approved changes thereto, are by this reference, made a part hereof. Before construction may commence on Project 2 a performance bond shall be obtained pursuant to Paragraph 16. Construction of Project 2 shall be completed by no later than October 1, 2020. Provided, however, the commencement and completion dates may be extended pursuant to Paragraph 5(g) herein. In the event of any inconsistency between the Plans and the terms and conditions of this Lease, the terms and conditions of this Lease shall prevail. **Before construction may commence on Project 2 the following conditions must be satisfied:**

- (1) **Working Drawings:** Lessee shall submit to District for approval by the Executive Director of the District or designee, six (6) copies of "Working Drawings" for development of Project 2. Working Drawings

shall be prepared by an architect or engineer, as appropriate, licensed to do business in the State of California, and shall consist of the following:

- i. Complete architectural, civil, structural, mechanical, electrical, plumbing, utility layout, landscaping and irrigation, stormwater and site horizontal (coordinate) and vertical control plans included in the civil drawings.
- ii. Complete specifications, materials, and color list, and engineering calculations for all improvements.
- iii. Construction contract form.
- iv. Construction schedule.
- v. A detailed final construction cost estimate of all improvements, with indirect costs, furniture, fixtures and equipment separately identified.

The Working Drawings must be in substantial conformance to the Preliminary Plans approved by the District. The Executive Director of the District, or designee, will approve or comment on the Working Drawings within twenty (20) days following submittal. Within twenty (20) days after the Executive Director of the District, or designee, approves or comments on the Working Drawings, Optionee shall complete all corrections and modifications to the Working Drawings to the satisfaction of the District. District approval shall not release Optionee from liability arising out of or related to the Working Drawings.

- (2) Project Financing/Equity Commitment: Lessee shall submit to the District evidence that Lessee either has sufficient cash on-hand to build Project 2 in accordance with the approved Working Drawings or has obtained a written commitment in form and content reasonably acceptable to District, to provide financing to build Project 2 in accordance with the approved Working Drawings.
- (3) Development Permits: Lessee shall obtain, at its sole cost and expense, all required construction and development permits in connection with Project 2, and deliver to District copies thereof. Said permits shall include, but are not limited to, the building permits issued

by the City of San Diego ("City"), Army Corps of Engineers ("ACOE") permit (if applicable) and the Coastal Development permit, which shall be issued by the District in its sole and absolute discretion. Optionee will submit to District a copy of all documents delivered to the City and ACOE in connection with obtaining such permits.

- (4) Performance Bond: Lessee shall provide to District a performance bond (in accordance with the requirements of Paragraph 16 herein) guaranteeing that construction of Project 2 will be timely completed in accordance with the requirements of Paragraph 5(c) of the Lease.
- (5) Construction Contract: Lessee shall submit an executed construction contract or contracts with competent and financially-responsible contractors for construction in accordance with the working drawings approved by District.
- (d) Lessee shall, as a condition of receiving the fifteen (15) year lease extension, make an investment in the Project 2 improvements in an amount which shall exceed Nine Million One Hundred Thousand Dollars (\$9,100,000). Such investment is qualification for the term of this Lease and is not a portion of the rent obligations provided in Paragraph 3 herein. Further, neither such investment, nor such improvements, nor any other Lessee investment or improvement shall be considered by the parties hereto or any arbitrator (in the event of arbitration) in determining any rent during the term of this Lease.
- (e) Investment in the Project improvements referenced in Paragraph 5(b) and 5(d) above shall include an investment of no less than one percent of the Lessee improvement's total project cost in artworks in compliance with Board of Port Commissioners' Policy No. 608 - Tenant Percent for Art and Board of Port Commissioners' Policy No. 609 - Public Art, respectively, in effect at the time the Project is granted conceptual approval by the Board of Port Commissioners.
- (f) Within sixty (60) days following completion of any substantial improvement within the Leased Premises, but at not less than quarterly intervals. Lessee shall furnish Lessor an itemized statement of the actual construction cost of such improvement. The statement shall be sworn to and signed, under penalty of perjury, by Lessee or its responsible agent.

Lessee shall maintain true, accurate, and complete records to support said statement. Such records shall include, but are not limited to a general ledger, vendor invoices, cancelled checks, construction loan documentation, agreements with third-party contractors, and contractor progress payment billings. Additionally, should Lessee perform any construction in-house, Lessee shall substantiate the actual work performed by maintaining a payroll

journal, copies of cancelled payroll checks, and timecards or other payroll documents which show dates worked, hours worked, and pay rates.

Books and records herein required shall be maintained and made available either at the Leased Premises or at such other location as is agreeable to Lessor. Further, Lessor shall have the right at any and all reasonable times to examine and audit said books and records without restriction for the purpose of determining the accuracy thereof, and the accuracy of the aforesaid statement. In the event Lessee does not make available the original books and records at the Leased Premises or within the limits of San Diego County, Lessee agrees to pay all necessary expenses incurred by Lessor in conducting an audit at the location where said books and records are maintained.

- (g) The time(s) during which Lessee's construction is delayed by acts of God, war, invasion, rebellion, revolution, insurrection, riots, labor problems, unavailability of materials, government intervention, or acts or omissions of Lessor, shall be added to the times for the commencement and completion of construction established in Paragraph 5(a) and 5(c) herein. Provided, however, in no event shall the period of excused delay exceed 365 days in the aggregate.
- (h) Failure to comply with this Paragraph is a breach of this Lease and cause for termination in accordance with Paragraph 10 herein.

H. Paragraph 7 is hereby deleted in its entirety and replaced with the following Paragraph 7 in its place:

7. LIENS

Lessee shall defend, indemnify, and hold harmless Lessor against all claims and liens for labor, services, or materials in connection with improvements, repairs, or alterations made by Lessee or Lessee's sublessees, contractors, and agents on the Leased Premises, and the costs of defending against such claims and liens, including reasonable attorneys' fees.

In the event any such claim or lien (other than the lien of a Permitted Leasehold Deed of Trust (as hereafter defined)), or any other claim(s), lien(s) or levy(ies) whatsoever of any nature caused by Lessee or Lessee's sublessees, contractors, and agents, is filed against the Leased Premises or the leasehold interests of Lessee therein, Lessee shall, upon written request of Lessor, deposit with Lessor a bond conditioned for the payment in full of all claims upon which said lien(s) or levy(ies) have been filed. Such bond shall be acknowledged by Lessee, as principal, and by an entity licensed by the Insurance Commissioner of the state of California to transact the business of a fidelity and surety insurance company, as surety. Lessor shall have the right to declare this Lease in default in the event the bond required by

this Paragraph has not been deposited with Lessor within ten (10) days after written request has been delivered to Lessee.

This provision shall not apply to a foreclosure of a trust deed or mortgage encumbering the leasehold if the encumbrance has previously received Lessor consent in accordance with Paragraph herein.

- I. Paragraph 8 is hereby deleted in its entirety and replaced with the following Paragraph 8 in its place:

8. LEASE ENCUMBRANCE

- (a) Lessor's Consent to Encumbrance. Lessee shall not encumber the Lease, leasehold interest, and the improvements thereon by a deed of trust, mortgage, or other security instrument to assure the payment of Lessee's promissory note, without Lessor's prior written consent, in each instance. If Lessee enters into any deed of trust, mortgage, or other security instrument that encumbers the Lease, leasehold interest, or the improvements thereon without Lessor's prior written consent, Lessor shall have the right to declare this Lease in default.

In the event Lessee requests Lessor's consent to any Lease encumbrance, hereinafter referred to as a "transaction" in this Paragraph 8, Lessee shall reimburse Lessor for all Lessor's reasonable costs and expenses associated with said transaction. Said costs shall include reasonable legal fees and disbursements relating to or arising out of any such transaction, regardless of whether such transaction is consummated.

In the event Lessor consents to any Lease encumbrance of this Lease, said consent shall be conditioned upon the following: (i) if, on the effective date of such proposed encumbrance, but subject to the conditions herein, the rent being paid under this Lease is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent; (ii) if deemed necessary by Lessor, a Lease amendment shall be executed which will include new or revised lease provisions; (iii) the maximum loan proceeds shall not be in excess of the greater of 75% loan-to-value as determined by lender's appraisal, or the amount of repayment of existing financing that encumbers the leasehold; (iv) the loan shall have an amortization term that is less than the remaining term of the ground lease; and (v) the Lessee shall acknowledge in writing that it will not seek rent relief as a result of not being able to meet its debt repayment obligations. Upon the effective date of any said consented-to-encumbrance, Lessee shall thereafter pay to Lessor the market rent as referenced herein, subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein

In the event of a consented-to encumbrance, if the parties cannot agree to an amount that is equal to the market rent, the rent shall be determined by the procedure described in Paragraph 3.2 herein, except that the award shall be

effective and retroactive to the effective date of the consented-to encumbrance. ‘

- (b) Definition of “Consented-to-Lender”. The term “Consented-to-Lender” as hereinafter used in this Lease, means the lender holding an encumbrance consented to by Lessor. It may include one or more lenders holding obligations of the Lessee secured by a single deed of trust, mortgage, or other security instrument.
- (c) Voluntary Lease Surrender. Without the prior written consent of the Consented-to-Lender, should Lessee owe the Consented-to-Lender any amounts under any security instrument encumbering this Lease, leasehold interest, or the improvements thereon, Lessor will not accept the voluntary surrender, cancellation, or termination of this Lease before the expiration of the term thereof.

Prior to the execution of any change, modification or amendment to the Lease, Lessor shall provide written notice of any such proposed change, modification or amendment, including all CPI adjustments and changes to rent pursuant to rent reviews, to each Consented-to-Lender; provided, however, if Lessor fails to provide such notice, such failure shall not (i) constitute a default by Lessor under the Lease or (ii) invalidate or render void any such change, modification or amendment taken without the knowledge or consent of such Consented-to-Lender.

- (d) Loan Default. If a Permitted Leasehold Deed of Trust is in default at any time, the Consented-to-Lender shall, as provided by law, have the right, without Lessor’s prior consent, to:
 - (1) Accept an assignment of the Lease in lieu of foreclosure; or
 - (2) Cause a foreclosure sale to be held pursuant to either judicial proceedings or power of sale as provided in its deed of trust, mortgage, or other security instrument.

Provided, however, with the exception of said Consented-to-Lender, no assignment to the successful bidder shall be effective without Lessor’s prior written consent, not to be unreasonably withheld.

- (e) Assume Lease Obligations. Before said Consented-to-Lender, or any other future consented-to assignee, acquires the leasehold interest, it shall, as an express condition precedent, agree in writing to assume each and every obligation under the Lease. Furthermore, before any said Consented-to-Lender, or any other future consented-to assignee or purchaser, may subsequently assign or sublease all or substantially all of the leasehold interest, it shall, in each instance, obtain Lessor's prior written consent.

Further, a Consented-to-Lender that has: (i) acquired the leasehold interest and assumed the Lessee's obligations, or (ii) entered into a new lease

pursuant to Paragraph 10 herein, concurrently with a termination of this Lease, shall be released from all further obligations under this Lease after it assigns the leasehold interest to an assignee consented to by Lessor, in accordance with this Paragraph 8.

- (f) Lessor's Consent to Assignment. Whenever a Consented-to-Lender is required by the provisions of this Paragraph 8 to obtain Lessor's prior consent to an:
- (1) Assignment to the successful bidder upon a foreclosure by said Consented-to-Lender; or
 - (2) Assignment or sublease of all or substantially all of the Leased Premises by said Consented-to-Lender should it become the lessee by reason of: (i) being the successful bidder upon said foreclosure, or (ii) an assignment in lieu of foreclosure, or (iii) under a new lease entered into pursuant to Paragraph 10 herein; then Lessor will grant such consent if:
 - (i) The principal(s) of such assignee, purchaser, or sublessee are reputable (meaning the absence of reputations for dishonesty, criminal conduct, or association with criminal elements -- "reputable" does not mean "prestigious," nor does the determination of whether one is reputable involve considerations of personal taste or preference);
 - (ii) The principal(s) of such assignee, purchaser, or sublessee possess sufficient business experience and financial means to perform Lessee's obligations under this Lease--according to the then-current standards for business experience and financial means that Lessor generally requires of new or renewed lessees at the time of the request; and
 - (iii) The assignee, purchaser, or sublessee agrees in writing to assume each and every obligation under this Lease.

Further, Lessor will not unreasonably or arbitrarily withhold such consent. Provided, however, no such assignee, purchaser, or sublessee shall subsequently: (i) assign, transfer, or sublease any or all of the Leased Premises without Lessor's prior written consent, in accordance with Paragraph 9 herein; or (ii) encumber the Lease, leasehold interest, and improvements thereon without Lessor's prior written consent, in accordance with this Paragraph 8.

Provided further, if said Consented-to-Lender becomes the lessee by reason of: (i) being the successful bidder upon foreclosure, or (ii) an assignment in lieu of foreclosure, or (iii) being the lessee of a new lease entered into pursuant to Paragraph 10 herein, then said Consented-to-Lender may, upon a subsequent assignment or subleasing of all or substantially all of the

Leased Premises, take back from its assignee, purchaser, or sublessee, a purchase money deed of trust, mortgage, or security instrument. Provided, however, said Consented-to-Lender must execute and submit to Lessor documentation substantially in the same form and content as was originally submitted to Lessor when consent was granted to the earlier encumbrance. Only said Consented-to-Lender or the successful bidder upon said foreclosure may enforce the provisions of this Paragraph 8. Further, no other third party shall have the rights or remedies, as third-party beneficiaries, or otherwise, hereunder.

The burden of producing evidence and the burden of proof showing Lessor that a prospective assignee, purchaser, or sublessee meets each and all of the aforesaid qualifications and standards shall be on said Consented-to-Lender or successful bidder upon foreclosure. Lessor's decision shall be based upon Lessor's high duty of care in administering a valuable public resource, which it holds in trust for the people of the state of California. In the absence of fraud or arbitrary or unreasonable action in applying or failing to apply said standards, Lessor's decision shall be final.

- (g) If Lessor Rejects Lease Transferee. In the event Lessor rejects: (i) the successful bidder upon foreclosure, or (ii) a proposed assignee or sublessee of the Consented-to-Lender (said successful bidder or Consented-to-Lender being sometimes referred to hereinafter as the "Aggrieved Party," and said successful bidder, or proposed assignee or sublessee from the Consented-to-Lender being sometimes referred to hereinafter as the "Applicant"), the sole remedy of the Aggrieved Party shall be to seek relief in the nature of specific performance through the arbitration procedure hereinafter established. Further, in no event shall Lessor be liable to the Aggrieved Party or Applicant, or any person or entity whatsoever, for money damages. Provided, however, the Aggrieved Party shall be entitled to recover such damages, if any, it may sustain as a result of Lessor's failure or refusal to comply with a Superior Court order confirming an award in favor of the Aggrieved Party in said arbitration.

The issue to be submitted to arbitration shall be whether Lessor's Board of Port Commissioners' record contains substantial evidence to support the decision to reject the Applicant in accordance with the standards of reputation, business experience, and/or financial means, as provided herein. The Aggrieved Party may submit said issue to arbitration.

The arbitration shall be conducted pursuant to Title 9 of Part 3 of the California Code of Civil Procedure (section references herein shall be to the Code of Civil Procedure), as amplified and modified by the following provisions:

- (1) Arbitration shall be initiated by the Aggrieved Party filing a written demand for arbitration with Lessor no later than thirty (30) days following Lessor's adoption of a resolution rejecting the Applicant. If the Aggrieved Party so elects, Lessor shall be deemed to have

adopted a resolution rejecting an Applicant if Lessor has not acted within ninety (90) days after the Aggrieved Party files a written application for Lessor to approve the Applicant;

- (2) Said arbitration shall be conducted by a single neutral arbitrator who shall not be a County of San Diego resident;
- (3) If the parties have not agreed on the selection of the arbitrator within five (5) days after said demand for arbitration is filed, either party may petition the Superior Court of the state of California, county of San Diego, to select the arbitrator pursuant to Section 1281.6;
- (4) Each party shall submit its nominees, if any, to the court within five (5) days after said petition is served and filed;
- (5) Said arbitrator shall not conduct a trial de novo, but shall consider only said record before Lessor's Board of Port Commissioners. Provided, however, said arbitrator may consider evidence outside said record if the arbitrator believes that the Board's decision was affected by Lessor's fraudulent action which was not reasonably discoverable prior to the Board's decision;
- (6) Said arbitrator shall make the award in writing within forty-five (45) days of being appointed;
- (7) The right of any party to take depositions for discovery purposes, as provided in Section 1283.05, shall be waived;
- (8) Certain time periods established in said Title 9 shall be shortened as follows:
 - (i) Sections 1284, 1288.4, 1290.2, and 1290.6--halved;
 - (ii) Section 1288--four years to 30 days and 100 days to 15 days; and
 - (iii) Section 1288.2--100 days to 15 days;
- (9) San Diego, California shall be the venue of the arbitration hearing and any court proceedings;
- (10) The decision of the Superior Court in any proceeding to confirm, correct, or vacate the award shall be final, and the parties to said arbitration waive any rights to appeal therefrom, as provided in Sections 1294 and 1294.2, or otherwise; and
- (11) The parties shall bear their costs, fees, and expenses incurred in connection with said arbitration, in accordance with the provisions of Section 1284.2.

- (h) Notice of Foreclosure Sale. Said Consented-to-Lender shall include a statement in any Notice of Foreclosure Sale covering the foregoing requirements for Lessor's consent to an assignment upon said foreclosure.
- (i) Subsequent Encumbrance. Except for subleases, utility easements, and other necessary rights-of-way, Lessor shall not expressly consent to a subsequent lien or encumbrance against the Leased Premises without said Consented-to-Lender's prior written consent, not to be unreasonably withheld.
- (j) Assignment of Security Interest. Said Consented-to-Lender shall not assign its security interest in the Leased Premises in whole or in part without Lessor's prior written consent, in each instance. Provided, however, Lessor's consent to such an assignment shall be deemed granted (and such assignee will for all purposes of this Lease be deemed to be a Consented-to-Lender) if the assignment is to:
 - (1) A Financial Institution in good legal standing under the laws of its jurisdiction of incorporation having assets exceeding Two Hundred and Fifty Million Dollars (\$250,000,000); or
 - (2) The United States of America or any state thereof, or any agency thereof; or
 - (3) An assignee by operation of law; e.g., a state insurance department engaged in supervising the liquidation or rehabilitation of an insurance company lender.

Provided, however, for purposes of the foregoing provisions "Financial Institution" shall mean: (i) an insurance company qualified to do business in the state of California; or (ii) a federally- or state-chartered bank, savings bank, or savings and loan association; or (iii) a pension or retirement fund operated for the employees and former employees of, and regulated and controlled by, the United States of America or any state thereof, or any agency thereof; e.g., the California State Teachers' Retirement System; or (iv) a finance company; or (v) an investment company, money management firm, or "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act of 1933, as amended, or an institutional "accredited investor" within the meaning of Regulation D under the Securities Act of 1933, as amended; or (vi) a real estate investment trust; or (vii) a combination of two or more of the preceding entities; or (viii) an entity controlled by, controlling or under common control with one or more of the preceding entities (provided that at least one participant, constituent, member or partner thereof meets the \$250,000,000 threshold set forth above). In this context "controlled" "controlling" or "under common control" shall be deemed to be either or both (i) the ownership of more than fifty percent (50%) of the stock or other voting interest of the subject entity or the ownership of beneficial interests in the subject entity, or (ii) the power to direct the management of the subject entity with respect to major decisions of the subject entity, whether through voting

interests or by way of agreement.

Provided, further, no subsequent assignment by such assignee will be permitted unless:

- (1) The assignment conforms to all requirements of this Paragraph 8;
- (2) A duplicate original(s) of such assignment is furnished Lessor; and
- (3) In case of an assignment where Lessor's consent is deemed granted:
 - (i) assignee promptly furnishes Lessor reasonably satisfactory evidence that said assignee complies with the foregoing requirements, and
 - (ii) said assignee expressly agrees to take such assignment subject to all Lessor's rights under this Lease.

J. Said Lease is hereby amended by adding Paragraph 8.1 "Lessor's Participation in Refinance Proceeds" as follows:

8.1 LESSOR'S PARTICIPATION IN REFINANCE PROCEEDS:

Upon Lessor's consent to a Lease encumbrance other than the construction financing of the initial development of the Improvements, Lessee shall pay to Lessor a fee (the "Financing Participation Fee") in an amount equal to two and one-half percent (2.5%) of the Net Proceeds of such transaction. Prior to Lessor's consent to any Financing Transaction, Lessee shall deliver to Lessor a written statement showing the calculation of the Financing Participation Fee owed to Lessor from Lessee based on the terms of the Financing Transaction. The statement of the calculation of the Financing Participation Fee shall contain such detail as may be reasonably requested by Lessor to verify the calculation of the Financing Participation Fee. The Financing Participation Fee due Lessor shall be payable in full to Lessor concurrent with the completion of the Financing Transaction. When owed, the Financing Participation Fee shall constitute additional rent.

For the purposes of this Paragraph 8.1, the term "Net Proceeds" shall mean with respect to a Financing Transaction, the difference between (a) the loan amount and (b) the total of the outstanding indebtedness being paid off by the Financing Transaction and the portion (if any) of the debt under the Financing Transaction to be expended on improving the Improvements, less any customary costs or fees of the Financing Transaction payable by Lessee [provided that the total amount of such costs and fees shall not exceed two percent (2%) of the actual gross proceeds of the subject transaction].

K. Paragraph 9 is hereby deleted in its entirety and replaced with the following Paragraph 9 in its place:

9. ASSIGNMENT – SUBLEASE:

Lessee shall not, without the prior written consent of Lessor:

- (a) Assign or transfer the whole or any part of this Lease or any interest therein;
- (b) Sublease (which shall also include management and/or operating agreements covering the Leased Premises) the whole or any part of the Leased Premises;
- (c) Permit transfer of the Lease or possession of the Leased Premises by merger, consolidation, or dissolution of Lessee;
- (d) Permit hypothecation, pledge, encumbrance, transfer or sale, voluntary or involuntary, in whole or in part, of this Lease or any interest therein other than to a Consented-to-Lender; or
- (e) Permit the occupancy of the whole or any part of the Leased Premises by any other person or entity other than a Consented-to-Lender.

Notwithstanding the foregoing, nothing herein shall be construed to prevent the occupancy of said Leased Premises by any employee or business invitee of Lessee.

Further, Lessee shall not, without the prior written consent of Lessor:

- (a) Permit assignment, hypothecation, withdrawal, admittance, dissolution, change, pledge, encumbrance, transfer or sale, voluntary or involuntary, of any interest of a member's managing interests, limiting interests or membership interests;
- (b) Contract for the management or operation of the whole or any part of the Leased Premises; or
- (c) Permit the transfer of the Lease or possession of the Leased Premises by any changes in the respective interests of the parties comprising Lessee.

It is mutually agreed that the personal qualifications of the parties controlling Lessee, specifically including, but not limited to, members of the limited liability company, are a part of the consideration for granting this Lease. Said parties do hereby specifically agree to maintain active control and supervision of the operations conducted on the Leased Premises.

In the event Lessee requests Lessor's consent to any Lease assignment, Lease transfer, Lease amendment, and/or sublease, Lessee shall reimburse Lessor for all Lessor's reasonable costs and expenses associated with such Lease assignment, Lease transfer, Lease amendment, and/or sublease. Said costs shall include reasonable legal fees and disbursements relating to or arising out of any such Lease assignment, Lease transfer,

Lease amendment, and/or sublease, regardless of whether such Lease assignment, Lease transfer, Lease amendment, and/or sublease is consummated.

In the event Lessor consents to any Lease assignment or transfer, said consent shall be conditioned upon the following: (i) if, on the effective date of such proposed assignment or transfer, the rent being paid under this Lease is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent; (ii) assignee shall agree and assume each and every obligation under the Lease; (iii) if deemed necessary by Lessor, a Lease amendment shall be executed which will include new or revised lease provisions; and (iv) assignee shall comply with other conditions and qualifications determined by the Board of Port Commissioners of Lessor. Notwithstanding, items (i), (iii), and (iv) shall not apply in the event of: (a) a Lease assignment or transfer to a third party from a Consented-to-Lender which acquired title to the Lease by foreclosure or deed in lieu of foreclosure or a new Lease pursuant to the provisions of Paragraph 10 herein, or (b) assignment or transfer of the Lease to a Consented-to-Lender by deed in lieu of foreclosure, or to a Consented-to-Lender or a third party as the successful bidder at a foreclosure sale. Upon the effective date of any said consented-to Lease assignment or transfer, assignee shall thereafter pay to Lessor the market rent as referenced herein, subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein.

In the event Lessor consents to any sublease, said consent shall be conditioned upon the following: (i) if, upon the effective date of any said consented-to sublease, the rent being paid for the sublease area is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent for the sublease area as long as said sublease is in effect; (ii) if deemed necessary by Lessor, a Lease amendment shall be executed which shall include new or revised lease provisions; and (iii) Lessee shall comply with other conditions and qualifications determined by the Board of Port Commissioners of Lessor. Furthermore, as long as said sublease is in effect, rent for the sublease area shall be subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein.

In the event of a consented-to assignment or sublease, if the parties cannot agree to an amount that is equal to the market rent, the rent shall be determined by the arbitration procedure described in Paragraph 3.2 herein, except that the award shall be effective and retroactive to the effective date of the assignment or sublease. Because of this provision, underpayment of rent, if any, shall be paid to Lessor within ten (10) days of the date that the market rent is determined by said arbitration procedure.

L. Said Lease is hereby amended by adding Paragraph 9.1 "Assignment Participation Fee" as follows:

9.1 ASSIGNMENT PARTICIPATION FEE:

(a) Upon each (i) Assignment of this Lease pursuant to Paragraph 9 to a Third Party (as defined below), (ii) a change in the composition of the direct or

indirect ownership of Lessee by which a Third Party (as defined below) acquires any direct or indirect interest in Lessee other than pursuant to a transfer of ownership interests traded on a recognized public exchange, and (iii) Sublease of all or substantially all of the Premises to a Third Party, Lessee shall pay to Lessor a fee (the "Assignment Participation Fee") in an amount equal to two and one-half percent (2.5%) of the Gross Proceeds of such transaction. Prior to Lessor's consent to any transaction subject to an Assignment Participation Fee, Lessee shall deliver to Lessor a written statement showing the calculation of the Assignment Participation Fee owed to Lessor from Lessee based on the terms of the transaction. The statement of the calculation of the Assignment Participation Fee shall contain such detail as may be reasonably requested by Lessor to verify the calculation of the Assignment Participation Fee. The Assignment Participation Fee due to Lessor shall be payable in full to Lessor concurrent with the completion of the transaction and shall be a joint and several obligation of the transferee and transferor. When owed, the Assignment Participation Fee shall constitute Additional Rent.

- (b) For the purposes of this Paragraph 9.1, the term "Third Party" shall mean any person or entity other than (i) Westgroup Kona Kai, LLC, a Delaware limited liability company (the "Approved Parent") or an entity who is directly or indirectly controlled by, [one or more of] the Approved Parent[s], (ii) a Consented-to-Lender or (iii) an assignee of a Consented-to-Lender (whether the Consented-to-Lender acquires the leasehold interest under this Lease by foreclosure or deed-in-lieu of foreclosure or pursuant to a new lease); provided, however, that if the Gross Proceeds paid by the assignee exceed the Aggregate Debt Amount (as defined below), then such assignee of the Consented-to-Lender shall be a Third Party. The term "Aggregate Debt Amount" shall mean the aggregate amount of the outstanding principal, interest and other amounts secured by the applicable Permitted Encumbrance at the time of acquisition by the Consented-to-Lender of the leasehold interest in the Premises.
- (c) For the purposes of this Paragraph 9.1, with respect to an assignment of this Lease or sublease of all or substantially all of the Premises or a change in the composition of the direct or indirect ownership of Lessee, the term "Gross Proceeds" shall mean the purchase price or other consideration paid (either in cash or by an assumption of debt or other consideration and, if paid over time, the present value of the total consideration using the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%)) to the Lessee and/or holders of direct or indirect interests in Lessee in connection with the subject transaction less the sum of (x) any prorations, closing costs or other customary deductions to the purchase price for which the seller is responsible [*provided that the total amount of such items shall not exceed two (2%) of the actual gross proceeds of the subject*

transaction] and (y) if the Third Party is the assignee of a Consented-to-Lender, the Aggregate Debt Amount.

- (d) Upon the request of Lessor from time to time (which request shall be no more frequent than once per year), Lessee shall provide Lessor with a schedule listing the names and mailing address of all holders of direct or indirect (at all levels) interests in Lessee other than holders of interests traded on a recognized public exchange. In the event that such shareholder, partner, member or other interest holder is a trust, Lessee shall include in such schedule the name and mailing address of each trustee of said trust, together with the names and mailing addresses of each beneficiary of said trust.

M. Paragraphs 10, 11, 15, 18, 20, 23, 27, and 28 are hereby deleted in their entirety and replaced with the following Paragraphs 10, 11, 15, 18, 20, 23, 27, and 28 in their place:

10. DEFAULTS AND REMEDIES:

- (a) Defaults. The occurrence of any one (1) or more of the following events shall constitute a default hereunder:
- (1) Abandonment of the Leased Premises. Abandonment is herein defined to include, but is not limited to, any absence by Lessee from the Leased Premises for ten (10) consecutive days or longer.
 - (2) Failure by Lessee to pay, when due, any Lease-required rent, other payment, and/or charge herein, where such failure continues for a period of ten (10) days after written notice thereof. Provided, however, any such notice provided in this Paragraph 10(a)(2) or in subsequent Paragraph 10(a)(3) shall be in lieu of and not in addition to, any notice required under Section 1161 of the California Code of Civil Procedure, as amended.
 - (3) Failure by Lessee to perform any other express or implied covenants, requirements, obligations, or conditions in this Lease (other than any breach under Paragraph 9, for which immediate notice of termination may be given), should such failure continue for thirty (30) days after written notice thereof.
 - (4) Subject to any restrictions or limitations placed on Lessor by applicable laws governing bankruptcy, Lessee's: (a) applying for, consenting to, or suffering the appointment of a receiver, trustee, or liquidator for all or a substantial portion of its assets; (b) making a general assignment for the benefit of creditors; (c) admitting in writing its inability to pay its debts or its willingness to be adjudged a bankrupt; (d) becoming unable to, or failing to, pay its debts as they mature; (e) being adjudged a bankrupt; (f) filing a voluntary petition or suffering an involuntary petition under any bankruptcy, arrangement,

reorganization, or insolvency law (unless in the case of an involuntary petition, the same is dismissed within thirty (30) days of such filing); (g) convening a meeting of its creditors, or any class thereof, for purposes of effecting a moratorium, extension, or composition of its debts; or (h) suffering, or permitting to continue unstayed and in effect for ten (10) consecutive days, any attachment, levy, execution, or seizure of all or a substantial portion of Lessee's assets or of Lessee's interest in this Lease.

This Paragraph 10(a)(4) shall not be applicable or binding on the beneficiary of any deed of trust, mortgage, or other security instrument on the Leased Premises which is of record with Lessor and is a Permitted Leasehold Deed of Trust, or to said beneficiary's successors in interest consented to by resolution of Lessor, as long as there remains any monies to be paid by Lessee to such beneficiary under the terms of such deed of trust; provided that such beneficiary or its successors in interest, continuously and timely pays to Lessor all rent due or coming due under the provisions of this Lease and the Leased Premises are continuously and actively used in accordance with Paragraph 14 of this Lease, and provided that said beneficiary agrees in writing to assume and perform each and every obligation under the Lease.

- (b) Remedies. In the event of any default, Lessor may exercise the following remedies:
- (1) Termination: Terminate Lessee's right to possession of the Leased Premises whereupon this Lease shall terminate and Lessee shall immediately surrender possession of the Leased Premises to Lessor. In such event, Lessor shall be entitled to recover from Lessee:
 - (i) The "Worth at the Time of Award", as hereinafter defined, of the unpaid rent which had been earned at the time of termination;
 - (ii) The "Worth at the Time of Award" of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided;
 - (iii) The "Worth at the Time of Award" of the amount by which the unpaid rent for the balance of the term of this Lease after the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided; and
 - (iv) Any other amount necessary to compensate Lessor for all the detriment proximately caused by Lessee's failure to perform its obligations under this Lease, or which would ordinarily be likely to result therefrom, including but not limited to the cost of recovering possession of the Leased Premises, expenses of

reletting (Including necessary repair, renovation and alteration of the Leased Premises), reasonable attorneys' fees, and any other reasonable costs.

The "Worth at the Time of Award" of the amounts referred to in Paragraphs 10(b)(1)(i) and 10(b)(1)(ii) shall be computed by charging interest at ten percent (10%) per annum from the dates such amounts accrued to Lessor. The "Worth at the Time of Award" of the amount referred to in Paragraph 10(b)(1)(iii) shall be computed by discounting such amount at one (1) percentage point above the Discount Rate of the Federal Reserve Bank of San Francisco at the time of the award.

- (2) Reletting: Without terminating or effecting a forfeiture of the Lease, or otherwise relieving Lessee of any obligation herein, Lessor may, but need not, relet the Leased Premises or any portion thereof, at any time or from time to time, for such terms and upon such conditions and rent as Lessor, in its sole discretion, deems proper. Regardless of whether the Leased Premises are relet, Lessee shall continue to pay to Lessor all Lease-required amounts up to the date that Lessor terminates Lessee's right to possession of the Leased Premises; provided, however, following a default, Lessor shall not unreasonably withhold its consent to any Lessee-requested assignment of this Lease or subletting of the Leased Premises, unless Lessor shall also elect to terminate this Lease and Lessee's right to possession of the Leased Premises, as provided in Paragraph 10(b)(1). Such payments shall be due at the times provided in this Lease and Lessor need not wait until the termination of the Lease to recover said amounts. If Lessor relets the Leased Premises, or any portion thereof; such reletting shall not relieve Lessee of any obligations herein, except that Lessor shall apply the rent or other proceeds actually collected for such reletting against amounts due from Lessee herein, to the extent such proceeds compensate Lessor for Lessee's nonperformance of any obligation herein. Lessor may execute any lease made pursuant thereto in its own name. Further, Lessor shall be under no obligation to reveal to new lessee how these proceeds were applied, nor shall said new lessee have any right to collect any such proceeds. Lessor shall not, by any reentry or other act, be deemed to have accepted Lessee's surrender of the Leased Premises or Lessee's interest therein, nor be deemed to have terminated this Lease or to have relieved Lessee of any obligation herein, unless Lessor shall have furnished Lessee with express written notice of Lessor's election to do so, as set forth herein.
- (3) Other: Any and/or all other rights or remedies of Lessor specified elsewhere in this Lease or provided by law.

In the event Lessee has encumbered of this Lease for security purposes in accordance with Paragraph 8 of this Lease, it is understood and agreed that Lessor shall furnish copies of all notice(s) of default(s) to the beneficiary or mortgagee under said encumbrance by certified mail (provided Lessee has delivered to Lessor written request, therefore, together with the

name and address of any such beneficiary or mortgagee) contemporaneously with the furnishing of such notices to Lessee. Furthermore, in the event Lessee fails to cure such default(s) within the time permitted herein, said beneficiary or mortgagee shall be permitted to cure such default(s) at any time within thirty (30) days following the expiration of the period within which Lessee may cure said default(s) if the default is monetary in nature, or within sixty (60) days following the expiration of the period within which Lessee may cure said default(s) if such default is non-monetary; provided, however, Lessor shall not be required to furnish any further notice(s) of default(s) to said beneficiary or mortgagee.

In the event this Lease is terminated pursuant to the provisions of this Paragraph 10, Lessor shall continue to have all rights provided in Paragraph 6 of this Lease.

Notwithstanding the foregoing, should a default not be cured within the cure periods referred to above, said Lease shall not be terminated as to said beneficiary or mortgagee unless Lessor first legally offers to enter into a valid lease with said beneficiary or mortgagee, and said offer is not accepted in writing within sixty (60) days after said offer is made. Furthermore, such new lease must be entered into as a condition concurrent with such termination for the then-remaining term of this Lease. Furthermore, the new lease must contain the same terms, conditions, and priority as this Lease, provided the mortgagee or beneficiary promptly cures all then-existing defaults under this Lease when and to the extent it is able to cure them. Such new lease may be entered into even though possession of the Leased Premises has not been surrendered by the defaulting Lessee. In such event, unless legally restrained, Lessor shall promptly proceed to obtain possession of the Leased Premises and to deliver possession to said mortgagee or beneficiary as soon as the same is obtained. Should the mortgagee or beneficiary fail to accept said offer in writing within said sixty (60) day period, or, having so accepted said offer, should it fail promptly to cure all existing defaults under this Lease when and to the extent it is able to cure them, then such termination shall also be effective as to said mortgagee or beneficiary. Furthermore, in the event this Lease is rejected in a bankruptcy proceeding, Lessor shall, within thirty (30) days thereafter, offer in writing to said beneficiary or mortgagee to enter into a valid lease in the same manner and under the same terms, covenants and conditions as provided for with respect to a new lease entered into in the event of a termination of this Lease as provided in the immediately preceding provisions.

11. BANKRUPTCY

If Lessor shall have the right to declare this Lease in default if Lessee: (i) becomes insolvent; (ii) makes an assignment for the benefit of creditors; (iii) becomes the subject of a bankruptcy proceeding, reorganization arrangement, insolvency, receivership, liquidation, or dissolution proceeding; or in the event of any judicial sale of Lessee's leasehold interest.

The conditions of this Paragraph shall not be applicable or binding on: (1) Lessee; or (2) the beneficiary in any Permitted Leasehold Deed of Trust; or (3) the aforesaid beneficiary's successors in interest which Lessor has consented to in writing, as long as there remains any monies to be paid by Lessee to such beneficiary under the terms of such deed of trust; provided Lessee, such beneficiary, or such beneficiary's successors in interest continuously

pay to Lessor all rent due or coming due under the provisions of this Lease, and the Leased Premises are continuously and actively used in accordance with Paragraph 14 herein.

15. MAINTENANCE AND REPAIR:

As part of the consideration for this Lease, Lessee shall assume full responsibility for operation and maintenance of the Leased Premises throughout the term and without expense to Lessor. Lessee shall perform all maintenance, which includes all painting, repairs, and replacements, including in-water dredging, necessary to maintain and preserve the Leased Premises in a good, safe, healthy, and sanitary condition, satisfactory to Lessor and in compliance with all applicable laws. Provided, however, prior to Lessee performing any extraordinary repairs, plans and specifications must first be submitted to Lessor and receive Lessor approval, pursuant to the procedures provided in Paragraph 4 herein. Further, Lessee shall provide approved containers for trash and garbage and keep the Leased Premises free and clear of rubbish, litter, and any other fire hazards. Lessee waives all rights to make repairs at the expense of Lessor, as provided in Section 1942 of the California Civil Code, and all rights provided by Section 1941 of said Code.

For the purpose of keeping the Leased Premises in a good, safe, healthy, and sanitary condition, Lessor always shall have the right but not the duty to enter, view, inspect, determine the condition of, and protect its interests in the Leased Premises. Provided, however, Lessor or its representatives shall: (a) conduct such entry in a manner that causes the least inconvenience and disruption to Lessee's operation as practicable; and (b) comply with all safety and security requirements of Lessee. It is not intended, however, that Lessee's safety and security requirements be used to bar Lessor's right of inspection. Further, Lessee shall provide Lessor reasonable access to the Leased Premises for such purpose.

If inspection discloses the Leased Premises are not in the condition required herein, Lessee immediately must commence the necessary maintenance work, and complete said work within ten (10) days after written notice from Lessor. Further, if at any time Lessor determines the Leased Premises are not in the condition required herein, Lessor may require Lessee to file and pay for a faithful performance bond to assure prompt correction, without additional notice. The amount of said bond shall be adequate, in Lessor's opinion, to correct all unsatisfactory conditions.

Notwithstanding, Lessor shall not be required to perform any maintenance, including painting, repairs, or replacements; or to make any improvements whatsoever on or for the benefit of the Leased Premises.

The rights reserved in this Paragraph shall not create any obligations or increase any obligations for Lessor elsewhere in this Lease.

18. CONFORMANCE WITH LAWS AND REGULATIONS:

Lessee agrees that, in all activities on or in connection with the Leased Premises, and in all uses thereof, including the making of any alterations, changes, installations, or other improvements, it will abide by and conform to all Applicable Laws. Said Applicable Laws shall include, but are not limited to those prescribed by the San Diego Unified Port District

Act; any ordinances of the city in which the Leased Premises are located, including the Building Code thereof; any ordinances and general rules of Lessor, including tariffs; and any applicable laws of the state of California and federal government, as any of the same now exist or may hereafter be adopted or amended. In particular and without limitation, Lessee shall have the sole and exclusive obligation and responsibility to comply with the requirements of: (i) Article 10 of Lessor Code entitled "Stormwater Management and Discharge Control," and (ii) the Americans With Disabilities Act of 1990, as amended, including but not limited to regulations promulgated thereunder, and Lessor shall have no such obligations or responsibilities as to the Leased Premises.

Lessee acknowledges that on December 10, 2013 Lessor adopted a climate action plan, a copy of which is available on-line at <http://www.portofsandiego.org/environment/3414-port-of-san-diego-adopts-climate-action-plan.html>, (the "CAP") and that the CAP is a framework document which provides as one of its goals the adoption by Lessor of a Sustainable Leasing Policy (the "SLP"). Lessee also acknowledges that Lessor desires that leases and lease amendments that it enters into prior to adoption of a SLP include specific operations requirements which reflect the goals of the CAP and which are likely to be the types of operational requirements required under the SLP when adopted. At any time during the term of this Lease, if an amendment to this Lease is required, Lessee and Lessor shall negotiate an amendment for the purpose of adding as a Tenant obligation the adoption, implementation and monitoring of specific operational requirements of the type generally described in the CAP and consistent with the objectives of the CAP provided, however, such requirements must be commercially reasonable and feasible and consistent with both the CAP and the allowable uses and terms and conditions of this Lease. The requirements agreed to by Lessor and Lessee may by their terms include a procedure for the review of the sustainability measures including their effectiveness and actual costs and, in connection with such review, Lessor may agree to modify such measures in its reasonable discretion. Such requirements will be distinct and separate from any environmental mitigation required under CEQA or other laws, rules, or regulations. Following the adoption of the SLP, Lessee agrees that the provisions of the SLP will be fully incorporated into the terms of any future amendments to this Lease.

20. NONDISCRIMINATION – INTENTIONALLY OMITTED

23. HOLD HARMLESS:

Lessee shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless Lessor and its officials, officers, representatives, agents, and employees (collectively "Indemnitees") for any and all liability, claims, actions, losses, fines, penalties, judgments, damages, proceedings, orders, directives, costs, causes of action, suits, rights, expenses, provisional relief, fees (including reasonable attorneys' fees), or demands, including, without limitation, any and all claims for compensation, reimbursement, or contributions whatsoever, (collectively, "Claims") arising directly or indirectly out of the obligations undertaken in connection with this Lease, or Lessee's use, occupancy, possession or operation of the Leased Premises, except claims or litigation arising through the sole negligence or willful misconduct of Lessor. It is the intent of this Paragraph that Lessee indemnify and hold harmless Lessor and Indemnitees for any actions of Lessee or Lessor, including duties that may be legally delegated to Lessee or to third parties, except for those arising out of the sole negligence or willful misconduct of Lessor. This indemnity obligation shall apply for the

entire time that any third party can make a claim against or sue Lessor for liabilities arising out of Lessee's use, occupancy, possession or operation of the Leased Premises, or arising from any defect in any part of the Leased Premises.

In the event Lessee proposes a Redevelopment Project to Lessor, Lessee agrees to indemnify and hold harmless Lessor and Indemnitees from any and all Claims arising directly or indirectly out of Lessor's review, analysis or approval(s) related to the Redevelopment Project, including, but not limited to, all specifications, plans, and reports, any third party challenges to an environmental document, mitigation and/or monitoring plan, or determinations conducted and adopted pursuant to CEQA for the Redevelopment Project, any third party challenges to any Lessor issued permits and other approvals, including, but not limited to, CDPs, PMPAs, concept design, working drawings, subleases, assignments and assumption agreements, letter agreements, memorandum of understanding, operating contracts, estoppel certificates, and any and all amendments or addendum to the same, and/ Lessee's development and operation of such Redevelopment Project.

In the event such Claims arise, Lessor may, in its sole and absolute discretion, participate in the defense of any Claims and the Lessee shall reimburse Lessor for said defense, including, but not limited to reimbursement for outside attorneys' and experts' fees and other costs. The Lessor's participation shall not relieve the Lessee of any of its obligations under this Paragraph 23. In the Lessor's sole and absolute discretion, the counsel of the Lessor or its Indemnitees may also jointly represent the Lessee. The Lessor shall promptly notify the Lessee of its receipt of any Claims.

27. INSURANCE:

Lessee shall maintain insurance acceptable to Lessor in full force and effect throughout the term of this Lease. The policies for said insurance shall, as a minimum, provide the following:

(a) Forms of Coverage

- (1) "OCCURRENCE" form Commercial General Liability covering the Leased Premises, operations, and contractual liability assumed by Lessee in this Lease in the amount of not less than Ten Million Dollars (\$10,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage. The general aggregate shall be Twenty Million Dollars (\$20,000,000) unless a Ten Million Dollars (\$10,000,000) per location aggregate limit is provided separate by endorsement.

If alcoholic beverages are served or sold on the Leased Premises, Liquor Liability coverage in the amount of not less than Five Million Dollars (\$5,000,000) shall be obtained. If no alcoholic beverages are served or sold on the Leased Premises, the proof of insurance shall so state.

- (2) All Risk Property Coverage, including water damage and debris

cleanup provisions, in an amount not less than the full replacement value of all improvements located within the Leased Premises without deduction for depreciation of the covered items and in amounts that meet any co-insurance clauses of the policies of insurance and shall include business interruption and extra expense for full recovery of the net profits and continuing expenses (including the rent to Lessor) for the duration of the period of restoration, a vandalism and malicious mischief endorsement, sprinkler leakage coverage, flood, and earthquake coverage. The coverage policies shall be endorsed with a Loss Payee endorsement in favor of Lessor. It is agreed that any insurance proceeds in excess of Twenty-Five Thousand Dollars (\$25,000) resulting from a loss under said policies shall be payable jointly to Lessor and Lessee to ensure that said proceeds will be reinvested in rebuilding and/or repairing the damaged portions of the Leased Premises and any damaged or destroyed improvements located thereon. However, if there is a consented-to-encumbrance held by a Financial Institution (as defined in Paragraph 8) encumbering the leasehold, then all proceeds from such policies of insurance shall be payable in trust with safeguards reasonably acceptable to Lessor to the Consented-to-Lender which is a Financial Institution (as defined in Paragraph 8) to be disbursed for the repair and restoration of the Premises (or, if there is no Consented-to-Lender, or the Consented-to-Lender declines to hold and disburse such proceeds, to a bank or trust company doing business in the County of San Diego agreed upon by the parties, or if the parties fail to agree, to Bank of America, N.A., or its successor, which proceeds shall be deposited in interest bearing accounts or deposits agreed upon by the parties, or if the parties fail to agree, then in the bank's regular passbook savings account). All interest shall be added to the trust funds to be disbursed with the principal. All proceeds shall be disbursed in progress payments for the payment of the cost of repairing or restoring the property so damaged or destroyed. The specific manner of holding such proceeds and the method and conditions of disbursement shall be subject to the prior written approval of Lessor so as to ensure the application of such proceeds in compliance with this Lease.

- (i) In the event that this Lease is terminated with consent of both Lessor and said mortgagee or beneficiary, and the improvements are not reconstructed, repaired, or replaced, the insurance proceeds shall be retained, without liability, by said mortgagee or beneficiary to the extent necessary to fully discharge the debt secured by said mortgage or deed of trust. Furthermore, said mortgagee or beneficiary shall hold the balance thereof to restore the Leased Premises to a neat and clean condition. Any remaining funds shall lastly be paid to Lessor and Lessee, as their interests may appear.
- (3) In the event underground storage tanks are located on the Leased

Premises, Lessee is required to comply with Code of Federal Regulations, Title 40, Chapter I, Subchapter H or Title 23, Division 3, Chapter 18 of California Code of Regulations, collectively, herein "UST Law." At the time Lessee is required to comply with any provisions of UST Law requiring financial assurance mechanisms, Lessee shall provide Lessor with a certified copy of its Certification of Financial Responsibility. If Lessee's program for financial responsibility requires insurance, then Lessee's policy(ies) shall name Lessor and its officers, employees, and agents as additional insureds, and all other terms of SubParagraph (b), below, shall apply. Should Lessee change its financial assurance mechanisms, Lessee shall immediately provide Lessor with a certified copy of its revised Certification of Financial Responsibility.

(b) General Requirements

- (1) All required insurance shall be in force the first day of the term of this Lease, and shall be maintained continuously in force throughout the term of this Lease. In addition, the cost of all required insurance shall be borne by Lessee. During the entire term of this Lease, Lessee shall provide Lessor with certificates, in a form acceptable to Lessor, evidencing the existence of the necessary insurance policies and original endorsements effecting coverage required by this Paragraph. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind insurance on its behalf. Notwithstanding the forgoing, Lessor reserves the right to require complete, certified copies of all required policies at any time.
- (2) All liability insurance policies shall name, or be endorsed to name Lessor and its officers, employees, and agents as additional insureds and protect Lessor and its officers, employees, and agents against any legal costs in defending claims. All liability policies shall provide cross-liability coverage. All insurance policies shall be endorsed to state that coverage will not be suspended, voided, cancelled, or reduced in coverage or in limits, except after Lessee has furnished Lessor with thirty (30) days' prior written notice by certified mail. All insurance policies shall be endorsed to state that Lessee's insurance is primary and not excess or contributory to any insurance issued in the name of Lessor. Further, all insurance companies must be satisfactory to Lessor.
- (3) Any deductibles or self-insured retentions must be declared and acceptable to Lessor. If the deductibles or self-insured retentions are unacceptable to Lessor, then Lessee shall have the option to either: (i) reduce or eliminate such deductibles or self-insured retentions as respects the Lessor and its officers, employees, and agents; or, (ii) procure a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

- (4) Lessor shall retain the right at any time to review the coverage, form, and amount of insurance required herein. If, in the opinion of Lessor, the insurance provisions in this Lease do not provide adequate protection for Lessor and/or members of the public using the Leased Premises or using services connected with Lessee's use or occupancy of the Leased Premises, Lessor may require Lessee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. Lessor's requirements shall be reasonable, but shall be designed to ensure protection from and against the kind and extent of risks that exist at the time a change in insurance is required.
- (5) Lessor may require that Lessee obtain and maintain additional or increased insurance from time to time. Lessor shall notify Lessee in writing of changes in the insurance requirements. With respect to changes in insurance requirements that are available from Lessee's then-existing insurance carrier, Lessee shall deposit certificates evidencing acceptable insurance policies with Lessor incorporating such changes within sixty (60) days of receipt of such notice. With respect to changes in insurance requirements that are not available from Lessee's then-existing insurance carrier, Lessee shall deposit certificates evidencing acceptable insurance policies with Lessor, incorporating such changes, within one hundred twenty (120) days of receipt of such notice. In the event Lessee fails to deposit insurance certificates as required herein, this Lease shall be in default without further notice to Lessee, and Lessor shall be entitled to exercise all legal remedies. Without limitation of the foregoing, Lessee agrees that if Lessee does not take out and maintain such insurance or furnish Lessor with renewals or binders in a timely manner, Lessor may (but shall not be required to), procure said insurance on Lessee's behalf and charge Lessee the cost thereof, which amount shall be payable by Lessee within thirty (30) days of written demand with interest at the Default Rate from the date such sums are expended. For purposes of this Subparagraph 27(b)(5), "Default Rate" shall mean an annual rate equal to the lesser of (i) the annual "Bank Prime Loan" rate cited in the Federal Reserve Statistical Release Publication H.15(519), published weekly (or such other comparable index as Lessor and Lessee shall reasonably agree upon if such rate ceases to be published), plus four (4) percentage points, and (ii) the highest rate permitted by applicable law.
- (6) If Lessee fails or refuses to maintain insurance as required in this Lease, or fails to provide proof of insurance, Lessor has the right to declare this Lease in default without further notice to Lessee, and Lessor shall be entitled to exercise all legal remedies.
- (7) The procuring of such required policies of insurance shall not be construed to limit Lessee's liability hereunder, nor to fulfill the indemnification provisions and requirements of this Lease. Notwithstanding said policies of insurance, Lessee shall be obligated

for the full and total amount of any damage, injury, or loss caused by negligence or neglect connected with this Lease, or with the use or occupancy of the Leased Premises.

- (8) Lessee agrees not to use the Leased Premises in any manner, even if use is for purposes stated herein, that will result in the cancellation of any insurance Lessor may have on the Leased Premises or on adjacent premises, or that will cause cancellation of any other insurance coverage for the Leased Premises or adjoining premises. Lessee further agrees not to keep on the Leased Premises or permit to be kept, used, or sold thereon, anything prohibited by any fire or other insurance policy covering the Leased Premises. Lessee shall, at its sole expense, comply with all reasonable requirements for maintaining fire and other insurance coverage on the Leased Premises.

28. COMPLIANCE WITH PREVAILING WAGE LAWS:

Lessee acknowledges and agrees that:

- (1.1) Lessor makes no representation concerning the applicability of any wage laws, including, but not limited to California Labor Code §§ 1720 through 1815, et seq. (PWL) To the extent Lessee intends to perform any construction, alteration, demolition, installation or repair work (Construction) on the Premises, Lessee warrants and acknowledges that: (1) Lessor is not paying for or subsidizing, in whole or in part, any such Construction; and (2) Lessee shall make its own determination regarding the applicability of any PWL to such Construction. Lessee assumes any and all risk in connection with the application of PWL to any Construction performed on the Premises on behalf of Lessee. Lessee agrees that Lessor may direct Lessee to seek a determination from the California State Department of Industrial Relations as to the applicability of PWL for any Construction performed pursuant to the Lease, and that Lessor shall have the ability to fully participate in that process at no out of pocket expense to the Lessor. As required by Section 18 Lessee acknowledges its obligation to pay any and all costs including but not limited to wages, interest, penalties and/or attorneys' fees and costs related to or arising out of PWL compliance.

- (1.2) Lessee's violations of PWL may constitute an Event of Default under this Lease.

N. Paragraph 47(e) is hereby deleted in its entirety and replaced with the following 47(e) in its place:

47. (e). Release and Waiver.

- (1) Release. Except to the extent of Claims (as defined below) against Lessor arising from any breach by Lessor of its covenants and obligations expressly provided in this Lease, Lessee, on behalf of

Lessee, its successors and assigns, hereby fully and forever releases, acquits and discharges Lessor of and from, and hereby fully forever waives:

Any and all Claims, whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent, that Lessee or any of Lessee's successors or assigns now has or may have or which may arise or be asserted in the future arising out of, directly or indirectly, or in any way connected with: (A) any act or omission of Lessor (or any person acting for or on behalf of Lessor or for whose conduct Lessor may be liable), whether or not such act be the active, passive or sole negligence of Lessor, in connection with prior ownership, maintenance, operation or use of the Leased Premises; (B) any condition of environmental contamination or pollution at the Leased Premises (including, without limitation, the contamination or pollution of any soils, subsoil media, surface waters or groundwaters at the Leased Premises); (C) to the extent not already included in clause (B) above, the prior, present or future existence, release or discharge, or threatened release, of any Hazardous Materials at the Leased Premises, (including, without limitation, the release or discharge, or threatened release, of any Hazardous Materials into the air at the Leased Premises or into any soils, subsoils, surface waters or groundwaters at the Leased Premises); (D) the violation of or noncompliance with, any Environmental Requirement or other Applicable Law now or hereafter in effect, however and whenever occurring; (E) the condition of the soil at the Leased Premises; (F) the condition of any Improvements located on the Leased Premises including, without limitation, the structural integrity and seismic compliance of such Improvements; (G) any matters which would be shown on an accurate ALTA land survey of the Leased Premises (including, without limitation, all existing easements and encroachments, if any); (H) all Applicable Laws now or hereafter in effect; (I) matters which would be apparent from a visual inspection of the Leased Premises; or (J) to the extent not already covered by any of the foregoing clauses (A) through (I) above, the use, maintenance, development, construction, ownership or operation of the Leased Premises by Lessor or any predecessor(s)-in-interest in the Leased Premises of Lessor.

- (2) Waiver of Civil Code Section 1542. With respect to all releases made by Lessee under or pursuant to the Lease, as amended herein, Lessee hereby waives the application and benefits of California Civil Code § 1542 and hereby verifies that it has read and understands the following provision of California Civil Code § 1542:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor."

Lessee: _____

- O. Said Lease is hereby amended by adding Paragraph 50.2 "USA Patriot Act" as follows:

50.2. USA PATRIOT ACT:

Lessee represents and warrants that (i) Lessee and each person or entity owning an interest in Lessee is not now, and shall not during the term of this Lease become, a person or entity with whom Lessor or any citizen of the United States is restricted from doing business with under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, H.R. 3162, Public Law 107-56 (commonly known as the "USA Patriot Act") and regulations promulgated pursuant thereto, or under any successor statutes or regulations, including, without limitation, persons and entities ("Prohibited Persons") named on the Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Assets Control, Department of the Treasury ("OFAC") and/or on any other similar list pursuant to any authorizing statute, executive order or regulation, nor a person or entity (also, a "Prohibited Person") with whom a citizen of the United States is prohibited to engage in transactions by any trade embargo, economic sanction, or other prohibition of United States law, regulation, or Executive Order of the President of the United States, (ii) none of the funds or other assets of Lessee constitute property of, or are beneficially owned, directly or indirectly, by any Prohibited Person, (iii) no Prohibited Person has any interest of any nature whatsoever in Lessee (whether directly or indirectly), (iv) none of the funds of Lessee have been derived from any unlawful activity with the result that the investment in Lessee is prohibited by law or that the Lease is in violation of law, and (v) Lessee has implemented procedures, and will consistently apply those procedures, to ensure the foregoing representations and warranties remain true and correct at all times.

- P. Exhibit C is hereby deleted in its entirety and replaced with Exhibit C, (OPTION TO COMIBINE KONA KAI RESORT AND KONA KAI MARINA LEASEHOLDS) in its place, attached hereto and incorporated by reference.

(ABSTRACT FOLLOWS)

ABSTRACT OF LEASE AMENDMENT NO. 1

ABSTRACT OF LEASE AMENDMENT NO. 1 (“Abstract”): This is the final Paragraph and Abstract of Lease Amendment No. 1, dated _____, 20____, between SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, as Lessor, and WESTGROUP KONA KAI, LLC., A Delaware limited liability company, dba Kona Kai Resort, as Lessee, concerning the Leased Premises described in Exhibits "A" and "B," attached hereto and by this reference made a part hereof.

For good and adequate consideration, Lessor leases the Leased Premises to Lessee, and Lessee hires them from Lessor, for the term and on the provisions contained in Lease dated May 1, 2014, including without limitation provisions prohibiting assignment, subleasing, and encumbering said leasehold without the express written consent of Lessor in each instance, all as more specifically set forth in said Lease and this Amendment, which are incorporated in this Abstract by this reference.

The term is thirty-five (35) years, subject to the potential increase in term to fifty (50) years, beginning May 1, 2014, and ending on April 30, 2049. This Amendment shall become effective as of _____, 20____.

This Abstract is not a complete summary of the Amendment. Provisions in this Abstract shall not be used in interpreting the Amendment provisions. In the event of conflict between this Abstract and other parts of the Amendment, the other parts shall control. Execution hereof constitutes execution of the Amendment itself.

APPROVED AS TO FORM AND LEGALITY

SAN DIEGO UNIFIED PORT DISTRICT

By: _____
Deputy General Counsel

By: _____
Shaun Sumner
Assistant Vice President
Real Estate Development

**WESTGROUP KONA KAI, LLC,
a Delaware limited liability company**

By: _____
Signature

PRINT NAME: _____

PRINT TITLE: _____

(FOR USE BY WESTGROUP KONA KAI)

(STATE OF WASHINGTON)

(COUNTY OF KING)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

OPTIONAL

Though the information below is not required by law, it may prove valuable to person relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name _____

- Individual
- Corporate Officer --Title(s): _____
- Partner -- Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

Signer's Name _____

- Individual
- Corporate Officer --Title(s): _____
- Partner -- Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

(FOR USE BY SAN DIEGO UNIFIED PORT DISTRICT)

STATE OF CALIFORNIA)

COUNTY OF SAN DIEGO)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

OPTIONAL

Though the information below is not required by law, it may prove valuable to person relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name _____

- Individual
Corporate Officer --Title(s):
Partner -- Limited General
Attorney in Fact
Trustee
Guardian or Conservator
Other:

Signer is Representing: _____

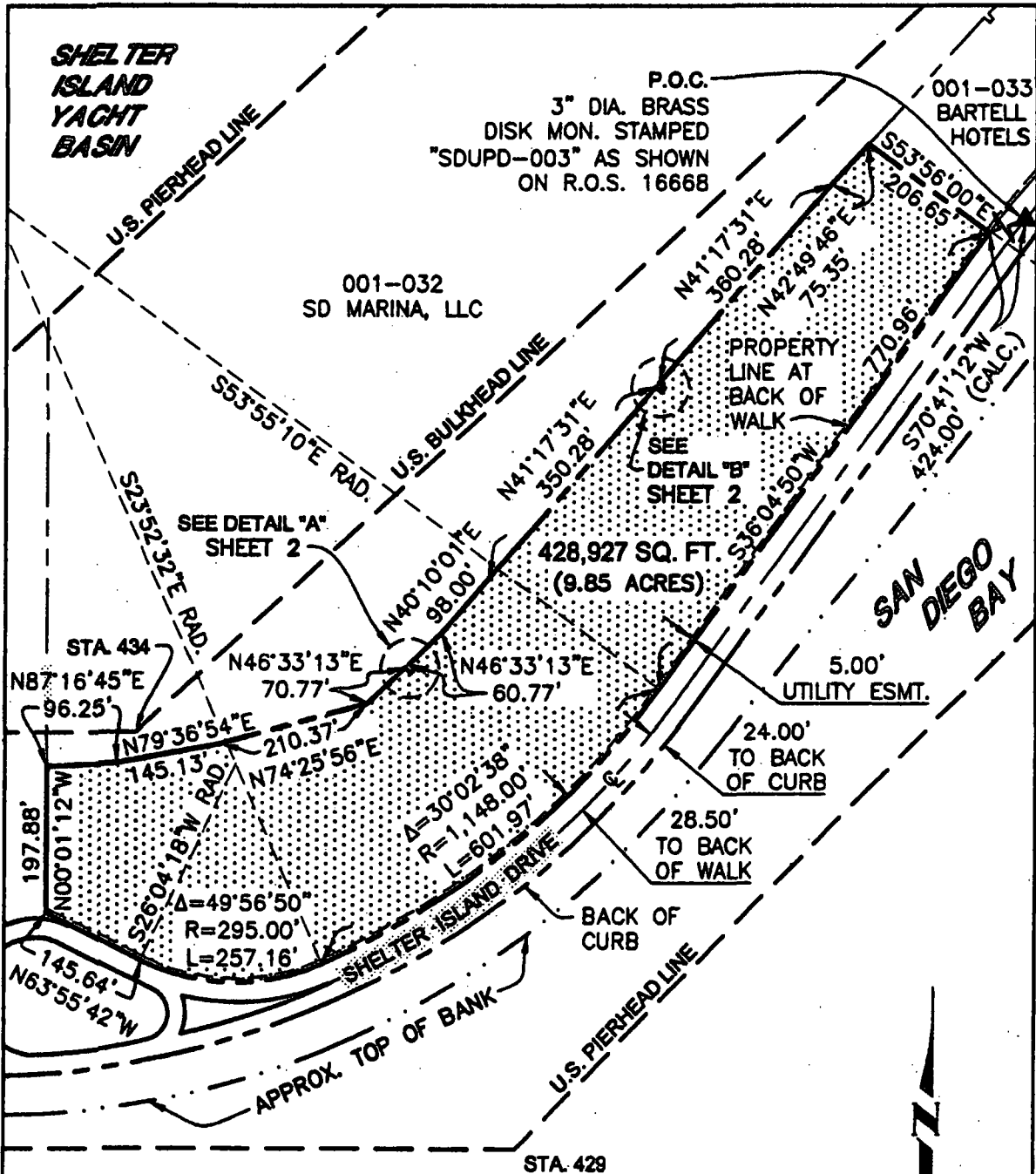
RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer's Name _____

- Individual
Corporate Officer --Title(s):
Partner -- Limited General
Attorney in Fact
Trustee
Guardian or Conservator
Other:

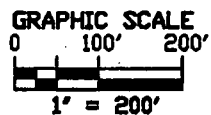
Signer is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here



NOTES:

1. LEASE AREAS SHOWN SHADED.
2. BEARINGS AND DISTANCES ARE GRID AND BASED UPON THE CALIFORNIA COORDINATE SYSTEM, ZONE 6, N.A.D. 83, EPOCH 1991.35.



DRAWN CSH
 CHECKED
 REVIEWED JED
 APPROVED
 GARY L. HUS, L.S. 7018

SAN DIEGO UNIFIED PORT DISTRICT
 TIDELAND LEASE
 WITHIN CORPORATE LIMITS OF SAN DIEGO
 WESTGROUP KONA KAI, LLC

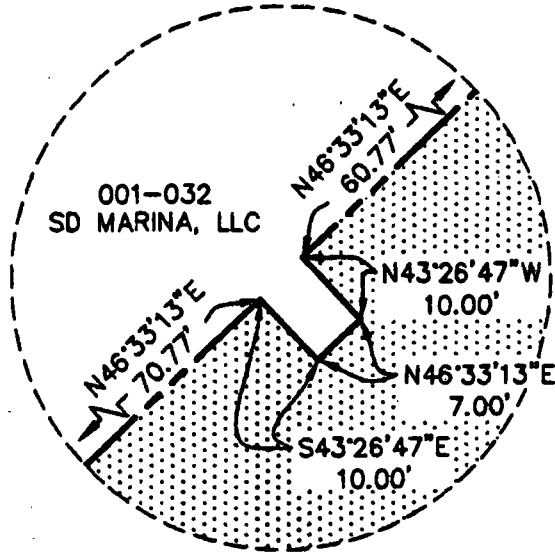
DATE AUGUST, 2012
 SCALE 1"=200'
 REF.
 DRAWING NO.
 SHEET 1 OF 2
 001-024

EXHIBIT 'A'

P:\3893\SURVEY_BNDRY\Task 5A-1\3893_Dwg 001-024.dwg

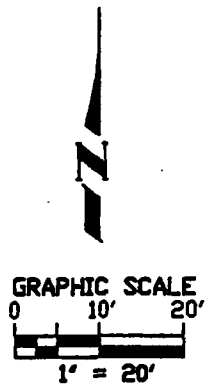
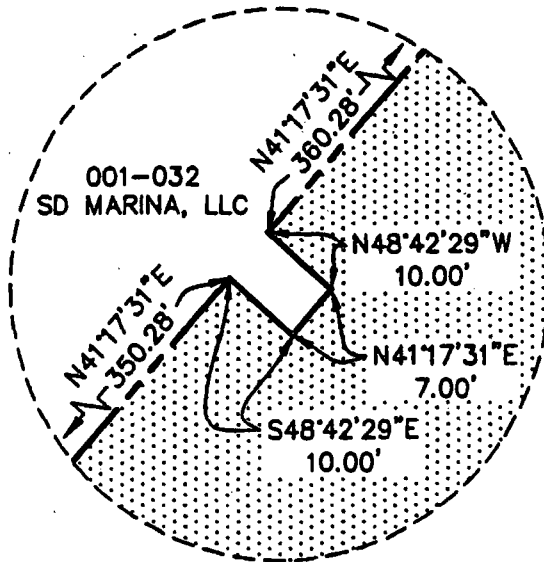
DETAIL "A"


SCALE: 1"=20'



DETAIL "B"

SCALE: 1"=20'



DRAWN/CSH
 CHECKED
 REVIEWED/JFD
 APPROVED

 GARY L. HUS, L.S. 2019

SAN DIEGO UNIFIED PORT DISTRICT
 TIDELAND LEASE
 WITHIN CORPORATE LIMITS OF SAN DIEGO
 WESTGROUP KONA KAI, LLC

DATE/AUGUST, 2012
 SCALE 1"=20'
 REF
 DRAWING NO.
 SHEET 2 OF 2
001-024

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EXHIBIT "A"

**Legal Description for
WESTGROUP KONA KAI, LLC
TIDELAND EASEMENT
Parcel / Drawing No 001-024
Within Corporate Limits of San Diego**

All that certain portion of land conveyed to the San Diego Unified Port District by that certain Act of Legislature of the State of California pursuant to Chapter 67, Statutes of 1962, First Extraordinary Session, as amended, and delineated on that certain Miscellaneous Map No. 564, filed in the Office of the San Diego County Recorder on May 28, 1976, File No. 76-164686, in the City of San Diego, County of San Diego, State of California, and more particularly described as follows:

Commencing at a 3" diameter brass disk monument stamped "SDUPD-003" as shown on Record Of Survey Map No. 16668, filed in the Office of the San Diego County Recorder on July 25, 2000; thence leaving said monument South 70°41'12" West a distance of 424.00 feet (calc.) to the TRUE POINT OF BEGINNING, being the most southerly corner of an area leased to Bartell Hotel, Ltd. as San Diego Unified Port District Parcel No. 001-033; thence South 36°04'50" West a distance of 770.96 feet to the beginning of a tangent 1,148.00 foot radius curve, concave northwesterly; thence southwesterly along the arc of said curve through a central angle of 30°02'38" an arc distance of 601.97 feet to the beginning of a 295.00 foot radius compound curve, concave northerly, a radial bearing to said point bears South 23°52'32" East; thence southwesterly along the arc of said curve through a central angle of 49°56'50" an arc distance of 257.16 feet; thence North 63°55'42" West a distance of 145.64 feet; thence North 00°01'12" West a distance of 197.88 feet to a point on the southeasterly property line of an area leased to SD Marina, LLC as San Diego Unified Port District Parcel No. 001-032; thence along said southeasterly property line the following courses: North 87°16'45" East a distance of 96.25 feet; thence North 79°36'54" East a distance of 145.13 feet; thence North 74°25'56" East a distance of 210.37 feet; thence North 46°33'13" East a distance of 70.77 feet; thence South 43°26'47" East a distance of 10.00 feet; thence North 46°33'13" East a distance of 7.00 feet; thence North 43°26'47" West a distance of 10.00 feet; thence North 46°33'13" East a distance of 60.77 feet; thence North 40°10'01" East a distance of 98.00 feet; thence North 41°17'31" East a distance of 350.28 feet; thence South 48°42'29" East a distance of 10.00 feet; thence North 41°17'31" East a distance of 7.00 feet; thence North 48°42'29" West a distance of 10.00 feet; thence North 41°17'31" East a distance of 360.28 feet; thence North 42°49'46" East a distance of 75.35 feet to the most westerly corner of said Parcel No. 001-033; thence leaving said southeasterly property line and along the southwesterly property line of said Parcel No. 001-033 South 53°56'00" East a distance of 206.65 feet to the TRUE POINT OF BEGINNING, containing 428,927 square feet or 9.85 acres of tidelands area.

PAGE 1 OF 2


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EXHIBIT "B"

The above described land area is delineated on the San Diego Unified Port District Drawing No. 001-024, dated August, 2012 and made a part of this agreement.

All bearings and distances in the above legal description are grid, and based upon the California Coordinate System, Zone 6, N.A.D. 83, Epoch 1991.35.

This legal description was prepared by me or under my direction in conformance with the Land Surveyors' Act.


GARY L. HUS
LS 7019


DATE

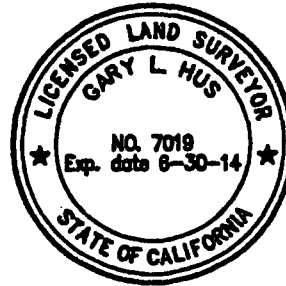


EXHIBIT C

OPTION TO COMBINE KONA KAI RESORT AND KONA KAI MARINA LEASEHOLDS

THIS OPTION TO COMBINE THE KONA KAI RESORT AND KONA KAI MARINA LEASEHOLDS is made and entered into by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, ("District"), and WESTGROUP KONA KAI, LLC, a Delaware limited liability company, ("Optionee").

WITNESSETH:

WHEREAS, Optionee is the current Lessee of a hotel property located at 1551 Shelter Island Drive, in the City of San Diego, CA, which lease is dated April 30, 2014, on file in the Office of the District Clerk as Document No. 61760 (the "Hotel Lease"); and

WHEREAS, Whereas, a commonly owned and affiliated company of Optionee (Cahuenga Associates II) is the majority owner of the adjacent marina leasehold which Lease is dated September 22, 2004, on file in the Office of the District Clerk as Document No. 47503 (the "Marina Lease"); and

WHEREAS, Optionee desires to obtain an option to combine the Hotel Lease with the adjacent Marina Lease, which combined lease is covering a portion of those lands within District's jurisdiction located at 1551 Shelter Island Drive, in the City of San Diego, California, which lands are more particularly described and delineated in Exhibits A and B in the lease attached hereto as Exhibit No. "1" ("Combined Lease") and made a part hereof, provided, however, each parcel is subject to modifications of its area and boundaries by mutual agreement of the parties (hereafter the "Premises"); and

WHEREAS, District is willing to enter into an Option to combine the Hotel Lease and the Marina Lease agreements into a single lease ("Agreement") for the operation of a hotel and marina, together with a shoreline promenade for public use.

NOW, THEREFORE, in consideration of the performance and observance of the terms, covenants and conditions hereafter set forth, the parties hereto mutually agree as follows:

1. **GRANT OF OPTION:** Subject to the conditions set forth in this Agreement, District hereby grants Optionee an option to lease the Premises ("Option") for the Term (as defined in Paragraph 2 below) and in accordance with the covenants and conditions set forth in the Combined Lease.
2. **OPTION TERM:** Unless otherwise extended by written agreement by the parties, the term ("Term") of this Option shall commence on May 1, 2014 ("Commencement Date") and shall expire at 5:00 p.m. on October 31, 2020; Notwithstanding any other provision of this Agreement, Optionee's right to exercise the Option and execute the Combined Lease will

terminate and be of no further force and effect if the conditions set forth in this Agreement are not timely satisfied, and the Option exercised, before the expiration of the Term.

3. **CONDITIONS PRECEDENT:** Optionee will have no right to exercise the Option unless and until the conditions set forth below in this Paragraph 3 have been satisfied. Except for Optionee's monetary obligation(s) set forth in "a." below, these conditions precedent are not covenants of District or of Optionee.
- a. Common Ownership: Optionee must provide sufficient evidence necessary for the District to determine in its sole discretion that the majority ownership interests in the Optionee are also the current majority owner of both the Hotel Lease and the Marina Lease and that Optionee has obtained written confirmation under both leases to enter into the new Combined Lease.
- b. Marina Inspection: By no later than May 1, 2019, Optionee must:
- (a) Notify Lessor in writing of the name and qualifications of at least one contractor experienced in the development and maintenance of docks, piers or marinas for District's review and approval to inspect the Kona Kai Marina;
 - (b) District must approve or deny in writing Optionee's selected contractor within twenty (20) days from receipt of Optionee's written notification, otherwise Optionee's selection will be considered approved;
 - (c) Within ninety (90) days after engaging the contractor, conduct an inspection of the marina, accompanied by District's representative, and produce a written inspection report signed the contractor that identifies:
 - (i) Deferred maintenance or replacement(s) which must be completed by no later than May 1, 2020 to bring the marina into the condition required by the Combined Lease and Paragraph 3(b)(c)(ii) below; and
 - (ii) Acknowledges that assuming the above repairs and replacements are made, that the remaining useful life of the Kona Kai Marina, assuming industry standard wear and tear and regularly scheduled maintenance per Paragraph 15.1 of the Combined Lease, has a remaining useful life at least equal to the remaining term of the Hotel Lease.
 - (d) Within ninety (90) days after conducting the inspection, send District a copy of the written inspection report; and
 - (e) By no later than May 1, 2020, complete all repairs recommended in the written inspection report. To ensure that all repairs have been completed, and that the repairs are consistent with District policy, Optionee must also:
 - (i) Obtain any required District and regulatory approvals prior to commencing repairs; and
 - (ii) Within ninety (90) days after completing all repairs listed in the written inspect report, send to District written confirmation from the

structural engineer that the repairs have been satisfactorily completed;
and

(ii) Allow District to inspect the Kona Kai Marina to determine to its satisfaction that the repairs have been completed.

c. Equal Employment Opportunity and Nondiscrimination Program: By no later than May 1, 2018, Optionee shall submit a written Equal Employment Opportunity and Nondiscrimination Program in accordance with Paragraph 19 of the Lease.

d. Tenants in Good Standing: Optionee must qualify as a "tenant in good standing" for the three year period preceding the option exercise under both the Hotel Lease and Marina Lease. To qualify as a "tenant in good standing," Optionee shall have: (i) maintained the Leased Premises in good condition, free of deferred maintenance; (ii) promptly paid its rent; (iii) complied with all of the provisions of this Lease including, but not limited to, the use provisions, insurance requirements, and regulatory permitting processes; (iv) maximized the gross revenue of Optionee's business; (v) maintained accurate financial records that were accessible to the District; and (vi) complied with the District's policies on public accommodation and non-discriminatory employment and contracting. Optionee shall only be considered not a "tenant in good standing" if Optionee has failed to cure any of the above provisions after all applicable notice and cure periods. Promptly upon Lessee failing to satisfy any of the forgoing conditions, District shall provide written notice to each Consented-to-Lender provide such lenders with the opportunity to cure such failures in the same manner as such lenders are permitted to cure Hotel Lease defaults under Section 10(b) of the Hotel Lease. Further, following a foreclosure by a Consented-to-Lender, or a deed or assignment in lieu thereof, consummated in accordance with the Hotel Lease, if the party succeeding to Optionee's leasehold interests or the equity interests in Optionee, as the case may be, causes the then-current Optionee to satisfy all of the foregoing conditions that are susceptible of being satisfied by such then-current Optionee, then the then-current Optionee shall be deemed to be a "tenant in good standing" for the three years prior the date of such satisfaction."

4. **EXERCISE OF OPTION**: If at any time before the expiration of the Term or earlier termination of this Agreement, all of the conditions precedent to the exercise of the Option set forth in this Agreement have been satisfied by the dates specified herein, District shall prepare the Exhibit No. "1" Lease for execution (which preparation shall include, but is not limited to, inserting the Commencement Date, Termination Date, dates of the Rental Periods, the Cost of Living Rent Adjustment dates, etc. into the Exhibit No. "1" Lease). Optionee may exercise the Option by delivering to the District written notice of its election to do so, accompanied by properly executed copies of the Lease in duplicate, including the Lease Guaranty. In the event Optionee timely exercises the Option in accordance with the express conditions herein, then the Executive Director of the District (or authorized representative) shall promptly thereafter execute the Lease in duplicate. The Executive Director, in his or her sole and absolute discretion, may arrange for the delivery of the Lease executed by the District through an escrow holder. Optionee shall pay all costs of the escrow. In the event the escrow fails to close within thirty (30) days following delivery of the Lease to the escrow holder, the escrow shall be canceled and each party agrees that it will not seek or be entitled to any money damages, reimbursement, or any other judicial remedy or relief of any kind from the other party because of the failure to close escrow.

5. **INDEMNITY:** Optionee shall, and hereby does, indemnify, protect, defend and hold the District including, but not limited to, its commissioners, managers, officers, directors, employees, representatives, administrators, and attorneys, and the respective successors and assigns of each of the foregoing and the Premises free and harmless from and against any and all claims, actions, causes of action, lawsuits including but not limited to third party challenges to the CEQA review and/or determination proceedings, losses, costs, expenses (including, without limitation, attorneys' fees and costs), liabilities, damages and liens of any type or nature arising out of any act or omission of Optionee or any of the Optionee's representatives in connection with Optionee's performance of its duties and obligations under this Agreement, including, without limitation, any activities of Optionee or Optionee's representatives on or about the Premises, prior to the Optionee's exercise of the Option under this Agreement and commencement of the Lease. The foregoing obligations of Optionee under this Paragraph 5 shall not include, and Optionee shall have no obligation to the District for, any loss, liability, costs or expenses to the extent directly arising from or directly related to the District's sole negligence or willful misconduct. The foregoing obligations of Optionee under this Paragraph 5 shall survive the Optionee's exercise of the Option or any termination of this Agreement.
6. **LEASE COMMENCEMENT:** It is understood and agreed that the commencement date of the term of the Lease shall be the first day of the month following the month in which the Lease is delivered by District to Optionee pursuant to Paragraph 4 above. On said date, possession of the Premises shall be delivered by District to Optionee. Notwithstanding the foregoing, if Optionee requests and the District and Optionee mutually agree in writing, the Lease shall commence on the first day of the month in which the Lease is delivered by District to Optionee pursuant to Paragraph 4 above.
7. **RESTRICTIONS ON AGREEMENT TRANSFERS:** Optionee acknowledges that District would not enter into this Agreement except in reliance on Optionee's expertise, reputation, prior experience in developing, constructing, and operating hotels, restaurants, marinas and other commercial real property projects, and District's knowledge of Optionee. Therefore, any purported transfer or assignment of this Agreement or any rights or duties hereunder, whether by operation of law or otherwise, without the prior written consent of District (which will be granted or rejected in District's sole and absolute discretion) will be void and shall absolutely and conclusively terminate Optionee's rights hereunder; and, further, any assignment or transfer of any partnership, corporate or other interest in Optionee or in any partner or member of Optionee, or change in form or ratio of ownership of Optionee (whether Optionee is a corporation, partnership, limited liability company, or other form of business entity) made without District's prior written consent (which will be granted or rejected in the District's sole and absolute discretion) will be void and shall absolutely and conclusively terminate Optionee's rights hereunder. If, nevertheless, the District consents or is deemed or required by law to consent to a transfer or assignment of this Agreement, then as a condition precedent to such consent and as additional non-refundable consideration for the granting of the option, Optionee shall pay to the District an amount equal to the excess, if any, of the net consideration received by Optionee as a result of such transfer or assignment over the sum of the costs and expenses paid or incurred by Optionee prior to said transfer or assignment in performing its obligations and satisfying the conditions precedent under this Agreement. The District shall have the right to examine and audit Optionee's books, records, financial statements and documentation for the purposes of determining the accuracy of such costs and expenses. If the audit discloses a discrepancy of more than five percent (5%) between the costs and expenses as reported by Optionee and the costs and expenses as determined by the audit, the Optionee shall pay the cost of the audit. Notwithstanding the foregoing provisions of this Section 7, (a) this Agreement may be transferred in connection with the foreclosure by a Consented-to-Lender

of a leasehold mortgage or deed of trust, or a deed-in-lieu thereof, consummated in accordance with the terms of the Hotel Lease, and shall run to the benefit of the party succeeding to Optionee's leasehold interest in the Leased Premises in connection therewith and (b) this Agreement shall be applicable to any new lease entered into pursuant to Section 10(b) of the Hotel Lease.

8. **NOTICES:** Notices given or to be given by District or Optionee to the other may be personally served upon District or Optionee or any person hereafter authorized by either in writing to receive such notice or may be served by certified letter addressed to the appropriate address hereinafter set forth or to such other address as District and Optionee may hereafter designate by written notice. If served by certified mail, forty-eight (48) hours after deposit in the U.S. Mail, service will be considered completed and binding on the other party. All notices and payments shall be made as follows:

- a. All notices to Optionee shall be given or sent by certified mail to:

Noble House Hotels and Resorts
Attention: General Counsel
600 6th Street South
Kirkland, WA 98033

- b. All notices and payments to the District shall be given or sent by certified mail to:

Director
Real Estate Development
San Diego Unified Port District
3165 Pacific Highway
P. O. Box 120488
San Diego, CA 92112-0488

- c. Any party may designate a different address by giving written notice as set forth in this paragraph.

9. **TIME IS OF THE ESSENCE:** Time is of the essence of all the express conditions contained herein, and failure of Optionee to so perform within the time limits stated shall automatically terminate Optionee's rights hereunder.
10. **PREMISES "AS IS, WITH ALL FAULTS":** Optionee understands and agrees that the Premises will be leased in an "as is, with all faults" condition and that improvements, grading, filling, removal of existing improvements, shoreline protection (if applicable) and relocation of utility lines shall be made and performed by Optionee at the sole cost and expense of Optionee.
11. **TERMINATION OF OPTION:** In the event that Optionee fails to fulfill and comply with any of the above conditions within the time limits provided, or in the event Optionee fails to exercise the Option, or in the event the Option term expires without having been duly exercised, the Option shall automatically expire and terminate without notice to Optionee and all rights of Optionee arising out of the Option shall immediately cease. Optionee agrees to execute, acknowledge, and deliver to the District within thirty (30) days after written request, a Quitclaim Deed or other recordable document required by a title insurance company selected by the District to remove any cloud of the Option from the Premises if Optionee has failed or defaulted

in the exercise of the Option, or defaults after the exercise of the Option, or in the event the Option term expires without having been duly exercised. In addition, Optionee shall deliver promptly to the District all documents and materials, if any, relating to the Premises previously delivered by the District to Optionee, together with any tests, inspections, studies, surveys and reports (including engineering, soils, geology, environmental, grading, street and storm drain, sewer, water, landscape, and feasibility studies or reports) performed by Optionee or provided to Optionee with respect to the Premises.

12. **FORCE MAJEURE:** Notwithstanding anything to the contrary in this Agreement, the dates for completion of the conditions in Paragraph 3 above and elsewhere herein and the Term of this Agreement will be extended as follows:
- a. One day for each day a condition is not satisfied due to a delay caused by the following events, if it causes a delay in the development of the Project or in Optionee's ability to perform its obligations hereunder, despite Optionee's diligent and commercially-reasonable best efforts to proceed with such development: riots; natural disasters and other acts of God, including, without limitation, fires, earthquakes, floods and hurricanes; labor strikes; delays caused by governmental agencies (i.e., delay caused by the California Coastal Commission taking more than ninety (90) days in approving a Port Master Plan Amendment or an approval of an appealed Coastal Development Permit from the date of the Port's approval of such, delays are caused by a governmental agency when it takes more than ninety [90] days to make a decision commencing from the time Optionee is notified by the governmental agency that all materials required by the governmental agency have been submitted); acts of terrorism; and war on United States soil ("Force Majeure Event"). Under no circumstances will Optionee's failure to obtain financing for the Project be considered a Force Majeure Event, including, without limitation, failure to obtain financing due to economic or other conditions beyond Optionee's control.
 - b. One day for each day that the District is late in providing its approval or disapproval of items that Optionee submits to District within the time specified for review and approval.
 - c. One day for each day that a delay is caused by litigation by a third party not affiliated with or under the direction of Optionee which prevents the District from approving the Coastal Development Permit, or results in a court order prohibiting or otherwise restraining Optionee from proceeding with the Project.

If two or more of the events described above in (a), (b) and/or (c) are occurring concurrently, the extensions shall be calculated as running concurrently and not as being cumulative. The combined total of all force majeure extensions pursuant to (a), (b) and/or (c) above shall not exceed Two Hundred and Seventy (270) days.

13. **THIRD PARTIES:** Nothing in this Agreement, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than Optionee and the District and their respective permitted successors and assigns. Nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement.
14. **ATTORNEY'S FEES:** In the event of any dispute between the parties hereto involving the covenants or conditions contained in this Agreement or arising out of the subject matter of this Agreement, the prevailing party shall be entitled to recover reasonable expenses, including

(without limitation) attorneys' fees (including for work performed by in-house attorneys) and costs.

15. **WAIVER OF CLAIMS AND LIMITATION OF REMEDIES:** Optionee acknowledges and agrees that Optionee's right and ability to exercise the Option, execute the Lease, and develop the Project is subject to various consents and approvals, including, without limitation, environmental review under CEQA and other consents and approvals as set forth in Paragraph 4 above. Optionee accepts the risk that District or the CCC may withhold those consents and approvals in their sole discretion. District will have no liability and Optionee will have no claim, cause of action, or right of compensation against District if Optionee does not obtain, for any reason whatsoever, any or all of the consents and approvals necessary to exercise the Option or construct the Project that Optionee proposes to develop on the Premises. Optionee will have no claim or cause of action in equity (including, without limitation, any action seeking specific performance, injunctive relief, mandamus or other extraordinary writ), or right of compensation for consequential damages against District, and Optionee hereby waives its right to seek to recover such equitable remedies and consequential damages. In any suit or action against District arising from the terms of this Agreement or in connection with the development of the Project, Optionee will be entitled to seek to recover its legal damages only, and hereby agrees that such legal damages will be limited to Optionee's out of pocket costs and expenses in furtherance of the development of the Project. In addition, Optionee and District agree that neither party will bring any action, claim, or cause of action against the other for any costs, damages, expenses, obligations, or liabilities for any acts or failure to act by either party arising from or relating to any negotiations, discussions, or actions in connection with the development of the Project, or negotiation, execution, or termination of this Agreement.
16. **DISTRICT CONSENT/APPROVAL:** Wherever in this Agreement the consent or approval of the District, the Board, the Executive Director of the District or any of their designees is required, such consent or approval may be given or denied in the sole and absolute discretion of the District, the Board, the Executive Director of the District or any of their designees, as appropriate. In addition, unless otherwise stated, any approvals or consents to be given by the Board and the Executive Director of the District shall be given or denied within sixty (60) days and twenty (20) days, respectively.
17. **COMPUTATION OF TIME PERIODS:** If any date or time period specified in this Agreement is or ends on a Saturday, Sunday or federal, state or legal holiday, such date will automatically be extended until 5:00 p.m., Pacific Time, of the next day which is not a Saturday, Sunday or federal, state or legal holiday.
18. **AMENDMENT TO THIS AGREEMENT:** The terms of this Agreement may not be modified or amended except by an instrument in writing executed by each of the parties.
19. **NO WAIVER:** The waiver or failure to enforce any provision of this Agreement will not operate as a waiver of such party's right to enforce future breaches of any such provision or any other provision of this Agreement.
20. **APPLICABLE LAW:** This Agreement will be governed by and construed and enforced in accordance with the laws of the State of California.
21. **ENTIRE AGREEMENT:** This Agreement supersedes all prior agreements, negotiations, and communications, oral or written, and contains the entire agreement between District and Optionee as to the subject matter hereof.

22. **PARTIAL INVALIDITY:** If any portion of this Agreement is declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, that portion will be deemed severed from this Agreement and the remaining parts of this Agreement will remain in full force as fully as though the invalid, illegal or unenforceable portion had never been part of this Agreement.
23. **CAPTIONS:** All captions to, or headings of, the paragraphs or sub-paragraphs of this Agreement are solely for the convenience of the parties, are not a part of this Agreement and will not be used for the interpretation or determination of the validity of this Agreement or any provision hereof.

(SIGNATURE PAGE FOLLOWS)

DRAFT

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and the year first above written.

Port Attorney

SAN DIEGO UNIFIED PORT DISTRICT

By _____

By _____

Shaun Sumner
Assistant Vice President
Real Estate Development

**WESTGROUP KONA KAI, LLC,
a Delaware limited liability company
dba KONA KAI RESORT**

By _____

Signature

PRINT NAME _____

PRINT TITLE _____

DR
A
F
E
T

(FOR USE BY WESTGROUP KONA KAI)

(STATE OF WASHINGTON)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of

(COUNTY OF KING)

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

OPTIONAL

Though the information below is not required by law, it may prove valuable to person relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name _____

- Individual
- Corporate Officer --Title(s): _____
- Partner -- Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer's Name _____

- Individual
- Corporate Officer --Title(s): _____
- Partner -- Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

(FOR USE BY SAN DIEGO UNIFIED PORT DISTRICT)

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

OPTIONAL

Though the information below is not required by law, it may prove valuable to person relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name _____

- Individual
Corporate Officer --Title(s):
Partner -- Limited General
Attorney in Fact
Trustee
Guardian or Conservator
Other:

Signer is Representing: _____



Signer's Name _____

- Individual
Corporate Officer --Title(s):
Partner -- Limited General
Attorney in Fact
Trustee
Guardian or Conservator
Other:

Signer is Representing: _____

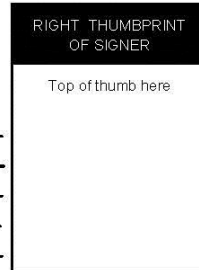


EXHIBIT NO. 1 – COMBINED LEASE

**SAN DIEGO UNIFIED PORT DISTRICT
AMENDED, RESTATED AND COMBINED LEASE TO
WESTGROUP KONA KAI, LLC DBA KONA KAI RESORT AND MARINA
FOR PROPERTY LOCATED AT
1551 SHELTER ISLAND DRIVE
SAN DIEGO, CALIFORNIA**

FOR INSERT REMAINING TERM FROM HOTEL LEASE (__) YEARS

COMMENCING _____, 20____

AND ENDING APRIL 30, 2049

SUBJECT TO THE POTENTIAL INCREASE IN TERM OF FIFTEEN (15) YEARS

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AMENDED, RESTATED AND COMBINED LEASE

THIS AMENDED, RESTATED AND COMBINED LEASE ("Lease"), made and entered into this _____ day of _____, 20____, between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, hereinafter "Lessor," and WESTGROUP KONA KAI, LLC, a Delaware limited liability company dba Kona Kai Resort and Marina hereinafter "Lessee," WITNESSETH:

Lessor, for the consideration hereinafter set forth, hereby leases to Lessee for the term and upon the conditions hereinafter set forth, a portion of those lands conveyed to the San Diego Unified Port District by that certain Act of the Legislature of the State of California entitled "San Diego Unified Port District Act," Stats. 1962, 1st Ex. Sess., c. 67, as amended, which lands are more particularly described as follows:

Approximately 428,927 square feet of land area and approximately 1,235,218 square feet of water area located at 1551 Shelter Island Drive in the City of San Diego, California, more particularly described and delineated as Parcel Nos. 1 and 2 on Drawing No. ____-____ dated _____, 20____, attached hereto as Exhibits "A" and "B," and by this reference made a part hereof, hereinafter "Leased Premises".

TO HAVE AND TO HOLD said Leased Premises for the term of the Lease and upon the conditions as follows:

1. TERM:

The term of this Lease shall be for a period of **INSERT REMAINING TERM FROM HOTEL LEASE** (__) years, commencing on the ____ day of _____, 20____, hereinafter "Commencement Date," unless sooner terminated as herein provided. Notwithstanding the foregoing, the term will automatically and without notice to Lessee be increased to **INSERT REMAINING TERM FROM HOTEL LEASE PLUS FIFTEEN (15) YEARS** (__) years beginning (To be inserted when known), 20__ and ending April 30, 2064 if the improvements required in paragraph 5(c) below are completed by Lessee prior to October 1, 2020.

2. USE:

Lessee agrees that the Leased Premises shall be used only and exclusively for an approximately 170-guestroom hotel and 520-slip marina providing for the following related operations and businesses conducted on or from the Leased Premises:

- (a) Rental of guest rooms;
- (b) Rental of banquet and conference rooms;
- (c) Full service restaurant of approximately 121-seats;

- (d) Room service to guest rooms and food and beverage service to banquet and conference rooms;
- (e) Retail shop(s);
- (f) Barber and beauty shop;
- (g) Sale of new and used boats;
- (h) Vending machines; including telephones;
- (i) Office and counter areas for hotel management;
- (j) Offices for operations and businesses listed herein;
- (k) Bicycle rentals for hotel customers and guest only;
- (l) Health and recreational facilities, including recreational lessons for hotel customers and guests only;
- (m) Office, storage, bathrooms, showers and laundry facilities for the adjacent marina;
- (n) Installation of telecommunications equipment with prior written approval of Lessor in each instance.
- (o) Rental of boat slips to the public, hereinafter "Boat Slip Renters", for mooring boats which shall not be used for any commercial purposes or activities. Said Boat Slip Renters shall be prohibited from renting or chartering said boats to any other person(s) for any purpose whatsoever, including, without limitation, for recreation or commercial purposes, or from otherwise using or allowing any other person(s) to use said boats for commercial purposes or activities. However, notwithstanding the above, the Lessee, or consented-to sublessee, as distinguished from a Boat Slip Renter, may rent or charter a maximum of ten (10) boats, accommodating not more than a combined total of sixty (60) passengers, to the public for recreational use, but not for any other commercial purposes or activities.
- (p) Rental of dock lockers, dinghy racks, and dry storage spaces to Boat Slip Renters only;
- (q) Boat launching and retrieving services for Boat Slip Renters only;
- (r) "Minor Marine Services," defined herein as sale and installation of small boat parts and components, and minor boat services and labor, inclusive of minor boat repairs, maintenance, cleaning, renovation, and similar minor services, to Boat Slip Renters only; and

- (s) Sailing school.

Lessee further agrees that all vessels, including end and side ties, shall be berthed within the leasehold bounds; vessels shall not be berthed partially or totally outside the leasehold bounds.

Furthermore, commercial sport fishing, and operations, activities, and/or services involving commercial passenger cruises and/or excursions, such as sightseeing on San Diego Bay or harbor excursions (whether or not said cruises are regularly-scheduled, advertised to the general public, or include "open party" ticket sales), are specifically prohibited uses, operations, activities, and/or services which shall not be conducted on and/or from the Leased Premises.

Except as expressly provided herein, Lessee shall not use or permit the Leased Premises to be used for any other uses or purposes whatsoever. This restriction on use of the Leased Premises absolutely prohibits a change in use.

Lessee further agrees to comply with all project conditions and any mitigation measures contained in the: (i) Addendum to the Final Mitigated Negative Declaration (Lessor Clerk's Document No. 60670) and/or the resolution adopting said Addendum to the Final Mitigated Negative Declaration, Resolution No. 2013-140, adopted by the Board of Port Commissioners on August 13, 2013; and (ii) Final Mitigated Negative Declaration (Lessor Clerk's Document No. 51132) and/or the resolution adopting said Negative Declaration, Resolution No. 2006-163, adopted by the Board of Port Commissioners on October 10, 2006.

2.1 UNAUTHORIZED USE CHARGE:

Lessee shall pay Lessor Twenty Percent (20%) of the gross receipts for any service or use that is not permitted under this Lease. This payment is subject to the due date for rent and the provisions for delinquent rent provided in Paragraph 3 herein. The existence of the Twenty Percent (20%) charge in this Paragraph and the payment of this charge or any part thereof, does not constitute an authorization for a particular service or use, and does not waive any Lessor rights to terminate a service or use or to default Lessee for participating in or allowing any unauthorized use of the Leased Premises.

3. RENT:

Lessee agrees to pay to Lessor rent in accordance with the following:

- (a) The term of this Lease shall be divided into the following rental periods, hereinafter "Rental Periods":

_____, 20__ - _____, 20__ **(INSERT REMAINING TERM OF FIRST RENTAL PERIOD OF HOTEL LEASE)**

May 1, 2024 - April 30, 2034

AMENDED, RESTATED AND COMBINED LEASE

THIS AMENDED, RESTATED AND COMBINED LEASE ("Lease"), made and entered into this _____ day of _____, 20____, between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, hereinafter "Lessor," and WESTGROUP KONA KAI, LLC, a Delaware limited liability company dba Kona Kai Resort and Marina hereinafter "Lessee," WITNESSETH:

Lessor, for the consideration hereinafter set forth, hereby leases to Lessee for the term and upon the conditions hereinafter set forth, a portion of those lands conveyed to the San Diego Unified Port District by that certain Act of the Legislature of the State of California entitled "San Diego Unified Port District Act," Stats. 1962, 1st Ex. Sess., c. 67, as amended, which lands are more particularly described as follows:

Approximately 428,927 square feet of land area and approximately 1,235,218 square feet of water area located at 1551 Shelter Island Drive in the City of San Diego, California, more particularly described and delineated as Parcel Nos. 1 and 2 on Drawing No. ____-____ dated _____, 20____, attached hereto as Exhibits "A" and "B," and by this reference made a part hereof, hereinafter "Leased Premises".

TO HAVE AND TO HOLD said Leased Premises for the term of the Lease and upon the conditions as follows:

1. TERM:

The term of this Lease shall be for a period of **INSERT REMAINING TERM FROM HOTEL LEASE** (__) years, commencing on the ____ day of _____, 20____, hereinafter "Commencement Date," unless sooner terminated as herein provided. Notwithstanding the foregoing, the term will automatically and without notice to Lessee be increased to **INSERT REMAINING TERM FROM HOTEL LEASE PLUS FIFTEEN (15) YEARS** (__) years beginning (To be inserted when known), 20__ and ending April 30, 2064 if the improvements required in paragraph 5(c) below are completed by Lessee prior to October 1, 2020.

2. USE:

Lessee agrees that the Leased Premises shall be used only and exclusively for an approximately 170-guestroom hotel and 520-slip marina providing for the following related operations and businesses conducted on or from the Leased Premises:

- (a) Rental of guest rooms;
- (b) Rental of banquet and conference rooms;
- (c) Full service restaurant of approximately 121-seats;

- (d) Room service to guest rooms and food and beverage service to banquet and conference rooms;
- (e) Retail shop(s);
- (f) Barber and beauty shop;
- (g) Sale of new and used boats;
- (h) Vending machines; including telephones;
- (i) Office and counter areas for hotel management;
- (j) Offices for operations and businesses listed herein;
- (k) Bicycle rentals for hotel customers and guest only;
- (l) Health and recreational facilities, including recreational lessons for hotel customers and guests only;
- (m) Office, storage, bathrooms, showers and laundry facilities for the adjacent marina;
- (n) Installation of telecommunications equipment with prior written approval of Lessor in each instance.
- (o) Rental of boat slips to the public, hereinafter "Boat Slip Renters", for mooring boats which shall not be used for any commercial purposes or activities. Said Boat Slip Renters shall be prohibited from renting or chartering said boats to any other person(s) for any purpose whatsoever, including, without limitation, for recreation or commercial purposes, or from otherwise using or allowing any other person(s) to use said boats for commercial purposes or activities. However, notwithstanding the above, the Lessee, or consented-to sublessee, as distinguished from a Boat Slip Renter, may rent or charter a maximum of ten (10) boats, accommodating not more than a combined total of sixty (60) passengers, to the public for recreational use, but not for any other commercial purposes or activities.
- (p) Rental of dock lockers, dinghy racks, and dry storage spaces to Boat Slip Renters only;
- (q) Boat launching and retrieving services for Boat Slip Renters only;
- (r) "Minor Marine Services," defined herein as sale and installation of small boat parts and components, and minor boat services and labor, inclusive of minor boat repairs, maintenance, cleaning, renovation, and similar minor services, to Boat Slip Renters only; and

- (s) Sailing school.

Lessee further agrees that all vessels, including end and side ties, shall be berthed within the leasehold bounds; vessels shall not be berthed partially or totally outside the leasehold bounds.

Furthermore, commercial sport fishing, and operations, activities, and/or services involving commercial passenger cruises and/or excursions, such as sightseeing on San Diego Bay or harbor excursions (whether or not said cruises are regularly-scheduled, advertised to the general public, or include "open party" ticket sales), are specifically prohibited uses, operations, activities, and/or services which shall not be conducted on and/or from the Leased Premises.

Except as expressly provided herein, Lessee shall not use or permit the Leased Premises to be used for any other uses or purposes whatsoever. This restriction on use of the Leased Premises absolutely prohibits a change in use.

Lessee further agrees to comply with all project conditions and any mitigation measures contained in the: (i) Addendum to the Final Mitigated Negative Declaration (Lessor Clerk's Document No. 60670) and/or the resolution adopting said Addendum to the Final Mitigated Negative Declaration, Resolution No. 2013-140, adopted by the Board of Port Commissioners on August 13, 2013; and (ii) Final Mitigated Negative Declaration (Lessor Clerk's Document No. 51132) and/or the resolution adopting said Negative Declaration, Resolution No. 2006-163, adopted by the Board of Port Commissioners on October 10, 2006.

2.1 UNAUTHORIZED USE CHARGE:

Lessee shall pay Lessor Twenty Percent (20%) of the gross receipts for any service or use that is not permitted under this Lease. This payment is subject to the due date for rent and the provisions for delinquent rent provided in Paragraph 3 herein. The existence of the Twenty Percent (20%) charge in this Paragraph and the payment of this charge or any part thereof, does not constitute an authorization for a particular service or use, and does not waive any Lessor rights to terminate a service or use or to default Lessee for participating in or allowing any unauthorized use of the Leased Premises.

3. RENT:

Lessee agrees to pay to Lessor rent in accordance with the following:

- (a) The term of this Lease shall be divided into the following rental periods, hereinafter "Rental Periods":

_____, 20__ - _____, 20__ (INSERT REMAINING TERM OF FIRST RENTAL PERIOD OF HOTEL LEASE)

May 1, 2024 - April 30, 2034

May 1, 2034 - April 30, 2044

May 1, 2044 - April 30, 2054 if applicable

May 1, 2054 - April 30, 2064 if applicable

- (b) The rent for the first Rental Period of this Lease commencing **(Commencement Date to be inserted)**, 20___ and ending April 30, 2024 **TO BE INSERTED ACCORDING TO THE FOLLOWING FORMULA - 90% of the combined average total percentage rents of the hotel lease and the marina lease payable during the last three accounting years prior to three months before the commencement date of this lease, or (B) the combined Minimum Annual Rent for both the hotel lease and marina lease, in effect for the current Rental Period (including the increased rent schedule in the hotel lease, also subject to any CPI increases or Rent Reviews in both leases), whichever is greater**, hereinafter "Minimum Annual Rent," subject to adjustment described in Paragraph 3.1 herein, or the cumulative total of the percentage and flat rents per year as provided in (c) below, whichever is greater.
- (c) Percentage rents shall be calculated on a monthly basis and shall be based on the following percentages of the gross income of the operations and businesses conducted on or from the Leased Premises:
- (1) Seven Percent (7%) of the gross income from rental of guest rooms, rental of in-room movies, sale of similar in-room entertainment services, charges for room service delivery, sale of telephone services, and sale of laundry and dry-cleaning services;
 - (2) Seven and One-Half Percent (7.5%) of the gross income from rental of conference and banquet rooms and sale of related merchandise and services provided to conference and banquet room users (including gross income from recovery charges for materials, utilities, security, and similarly related accommodations, sales and services);
 - (3) Three Percent (3%) of the gross income from sale of food from full-service restaurants;
 - (4) Three Percent (3%) of the gross income from sale of food from limited-service restaurants, snack bars, and delicatessens;
 - (5) Five Percent (5%) of the gross income from sale of alcoholic and nonalcoholic beverages for consumption on the Leased Premises;
 - (6) Three Percent (3%) of the gross income from sale of alcoholic and nonalcoholic beverages for consumption off of the Leased Premises;

- (7) Twenty-Two Percent (22%) of the gross income from rental of boat slips, dock lockers, dinghy racks, and dry storage spaces, and from sale of related boat launching and retrieving services;
- (8) Ten Percent (10%) of the gross income from boat rentals, defined herein as the hiring of boats on a "bare boat" basis, of boats that are less than twenty (20) feet in overall length, for periods of less than twenty-four (24) hours, in addition to the percentage rent required in subparagraph 3(c)(7)
- (9) Six Percent (6%) of the gross income from sale of boat charters, defined herein as the hiring of boats with crew, or the hiring of boats on a "bare boat" basis for periods of twenty-four (24) hours or more, or the hiring of boats on a "bare boat" basis that are twenty (20) feet or more in overall length, in addition to the percentage rent required in subparagraph 3(c)(7)
- (10) Seven Percent (7%) of the gross income from all sales related to boat and breakfast operations, including boat management fees, in addition to the percentage rent required in Paragraph 3(c)(7) herein;
- (11) Ten Percent (10%) of the gross income from sailing school operations, in addition to the percentage rent required in subparagraph 3(c)(7)
- (12) Five Percent (5%) of the gross income from sale of Minor Marine Services to Boat Slip Renters;
- (13) Five Percent (5%) of the gross income from sale of merchandise including, but not limited to, gifts, novelties, souvenirs, clothing, luggage, jewelry, cigars, cigarettes, candy, sundries, and incidentals of any kind;
- (14) Five Percent (5%) of the gross income from any admission, cover, or other entertainment charges;
- (15) Five Percent (5%) of the gross income from sale of barber and beauty shop services to hotel guests;
- (16) Ten Percent (10%) of the gross income from sale of health club services and/or sale of spa services, including but not limited to facials, massages, body wraps, aromatherapy, etc.;
- (17) Ten Percent (10%) of the gross income from membership dues, initiation fees, and guest fees;
- (18) Fifteen Percent (15%) of the gross income from rental of bicycles and

other recreational equipment, and rental of recreational facilities;

- (19) Ten Percent (10%) of the gross income from sale of recreation lessons;
- (20) Fifteen Percent (15%) of the gross income from sale of parking services or rental of parking spaces;
- (21) One-half Percent (0.5%) of the gross income from sale of any and all California State Lottery tickets;
- (22) Ten Percent (10%) of the gross income from the rental of office space;
- (23) The sum of Fifty-Five Cents (\$0.55) per square foot per month for land (including land under buildings) devoted to the sale of new and used boats (i.e., boat sales office space, boat display areas and parking spaces reserved by Lessee for boat sales customers and employees), which sum is in lieu of percentage rent(s) on boat sales and is in addition to the percentage rents required for office space in subparagraph 3(c)22 herein. If Lessor's Board of Port Commissioners adopts percentage rent(s) for boat sales or a different formula for flat rent for boat sales in lieu of percentage rent(s), Lessee agrees to pay said adopted percentage rent(s) or the new flat rent beginning with the first month following Lessor's adoption of percentage rent(s) or revised flat rent formula;
- (24) Five Percent (5%) of the gross income from sale of merchandise and/or services through coin-operated vending or service machines or devices, including telephones, that are owned, rented, or leased by Lessee or sublessee;
- (25) Twenty-five Percent (25%) of the gross income from commissions and other compensation received for the right to install and operate coin-operated vending or service machines or devices, including telephones that are not owned, rented, or leased by Lessee or sublessee;
- (26) Fifty percent (50%) of the gross rental from any and all telecommunications uses which shall include, but are not limited to, rooftop wireless antennas, antennas attached to a building façade, microwave antennas, and paging antennas;
- (27) Ten Percent (10%) of the gross income from any and all activities, operations, and enterprises permitted under the terms of the Lease and not otherwise addressed within the foregoing provisions;

- (28) Twenty Percent (20%) of the gross income from any and all services or uses not permitted under the terms of the Lease and not otherwise addressed within the foregoing provisions.
- (d) The rent for each successive Rental Period and any extension thereof shall be adjusted in accordance with Paragraphs 3.1 and 3.2 herein.
- (e) On or before the 20th day of each month, Lessee shall render to Lessor, in a form prescribed by Lessor, a detailed report of gross income for that portion of the accounting year which ends with and includes the last day of the previous calendar month. The accounting year shall be 12 full calendar months. The first accounting year shall begin on the first day of the first month during which the percentage rent described in this Lease becomes effective. Subsequent accounting years shall begin upon each anniversary of that date during the Lease term or any extension thereof. Each report shall be signed by Lessee or its responsible agent under penalty of perjury and shall include the following.
- (1) The total gross income for said portion of the accounting year, itemized as to each of the business categories for which a separate percentage rent rate is established.
 - (2) The related itemized amounts of percentage rent computed, as herein provided, and the total thereof.
 - (3) The total rent previously paid by Lessee for the accounting year within which the preceding month falls.
- Concurrently with the rendering of each monthly statement, Lessee shall pay the greater of the following two amounts:
- (1) The total percentage rent computed for that portion of the accounting year ending with and including the last day of the preceding month [Item (2) above], less total rent previously paid for the accounting year [Item (3) above], or;
 - (2) One-twelfth (1/12th) of the Minimum Annual Rent, multiplied by the number of months from the beginning of the accounting year to and including the preceding month, less total rent previously paid for the accounting year [Item (3) above].
- (f) All payments shall be delivered to and statements required in Paragraph (e) above shall be filed with Lessor's Treasurer. Checks shall be made payable to the San Diego Unified Port District and mailed to the Treasurer's Office, San Diego Unified Port District, Post Office Box 120488, San Diego, California 92112-0488, or delivered to the Treasurer's Office, San Diego

Unified Port District, 3165 Pacific Highway, San Diego, California. Lessor may change the designated place of payment and filing at any time upon ten (10) days' written notice to Lessee. Lessee assumes all risk of loss and responsibility for Late Charges, as hereinafter described, if payments are made by mail.

- (g) Lessee hereby acknowledges that late payment by Lessee to Lessor of rent and other sums due hereunder will cause Lessor to incur costs not contemplated by this Lease. Accordingly, in the event Lessee is delinquent in rendering to Lessor an accounting of rent due or in remitting the rent due in accordance with the rent provisions of this Lease, Lessee shall pay, in addition to the unpaid rent, five percent (5%) of the delinquent rent. If rent is still unpaid at the end of fifteen (15) days, Lessee shall pay an additional five percent (5%) [being a total of ten percent (10%)] (collectively, "Late Charges"). The parties hereby agree that said Late Charges are additional rent and are not interest, and that said Late Charges are appropriate to compensate Lessor for loss resulting from rent delinquency including, without limitation, lost opportunities and the cost of servicing the delinquent account. Notwithstanding the foregoing, in no event shall the charge for late submittal of an accounting of rent due and/or late payment of rent be less than Twenty-Five Dollars (\$25). Acceptance of such Late Charges and any portion of the late payment by Lessor shall in no event constitute a waiver of Lessee's default with respect to such overdue amount, nor prevent Lessor from exercising any of its other rights and remedies. The Executive Director of Lessor shall have the right to waive for good cause any Late Charges upon written application of Lessee for any such delinquency period.
- (h) All payments by Lessee to Lessor shall be by a good and sufficient check. No payment made by Lessee or receipt or acceptance by Lessor of a lesser amount than the correct amount of rent due under this Lease shall be deemed to be other than a payment on account of the earliest rent due hereunder, nor shall any endorsement or statement on any check or any letter accompanying any check or payment be deemed an accord and satisfaction, and Lessor may accept such check or payment without prejudice to Lessor's right to recover the balance or pursue any other available remedy.
- (i) Lessee shall, at all times during the term of this Lease, keep or cause to be kept, accurate and complete records and double entry books of account of all financial transactions in the operation of all business activities, of whatever nature, conducted in pursuance of the rights granted herein. The records must be supported by source documents of original entry such as sales invoices, cash register tapes, bank depository documentation, purchase invoices, or other pertinent supporting documents. Financial statements (a balance sheet and income/expense statement), based upon the double entry books of account, shall be prepared not less than annually.

All retail sales shall be recorded by means of cash registers, except as expressly provided for herein. All cash registers shall be equipped with sales totalizer counters for all sales categories, as herein provided, which counters are locked in, constantly accumulating, and which cannot be reset. Said registers shall further contain tapes upon which sales details are imprinted. Beginning and ending sales totalizer counter readings shall be made a matter of daily record. Retail sales may be recorded by a system other than cash registers, provided such system is first approved in writing by the Executive Director of Lessor.

In addition to the above, in the event of admission or cover charges, Lessee shall also issue preprinted serially numbered tickets for each such admission or cover charge. Further, in the event of the rental of vehicles or vessels, Lessee shall issue preprinted serially numbered rental agreements for each such rental transaction. Lessee shall keep a sequential record of said tickets and agreements, both issued and unissued, and shall retain all voids.

All Lessee's books of account, records, financial statements, and documentation related to this Lease or to business operations conducted within or from the Leased Premises, shall be kept either at the Leased Premises or at such other locations as are acceptable to Lessor. Lessor shall have the right at any and all reasonable times to examine and audit said books, records, financial statements, and documentation, without restriction, for the purpose of determining the accuracy thereof, the accuracy of the monthly statements of gross income submitted, and the accuracy of the rent paid to the Lessor. In the event that the Lessee's business operations conducted within or from the Leased Premises are part of a larger business operation of the Lessee, and any part of the books, records, financial statements and documentation required herein is prepared only for the larger operation, and not solely for the business operations of the Leased Premises, then the Lessor shall also have the right to examine and audit that part of said books, records, financial statements, and documentation of the larger business operation.

Lessee's failure to keep such books of account, records, financial statements, and documentation and make them available for inspection by Lessor is a breach of this Lease and cause for termination. The Executive Director of Lessor shall have the discretion to require the installation of any additional accounting methods or controls he may deem necessary, subject to prior written notice. In the event the Lessee does not make available the original records and books of account at the Leased Premises or within the limits of San Diego County, Lessee agrees to pay all necessary travel expenses incurred by Lessor in conducting an audit at the location where said records and books of account are maintained.

Additionally, if the audit reveals a discrepancy of more than five percent (5%) between the rent due as reported by Lessee and the rent due as determined by the audit, and/or Lessee has failed to maintain complete and accurate books of account, records, financial statements, and documentation in accordance with this Lease, then Lessee shall pay the cost of the audit, as determined by the Executive Director of Lessor, plus the rent determined to have been underpaid. In addition, should Lessee fail to pay said amounts within thirty (30) days after written notice from Lessor, then Lessee shall pay an additional fee of ten percent (10%) of said unpaid amounts as compensation to Lessor for administrative costs, as previously described herein, along with the rent determined to have been underpaid.

Furthermore, if the audit reveals that rent due to Lessor is less than five percent (5%) between the rent due as reported by Lessee and the rent due as determined by the audit, and should Lessee fail to pay said unpaid rent within thirty (30) days after written notice from Lessor, then Lessee shall pay an additional fee of ten percent (10%) of said unpaid rent as compensation to Lessor for administrative costs, as previously described herein, along with the rent determined to have been underpaid.

Lessee agrees to pay such amounts set forth above. Acceptance of Late Charges and any portion of the late payment by Lessor shall in no event constitute a waiver of Lessee default with respect to late payment, nor prevent Lessor from exercising any of the other rights and remedies granted in this Lease. The Executive Director of Lessor shall have the right to waive for good cause any Late Charges upon written application of Lessee for any such delinquency period.

- (j) Gross income upon which the percentage rent is to be based shall include all income resulting from occupancy or use of the Leased Premises in any manner, whether by Lessee, its sublessees or concessionaires, or parties operating through Lessee, its sublessees, or concessionaires, from whatever source derived, and whether for cash or credit.

Gross income shall include any manufacturer's or importer's excise tax included in the prices of the goods sold, even though the manufacturer or importer is also the retailer thereof, and it is immaterial whether the amount of such excise tax is stated as a separate charge.

Gross income, however, shall not include any of the following: (1) sales of United States postage; (2) any sales or excise taxes payable by Lessee to any governmental agency as a direct result of operations under this Lease, provided that the amount of such taxes is shown on the books and records elsewhere herein required to be maintained; and (3) gratuities, provided the customer voluntarily determines the amount of said gratuity to be paid, or the

customer is aware that the Lessee has added a pre-established gratuity to the charge for the services rendered and said additional amount is segregated and identified as a gratuity on the billing to the customer.

Further, refunds for goods returned shall be deducted from current gross income upon their return.

Bad debt losses shall not be deducted from gross income.

3.1 COST OF LIVING RENT ADJUSTMENTS:

- (a) This Lease shall provide for the following mid-term Rental Period adjustment dates, hereinafter "Adjustment Dates":

May 1, 2019

May 1, 2029

May 1, 2039

May 1, 2049 if applicable

May 1, 2059 if applicable

- (b) On the referenced Adjustment Dates, the Minimum Annual Rent specified in Paragraphs 3(b) and 3(d) herein shall be adjusted by the increase, if any, in the Consumer Price Index for All Urban Consumers for Los Angeles/Riverside/Orange County, CA/All Items based on the period 1982-84 = 100 as published by the United States Department of Labor's Bureau of Labor Statistics, hereinafter "CPI". The Minimum Annual Rent payable pursuant to Paragraphs 3(b) and 3(d) of this Lease shall be multiplied by a fraction, the numerator of which shall be the CPI for the calendar month which is three months prior to the Adjustment Date under consideration, and the denominator of which shall be the CPI for the calendar month which is three months prior to commencement of the then-current Rental Period. The sum so calculated shall constitute the new Minimum Annual Rent herein, but in no event shall such new Minimum Annual Rent be less than the Minimum Annual Rent payable for the Rental Period immediately preceding said Adjustment Date.

In the event the CPI is no longer published, the index for the Adjustment Date shall be the one reported in the U. S. Department of Labor's comprehensive official index most nearly corresponding to the foregoing description of the CPI. If the herein-described Department of Labor indices are no longer published, another index generally recognized as authoritative shall be substituted by agreement of the parties. If they are unable to agree within

sixty (60) days after demand by either party, a substitute index will be selected by the Chief Officer of the San Francisco Regional Office of the Bureau of Labor Statistics or its successor.

Notwithstanding the publication dates of the CPI, the Minimum Annual Rent shall be adjusted to be effective on the Adjustment Dates. Until said Minimum Annual Rent Adjustment can be reasonably determined by CPI publication, Lessee shall continue to make rent payments pursuant to this Lease at the same rent in effect at the then-current Rental Period. Because of this provision, underpayments of rent shall be immediately paid to the Lessor.

3.2 RENT REVIEW:

- (a) At least two hundred seventy (270) days prior to the beginning of the Rental Period which commences May 1, 2024 and at least two hundred seventy (270) days prior to the beginning of each Rental Period thereafter as described in Paragraph 3(a) herein, Lessor and Lessee shall attempt to reach mutual agreement on the rent as specified in Paragraphs 3(b) and 3(c) herein; provided, however, that the rent shall not be less than the "Rent Requirements" set forth in Paragraph 3.2(c) below.
- (b) If Lessor and Lessee shall fail to reach agreement on the rent as specified in Paragraphs 3(b) and 3(c) for the next Rental Period at least two hundred ten (210) days prior to the beginning of the next Rental Period ("Outside Agreement Date"), then either party may elect to require that the rent specified in Paragraphs 3(b) and 3(c) be determined by the appraisal process described in this Paragraph 3.2(b) by delivery of written notice of such election to the other party within ten (10) days following the Outside Agreement Date. Such written notice of the election to initiate the appraisal process shall specifically refer to this Paragraph 3.2(b) and shall expressly state that the parties have sixty (60) days after the Outside Agreement Date to submit their Rent Proposals (as defined below) and to appoint their appraisers. If the parties have failed to reach agreement on the rent by the Outside Agreement Date, and if neither party delivers written notice to the other party within ten (10) days following the Outside Agreement Date of its election to have the rent determined by an appraisal process, then the rent specified in Paragraphs 3(b) and 3(c) shall be deemed to be the greater of (i) the Minimum Annual Rent and the percentage rent categories then currently in effect (but with the Minimum Annual Rent increased by any increase in the CPI from the immediately prior CPI Adjustment Date), or (ii) the Rent Requirements set forth in Paragraph 3.2(c) below.

If either party elects to require that the rent be determined by the appraisal process described in this Paragraph 3.2(b) by delivery of written notice of

such election to the other party within ten (10) days following the Outside Agreement Date, then each party shall make a separate, written determination of the Minimum Annual Rent and the percentage rent categories (“Rent Proposal”). No Rent Proposal shall include terms requiring Lessor to provide any economic concessions, incentives, abatements, allowances, subsidies, discounts or other similar benefits to Lessee and no Rent Proposal shall provide for Minimum Annual Rent or percentage rent categories that are less than the Rent Requirements. Each written Rent Proposal shall be concurrently submitted by Lessor and Lessee to each other within sixty (60) days after the Outside Agreement Date and such determinations of Minimum Annual Rent and the percentage rent categories shall then be submitted to the appraisal process in accordance with the following items:

- (1) Lessor and Lessee shall each appoint, within sixty (60) days of the Outside Agreement Date, one appraiser who shall by profession be a current MAI real estate appraiser well familiar with commercial properties in the immediate vicinity of the Leased Premises, and who has been active in such field over the last five (5) years. The determination of the appraisers shall be limited solely to the issue of whether Lessor's or Lessee's submitted Rent Proposal is the closest to the actual fair market rent of the Leased Premises as determined by the appraisers, (i.e., the appraisers may only select Lessor's or Lessee's Rent Proposal and shall not be entitled to make a compromise determination). Nothing herein shall be construed to prohibit a party from appointing an appraiser who has assisted such party in the preparation of such party's Rent Proposal.
- (2) Notice of the appointment of an appraiser shall be given by each party to the other party when made. Should either party fail to appoint its appraiser within said time period, then the party that has appointed its appraiser shall provide written notice (“Second Notice”) to the other party expressly stating as follows: “PURSUANT TO PARAGRAPH 3.2(b) OF THE LEASE, UNLESS YOU APPOINT YOUR APPRAISER FOR THE DETERMINATION OF RENT AND PROVIDE WRITTEN NOTICE THEREOF TO THE UNDERSIGNED WITHIN TEN (10) DAYS FOLLOWING RECEIPT OF THIS NOTICE, THEN THE RENT SHALL BE DEEMED TO THAT SET FORTH IN THE RENT PROPOSAL PREVIOUSLY SUBMITTED BY THE UNDERSIGNED.” If the other party does not appoint its appraiser and provide written notice thereof within ten (10) days following receipt of the Second Notice, then the rent specified in Paragraphs 3(b) and 3(c) shall be deemed to be that set forth in the Rent Proposal submitted by the party that has appointed its appraiser and provided the Second Notice.

- (3) If both appraisers are appointed as provided above, then the two appraisers shall immediately choose an independent, third appraiser who shall be qualified under the same criteria set forth hereinabove for qualification of the initial two (2) appraisers to act with them. The third appraiser shall not have assisted either party in the evaluation or preparation of its Rent Proposal. The fact that an appraiser may have, in the past, acted as an independent, third appraiser in an appraisal process similar to that provided in this Paragraph 3.2(b) involving Lessor or Lessee shall not, in itself, disqualify such appraiser from acting as the third appraiser under this Lease. If the two appraisers fail to select a third appraiser within fifteen (15) business days following the appointment of the second appraiser, on application by either party, the third appraiser shall be promptly appointed by the then-current president of the Appraisal Institute, San Diego Chapter, or if such person fails or refuses to make such appointment or there is no longer a San Diego Chapter of the Appraisal Institute, such third appraiser shall be appointed by the presiding judge of the Superior Court of the State of California, County of San Diego, acting in his/her individual capacity. The party making the application shall give the other party notice of its application.
- (4) The appraisers shall consider the following (collectively, the "Rent Determination Factors"):
- (i) the Leased Premises as if vacant of Lessee-owned improvements and available for new construction but with street access, utility services, and shoreline protection (if the Leased Premises are located on the waterfront) regardless of who paid for the installation of the street improvements, utility services and/or shoreline protection;
 - (ii) the Leased Premises as having all regulatory entitlements and development rights for the types of uses permitted in Paragraph 2 above which includes, but is not restricted to, the design, construction and size of the existing improvements;
 - (iii) the highest and best use of the Leased Premises as if available for new leasing purposes under optimal development assumptions that are consistent with the uses provided in Paragraph 2 and to the other terms, conditions and restrictions of the Lease;
 - (iv) as if held by a private party in fee simple with all of the rights to sell, lease or transfer the owner's interest, and shall disregard any limitation resulting from public ownership;

- (v) as if offered for lease in the open market, and
 - (vi) the appraisers shall not reduce or discount the rent by reason of, or otherwise consider, any economic concessions, incentives, abatements, allowances, subsidies, discounts or other benefits granted by the San Diego Unified Port District or other governmental entity or agency to any other tenant. No diminution in value shall be taken as a result of any existing Hazardous Materials, as herein described, or improvements, or lack of improvements, on the Leased Premises. The appraisers shall use and analyze only the market data that is found in the marketplace, such as is demanded and received by other lessors for the same or similar types of uses allowed on the Leases Premises. In all cases, the appraisal decision shall be based upon recognized real estate appraisal principles and methods, unless otherwise specified in this Paragraph 3.2(b).
- (5) Within thirty (30) days following the selection of the third appraiser, the three appraisers shall exchange information and discuss the Rent Proposals. If the third, independent appraiser believes that expert advice would materially assist him or her, the third appraiser may retain one or more qualified persons to provide expert advice. The fees of the third appraiser and the fees and expenses of any expert consultants retained by the third appraiser shall be shared equally by Lessor and Lessee. The decision of the majority of the appraisers shall control. The decision of the appraisers shall be strictly limited to determining whether Lessor's or Lessee's submitted Rent Proposal is the closest to the actual fair market rent of the Leased Premises.
- (i) The determination of the appraisers shall be effective and retroactive to the first day of the Rental Period to which such appraisal relates. The determination shall be in writing and shall be made no later than forty-five (45) days following the selection of the third appraiser. The determination shall be either Lessor's Rent Proposal or Lessee's Rent Proposal. The appraisers shall not possess any right or authority to propose a compromise between Lessor's Rent Proposal and Lessee's Rent Proposal or the modification of either Rent Proposal. Within ten (10) days of the date the determination is made, the underpayment of the rent, if any, shall be paid by Lessee to Lessor, with interest at the rate of ten percent (10%) per annum from the commencement of the relevant Rental Period until paid. Any overpayment of the rent shall be credited to the next payment of rent owed by Lessee under the Lease following the

determination. Subject to subparagraph (7) below, the new rent as of the commencement of the relevant Rental Period shall be the Rental Proposal selected pursuant to such appraisal process.

- (ii) Notwithstanding any determination of the appraisers, in no event shall the rent as so adjusted be less than the Rent Requirements described in Paragraph 3.2(c) below.
- (6) The Minimum Annual Rent determined pursuant to this Paragraph 3.2(b) shall be subject to further adjustment to reflect increases in the CPI on each subsequent Adjustment Date as provided in Paragraph 3.1(b).
- (7) Lessor and Lessee shall each pay for the cost of its appointed appraiser. Lessor and Lessee shall equally share the third appraiser's fee and expenses.
- (c) The following "Rent Requirements" shall apply to all rent adjustments and In no event shall the Minimum Annual Rent or any percentage rent category be adjusted to less than any of the following "Rent Requirements": (i) the Minimum Annual Rent at the commencement of each Rental Period shall not be less than the greater of (A) exactly 80% of the average total percentage rents payable during the last three accounting years of the immediately preceding Rental Period, or (B) the Minimum Annual Rent in effect for the immediately preceding Rental Period (as increased by any increase in the CPI from the immediately prior CPI Adjustment Date); and (ii) no percentage rent category described in Paragraph 3(c), as adjusted, shall be less than the then current percentage rent category rate most recently adopted by the Board of Port Commissioners. However, in no event shall the percentage rent rate for any percentage rent category increase by more than the greater of (i) two hundred fifty (250) basis points from the relevant percentage rent category originally set forth in Paragraph 3(c) of this Lease, or (ii) the percentage change in the CPI from the calendar month which is three months prior to the Commencement Date as compared to the CPI for the calendar month which is three months prior to the commencement of the relevant Rental Period. LESSEE ACKNOWLEDGES THAT THE TERMS OF THIS PARAGRAPH HAVE BEEN SPECIFICALLY REVIEWED BY LESSEE AND LESSEE ACCEPTS THE PARAMETERS FOR CHANGE IN THE PERCENTAGE RENT RATES SET FORTH IN THIS PARAGRAPH AND AGREES THAT SUCH PARAMETERS REFLECT COMMERCIALY REASONABLE TERMS FOR THE ADJUSTMENT OF PERCENTAGE RENT RATES AND CATEGORIES BY THE BOARD OF PORT COMMISSIONERS FROM TIME TO TIME DURING THE TERM OF THIS LEASE.

4. IMPROVEMENTS:

- (a) In accordance with the procedures described herein, Lessee may, at its own expense, make alterations or changes, or cause to be made, built, installed, or removed any structures, machines, appliances, utilities, signs, or other improvements necessary or desirable for the authorized use of the Leased Premises. Provided, however, said work shall be in accordance with plans and specifications, including but not limited to working drawings, hereinafter "Plans," previously submitted to and approved in writing by Lessor.
- (b) No construction, installation, or removal of any improvement upon the Leased Premises shall commence without Lessor's prior written approval. All construction, installations, and removals shall be in accordance with Plans submitted to and approved in writing by Lessor prior to the commencement of any such work. All Plans are subject to changes as may be approved by Lessor, in Lessor's sole discretion. Further, all work shall be in accordance with all applicable laws, regulations, ordinances, and codes.
- (c) Notwithstanding the foregoing, within the interior of any enclosed building structure, and without Lessor's prior consent, Lessee shall have the right to install and/or remove machines, equipment, appliances, and trade fixtures that are necessary or desirable for the authorized use of the Leased Premises.
- (d) When required by Lessor, Lessee shall, at its sole cost and expense, pave or landscape the entire portion of the Leased Premises not covered by structures. All paving and/or landscaping shall be in accordance with Plans which must be submitted to and approved in writing by Lessor prior to the commencement of any such paving and/or landscaping.
- (e) Lessee shall notify Lessor prior to submitting application(s) to any governmental regulatory agency for any development or construction permit or license pertaining to the Leased Premises. Lessee shall also provide Lessor with a copy of all application(s) within five (5) days of making said application(s), along with copies of all Plans submitted as part of the application(s). Lessee shall also provide Lessor, within ten (10) days of Lessee's receipt, a copy of all permits, licenses, or other authorizations subsequently issued.
- (f) Lessee agrees that no banners, pennants, flags, spinners, or other advertising devices, nor any temporary signs, shall be flown, installed, placed, or erected on the Leased Premises without Lessor's prior written consent.
- (g) In the event Lessee proposes a redevelopment of the Leased Premises ("Redevelopment Project") to Lessor, if a California Environmental Quality Act ("CEQA") document and/or Port Master Plan Amendment ("PMPA") and/or

appealable Coastal Development Permit (“CDP”) are deemed necessary for the Redevelopment Project in Lessor’s determination, Lessee agrees to reimburse Lessor for all costs and expenses incurred by Lessor in obtaining the necessary entitlements for the Redevelopment Project, including but not limited to, the preparation and certification of the CEQA document by the Board of Port Commissioners of Lessor, the preparation and approval of the PMPA by the Board and the California Coastal Commission (“CCC”), the preparation and issuance of an appealable CDP by the Board or, if appealed, the CCC, and any other costs and expenses arising out of the entitlement process in Lessor’s determination.

- (h) For tenant development projects pursuant to Board of Port Commissioners' Policy No. 357 - Policy For Approval of Tenant Project Plans with a project cost of \$5,000,000 or more, Lessee shall allocate no less than one percent of the Lessee improvement's total project cost on artwork for the project pursuant to Board of Port Commissioners' Policy No. 608 - Tenant Percent for Art. All commissions or purchases of artwork in fulfillment of the tenant percent for art requirement or otherwise must be approved in writing by Lessor before installation on the Leased Premises. Lessee acknowledges and understands that all commissions or purchases of artwork or otherwise in fulfillment of the tenant percent for art requirement or installed on the Leased Premises shall comply with Board of Port Commissioners' Policy No. 608 - Tenant Percent for Art and Board of Port Commissioners' Policy No. 609 - Public Art, respectively, in effect at the time the Tenant Project Plan is deemed complete by the District.

Lessee shall enter into a tenant art agreement with the District to outline the parties' responsibilities related to fulfilling the requirement in compliance with Board of Port Commissioners' Policy No. 608 - Tenant Percent for Art, including but not limited to: artist, artist concept proposal, final design, artwork, representations and warranties, ownership and rights, Lessee obligations, public safety, maintenance and conservation, removal, disposition, signage and time schedule. Alternatively, Lessee shall deposit into the public art fund, payment of an in-lieu contribution in accordance with Board of Port Commissioners' Policy No. 608 - Tenant Percent for Art.

5. CONSTRUCTION OF IMPROVEMENTS:

- (a) On or before June 1, 2014, Lessee shall commence the construction of and diligently proceed to completion, a project which consists of (i) the renovation of all existing guestrooms and corridors; (ii) the renovation and addition of marina support buildings, including the addition of four buildings and a sundry; (iii) renovation and reconfiguration of the pool area including the addition of a pool bar; (iv) renovation of the existing fitness center with new spa, lockers and fitness area; (v) enhanced point of arrival with new fire and

water feature; (vi) renovation and enhancement of the existing lobby; (vii) renovation and enhancement of the existing restaurant; (viii) renovation and enhancement of the existing conference space; (ix) the existing beach area will be enhanced with new cabanas, chaises and a water feature, hereinafter "Project 1." The Project 1 shall be substantially in accordance with plans and specifications, including but not limited to working drawings, hereinafter "Plans," previously approved in writing by Lessor, subject to changes thereto as may be approved by Lessor, in Lessor's sole discretion. Said Plans, and any approved changes thereto, are by this reference made a part hereof. Construction of the Project shall be completed by no later than May 1, 2016. Provided, however, the commencement and completion dates may be extended pursuant to Paragraph 5(g) herein. In the event of any inconsistency between the Plans and the terms and conditions of this Lease, the terms and conditions of this Lease shall prevail.

- (b) Lessee shall, as a condition of this Lease, make an investment in the Project 1 improvements in an amount which shall exceed Five Million Two Hundred Thousand Dollars (\$5,200,000). Such investment is qualification for the term of this Lease and is not a portion of the rent obligations provided in Paragraph 3 herein. Further, neither such investment, nor such improvements, nor any other Lessee investment or improvement shall be considered by the parties hereto or any arbitrator (in the event of arbitration) in determining any rent during the term of this Lease.
- (c) By no later than May 1, 2019. Lessee shall commence the construction of and diligently proceed to completion, (i) the construction of two new two-story buildings containing 41 guest rooms; (ii) upgrade and enhance the existing landscaping; (iii) resurface and restripe the parking lot; and (iv) upgrade the existing seawall, collectively hereinafter "Project 2." Project 2 shall be substantially in accordance with plans and specifications, including but not limited to concept drawings, hereinafter "Plans," previously approved in writing by Lessor, subject to changes thereto as may be approved by Lessor, in Lessor's sole discretion. Said Plans, and any approved changes thereto, are by this reference, made a part hereof. Before construction may commence on Project 2, a performance bond shall be obtained pursuant to Paragraph 16. Construction of Project 2 shall be completed by no later than October 1, 2020. Provided, however, the commencement and completion dates may be extended pursuant to Paragraph 5(g) herein. In the event of any inconsistency between the Plans and the terms and conditions of this Lease, the terms and conditions of this Lease shall prevail. Before construction may commence on Project 2 the following conditions must be satisfied.
- (1) Working Drawings: Lessee shall submit to District for approval by the Executive Director of the District or designee, six (6) copies of

"Working Drawings" for development of Project 2. Working Drawings shall be prepared by an architect or engineer, as appropriate, licensed to do business in the State of California, and shall consist of the following:

- i. Complete architectural, civil, structural, mechanical, electrical, plumbing, utility layout, landscaping and irrigation, stormwater and site horizontal (coordinate) and vertical control plans included in the civil drawings.
- ii. Complete specifications, materials, and color list, and engineering calculations for all improvements.
- iii. Construction contract form.
- iv. Construction schedule.
- v. A detailed final construction cost estimate of all improvements, with indirect costs, furniture, fixtures and equipment separately identified.

The Working Drawings must be in substantial conformance to the Preliminary Plans approved by the District. The Executive Director of the District, or designee, will approve or comment on the Working Drawings within twenty (20) days following submittal. Within twenty (20) days after the Executive Director of the District, or designee, approves or comments on the Working Drawings, Optionee shall complete all corrections and modifications to the Working Drawings to the satisfaction of the District. District approval shall not release Optionee from liability arising out of or related to the Working Drawings.

- (2) Project Financing/Equity Commitment: Lessee shall submit to the District evidence that Lessee either has sufficient cash on-hand to build Project 2 in accordance with the approved Working Drawings or has obtained a written commitment in form and content reasonably acceptable to District, to provide financing to build Project 2 in accordance with the approved Working Drawings.
- (3) Development Permits: Lessee shall obtain, at its sole cost and expense, all required construction and development permits in connection with Project 2, and deliver to District copies thereof. Said permits shall include, but are not limited to, the building permits issued by the City of San Diego ("City"), Army Corps of Engineers ("ACOE") permit (if applicable) and the Coastal Development permit, which shall be issued by the District in its sole and absolute discretion. Optionee

will submit to District a copy of all documents delivered to the City and ACOE in connection with obtaining such permits.

- (4) Performance Bond: Lessee shall provide to District a performance bond (in accordance with the requirements of Paragraph 16 herein) guaranteeing that construction of Project 2 will be timely completed in accordance with the requirements of Paragraph 5(c) of the Lease.
 - (5) Construction Contract: Lessee shall submit an executed construction contract or contracts with competent and financially-responsible contractors for construction in accordance with the working drawings approved by District.
- (d) Lessee shall, as a condition of receiving the fifteen (15) year lease extension, make an investment in the Project 2 improvements in an amount which shall exceed Nine Million One Hundred Thousand Dollars (\$9,100,000). Such investment is qualification for the term of this Lease and is not a portion of the rent obligations provided in Paragraph 3 herein. Further, neither such investment, nor such improvements, nor any other Lessee investment or improvement shall be considered by the parties hereto or any arbitrator (in the event of arbitration) in determining any rent during the term of this Lease.
 - (e) Investment in the Project improvements referenced in Paragraph 5(b) and 5(d) above shall include an investment of no less than one percent of the Lessee improvement's total project cost in artworks in compliance with Board of Port Commissioners' Policy No. 608 – Tenant Percent for Art and Board of Port Commissioners' Policy No. 609 – Public Art, respectively, in effect at the time the Project is granted conceptual approval by the Board of Port Commissioners.
 - (f) Within sixty (60) days following completion of any substantial improvement within the Leased Premises, but at not less than quarterly intervals, Lessee shall furnish Lessor an itemized statement of the actual construction cost of such improvement. The statement shall be sworn to and signed, under penalty of perjury, by Lessee or its responsible agent.

Lessee shall maintain true, accurate, and complete records to support said statement. Such records shall include, but are not limited to a general ledger, vendor invoices, cancelled checks, construction loan documentation, agreements with third-party contractors, and contractor progress payment billings. Additionally, should Lessee perform any construction in-house, Lessee shall substantiate the actual work performed by maintaining a payroll journal, copies of cancelled payroll checks, and timecards or other payroll documents which show dates worked, hours worked, and pay rates.

Books and records herein required shall be maintained and made available either at the Leased Premises or at such other location as is agreeable to Lessor. Further, Lessor shall have the right at any and all reasonable times to examine and audit said books and records without restriction for the purpose of determining the accuracy thereof, and the accuracy of the aforesaid statement. In the event Lessee does not make available the original books and records at the Leased Premises or within the limits of San Diego County, Lessee agrees to pay all necessary expenses incurred by Lessor in conducting an audit at the location where said books and records are maintained.

- (g) The time(s) during which Lessee's construction is delayed by acts of God, war, invasion, rebellion, revolution, insurrection, riots, labor problems, unavailability of materials, government intervention, or acts or omissions of Lessor, shall be added to the times for the commencement and completion of construction established in Paragraph 5(a) and 5(c) herein. Provided, however, in no event shall the period of excused delay exceed 365 days in the aggregate.
- (h) Failure to comply with this Paragraph is a breach of this Lease and cause for termination in accordance with Paragraph 10 herein.

6. TITLE TO IMPROVEMENTS:

For the purpose of this Paragraph, "improvements" shall include, but are not limited to subsurface improvements. On the Commencement Date of this Lease, all existing structures, buildings, installations, and improvements located on the Leased Premises are owned by and title thereto is vested in Lessee, with the exception title to artwork created in compliance with Board of Port Commissioners' Policy No. 608 – Tenant Percent for Art which shall be outlined in a tenant art agreement. All said existing structures, buildings, installations, and improvements, as well as structures, buildings, installations, and improvements of any kind placed on the Leased Premises by Lessee subsequent to the Commencement Date of this Lease shall, at the option of Lessor, be removed by Lessee at Lessee's expense. Lessor may exercise said option as to any or all of the structures, buildings, installations, and improvements either before or after the Termination Date or sooner termination of this Lease. If Lessor exercises such option, Lessee shall remove such structures, buildings, installations, and/or improvements within sixty (60) days after the Termination Date of this Lease or sooner termination thereof, whichever occurs earlier. Provided, however, Lessee agrees to repair any and all damage occasioned by their removal. Title to any such structures, buildings, installations, and/or improvements not so removed within said sixty (60) days shall vest in Lessor, without cost to Lessor and without any payment to Lessee, except that Lessor shall have the right to have them removed and to repair any and all damage occasioned by their removal, all at the expense of Lessee.

On the Commencement Date of this Lease, all existing machines, appliances, equipment

and trade fixtures located on the Leased Premises are owned by and title thereto is vested in Lessee. Furthermore, all machines, appliances, equipment and trade fixtures placed on the Leased Premises by Lessee subsequent to the Commencement Date of this Lease are owned by and title thereto is vested in Lessee. All machines, appliances, equipment and trade fixtures shall be removed by Lessee, at Lessee's expense, within sixty (60) days after the Termination Date of this Lease or sooner termination thereof, whichever occurs earlier. Provided, however, Lessee agrees to repair any and all damage occasioned by their removal.

Notwithstanding the foregoing, any machines, appliances, equipment and trade fixtures placed on the Leased Premises by Lessee as qualification for the term of this Lease pursuant to Paragraph 5 herein, may only be removed by Lessee, at Lessor's option. If machines, appliances, equipment and trade fixtures required by Lessor to be removed are not removed by Lessee within sixty (60) days after the Termination Date of this Lease or sooner termination thereof, whichever occurs earlier, the same may be considered abandoned and shall thereupon become the property of Lessor, without cost to Lessor and without any payment to Lessee, except that Lessor shall have the right to have them removed and to repair any and all damage occasioned by their removal, all at the expense of Lessee

During any period of time employed by Lessee under this Paragraph to remove structures, buildings, installations, improvements, machines, appliances, equipment and trade fixtures, Lessee shall continue to pay the full rent to Lessor in accordance with this Lease, which said rent shall be prorated daily.

7. LIENS:

Lessee shall defend, indemnify, and hold harmless Lessor against all claims and liens for labor, services, or materials in connection with improvements, repairs, or alterations made by Lessee or Lessee's sublessees, contractors, and agents on the Leased Premises, and the costs of defending against such claims and liens, including reasonable attorneys' fees.

In the event any such claim or lien (other than the lien of a Permitted Leasehold Deed of Trust (as hereafter defined)), or any other claim(s), lien(s) or levy(ies) whatsoever of any nature caused by Lessee or Lessee's sublessees, contractors, and agents, is filed against the Leased Premises or the leasehold interests of Lessee therein, Lessee shall, upon written request of Lessor, deposit with Lessor a bond conditioned for the payment in full of all claims upon which said lien(s) or levy(ies) have been filed. Such bond shall be acknowledged by Lessee, as principal, and by an entity licensed by the Insurance Commissioner of the state of California to transact the business of a fidelity and surety insurance company, as surety. Lessor shall have the right to declare this Lease in default in the event the bond required by this Paragraph has not been deposited with Lessor within ten (10) days after written request has been delivered to Lessee.

This provision shall not apply to a foreclosure of a trust deed or mortgage encumbering the leasehold if the encumbrance has previously received Lessor consent in accordance with Paragraph herein.

8. LEASE ENCUMBRANCE:

- (a) Lessor's Consent to Encumbrance. Lessee shall not encumber the Lease, leasehold interest, and the improvements thereon by a deed of trust, mortgage, or other security instrument to assure the payment of Lessee's promissory note, without Lessor's prior written consent, in each instance. If Lessee enters into any deed of trust, mortgage, or other security instrument that encumbers the Lease, leasehold interest, or the improvements thereon without Lessor's prior written consent, Lessor shall have the right to declare this Lease in default.

In the event Lessee requests Lessor's consent to any Lease encumbrance, hereinafter referred to as a "transaction" in this Paragraph 8, Lessee shall reimburse Lessor for all Lessor's reasonable costs and expenses associated with said transaction. Said costs shall include reasonable legal fees and disbursements relating to or arising out of any such transaction, regardless of whether such transaction is consummated.

In the event Lessor consents to any Lease encumbrance, said consent shall be conditioned upon the following: (i) if, on the effective date of such proposed encumbrance, but subject to the conditions herein, the rent being paid under this Lease is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent; (ii) if deemed necessary by Lessor, a Lease amendment shall be executed which will include new or revised lease provisions; (iii) the maximum loan proceeds shall not be in excess of the greater of 75% loan-to-value as determined by lender's appraisal, or the amount of repayment of existing financing that encumbers the leasehold; (iv) the loan shall have an amortization term that is less than the remaining term of the ground lease; and (v) the Lessee shall acknowledge in writing that it will not seek rent relief as a result of not being able to meet its debt repayment obligations. Upon the effective date of any said consented-to-encumbrance, Lessee shall thereafter pay to Lessor the market rent as referenced herein, subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein

In the event of a consented-to encumbrance, if the parties cannot agree to an amount that is equal to the market rent, the rent shall be determined by the procedure described in Paragraph 3.2 herein, except that the award shall be effective and retroactive to the effective date of the consented-to encumbrance.

- (b) Definition of "Consented-to-Lender". The term "Consented-to-Lender" as

hereinafter used in this Lease, means the lender holding an encumbrance consented to by Lessor. It may include one or more lenders holding obligations of the Lessee secured by a single deed of trust, mortgage, or other security instrument.

- (c) Voluntary Lease Surrender. Without the prior written consent of the Consented-to-Lender, should Lessee owe the Consented-to-Lender any amounts under any security instrument encumbering this Lease, leasehold interest, or the improvements thereon, Lessor will not accept the voluntary surrender, cancellation, or termination of this Lease before the expiration of the term thereof.

Prior to the execution of any change, modification or amendment to the Lease, Lessor shall provide written notice of any such proposed change, modification or amendment, including all CPI adjustments and changes to rent pursuant to rent reviews, to each Consented-to-Lender; provided, however, if Lessor fails to provide such notice, such failure shall not (i) constitute a default by Lessor under the Lease or (ii) invalidate or render void any such change, modification or amendment taken without the knowledge or consent of such Consented-to-Lender.

- (d) Loan Default. If a Permitted Leasehold Deed of Trust is in default at any time, the Consented-to-Lender shall, as provided by law, have the right, without Lessor's prior consent, to:
- (1) Accept an assignment of the Lease in lieu of foreclosure; or
 - (2) Cause a foreclosure sale to be held pursuant to either judicial proceedings or power of sale as provided in its deed of trust, mortgage, or other security instrument.

Provided, however, with the exception of said Consented-to-Lender, no assignment to the successful bidder shall be effective without Lessor's prior written consent, not to be unreasonably withheld.

- (e) Assume Lease Obligations. Before said Consented-to-Lender, or any other future consented-to assignee, acquires the leasehold interest, it shall, as an express condition precedent, agree in writing to assume each and every obligation under the Lease. Furthermore, before any said Consented-to-Lender, or any other future consented-to assignee or purchaser, may subsequently assign or sublease all or substantially all of the leasehold interest, it shall, in each instance, obtain Lessor's prior written consent.

Further, a Consented-to-Lender that has: (i) acquired the leasehold interest and assumed the Lessee's obligations, or (ii) entered into a new lease pursuant to Paragraph 10 herein, concurrently with a termination of this

Lease, shall be released from all further obligations under this Lease after it assigns the leasehold interest to an assignee consented to by Lessor, in accordance with this Paragraph 8.

- (f) Lessor's Consent to Assignment. Whenever a Consented-to-Lender is required by the provisions of this Paragraph 8 to obtain Lessor's prior consent to an:
- (1) Assignment to the successful bidder upon a foreclosure by said Consented-to-Lender; or
 - (2) Assignment or sublease of all or substantially all of the Leased Premises by said Consented-to-Lender should it become the lessee by reason of: (i) being the successful bidder upon said foreclosure, or (ii) an assignment in lieu of foreclosure, or (iii) under a new lease entered into pursuant to Paragraph 10 herein; then Lessor will grant such consent if:
 - (i) The principal(s) of such assignee, purchaser, or sublessee are reputable (meaning the absence of reputations for dishonesty, criminal conduct, or association with criminal elements -- "reputable" does not mean "prestigious," nor does the determination of whether one is reputable involve considerations of personal taste or preference);
 - (ii) The principal(s) of such assignee, purchaser, or sublessee possess sufficient business experience and financial means to perform Lessee's obligations under this Lease--according to the then-current standards for business experience and financial means that Lessor generally requires of new or renewed lessees at the time of the request; and
 - (iii) The assignee, purchaser, or sublessee agrees in writing to assume each and every obligation under this Lease.

Further, Lessor will not unreasonably or arbitrarily withhold such consent

Provided, however, no such assignee, purchaser, or sublessee shall subsequently: (i) assign, transfer, or sublease any or all of the Leased Premises without Lessor's prior written consent, in accordance with Paragraph 9 herein; or (ii) encumber the Lease, leasehold interest, and improvements thereon without Lessor's prior written consent, in accordance with this Paragraph 8.

Provided further, if said Consented-to-Lender becomes the lessee by reason of: (i) being the successful bidder upon foreclosure, or (ii) an assignment in

lieu of foreclosure, or (iii) being the lessee of a new lease entered into pursuant to Paragraph 10 herein, then said Consented-to-Lender may, upon a subsequent assignment or subleasing of all or substantially all of the Leased Premises, take back from its assignee, purchaser, or sublessee, a purchase money deed of trust, mortgage, or security instrument. Provided, however, said Consented-to-Lender must execute and submit to Lessor documentation substantially in the same form and content as was originally submitted to Lessor when consent was granted to the earlier encumbrance. Only said Consented-to-Lender or the successful bidder upon said foreclosure may enforce the provisions of this Paragraph 8. Further, no other third party shall have the rights or remedies, as third-party beneficiaries, or otherwise, hereunder.

The burden of producing evidence and the burden of proof showing Lessor that a prospective assignee, purchaser, or sublessee meets each and all of the aforesaid qualifications and standards shall be on said Consented-to-Lender or successful bidder upon foreclosure. Lessor's decision shall be based upon Lessor's high duty of care in administering a valuable public resource, which it holds in trust for the people of the state of California. In the absence of fraud or arbitrary or unreasonable action in applying or failing to apply said standards, Lessor's decision shall be final.

- (g) If Lessor Rejects Lease Transferee. In the event Lessor rejects: (i) the successful bidder upon foreclosure, or (ii) a proposed assignee or sublessee of the Consented-to-Lender (said successful bidder or Consented-to-Lender being sometimes referred to hereinafter as the "Aggrieved Party," and said successful bidder, or proposed assignee or sublessee from the Consented-to-Lender being sometimes referred to hereinafter as the "Applicant"), the sole remedy of the Aggrieved Party shall be to seek relief in the nature of specific performance through the arbitration procedure hereinafter established. Further, in no event shall Lessor be liable to the Aggrieved Party or Applicant, or any person or entity whatsoever, for money damages. Provided, however, the Aggrieved Party shall be entitled to recover such damages, if any, it may sustain as a result of Lessor's failure or refusal to comply with a Superior Court order confirming an award in favor of the Aggrieved Party in said arbitration.

The issue to be submitted to arbitration shall be whether Lessor's Board of Port Commissioners' record contains substantial evidence to support the decision to reject the Applicant in accordance with the standards of reputation, business experience, and/or financial means, as provided herein. The Aggrieved Party may submit said issue to arbitration.

The arbitration shall be conducted pursuant to Title 9 of Part 3 of the California Code of Civil Procedure (section references herein shall be to the

Code of Civil Procedure), as amplified and modified by the following provisions:

- (1) Arbitration shall be initiated by the Aggrieved Party filing a written demand for arbitration with Lessor no later than thirty (30) days following Lessor's adoption of a resolution rejecting the Applicant. If the Aggrieved Party so elects, Lessor shall be deemed to have adopted a resolution rejecting an Applicant if Lessor has not acted within ninety (90) days after the Aggrieved Party files a written application for Lessor to approve the Applicant;
- (2) Said arbitration shall be conducted by a single neutral arbitrator who shall not be a County of San Diego resident;
- (3) If the parties have not agreed on the selection of the arbitrator within five (5) days after said demand for arbitration is filed, either party may petition the Superior Court of the state of California, county of San Diego, to select the arbitrator pursuant to Section 1281.6;
- (4) Each party shall submit its nominees, if any, to the court within five (5) days after said petition is served and filed;
- (5) Said arbitrator shall not conduct a trial de novo, but shall consider only said record before Lessor's Board of Port Commissioners. Provided, however, said arbitrator may consider evidence outside said record if the arbitrator believes that the Board's decision was affected by Lessor's fraudulent action which was not reasonably discoverable prior to the Board's decision;
- (6) Said arbitrator shall make the award in writing within forty-five (45) days of being appointed;
- (7) The right of any party to take depositions for discovery purposes, as provided in Section 1283.05, shall be waived;
- (8) Certain time periods established in said Title 9 shall be shortened as follows:
 - (i) Sections 1284, 1288.4, 1290.2, and 1290.6--halved;
 - (i) Section 1288--four years to 30 days and 100 days to 15 days; and
 - (ii) Section 1288.2--100 days to 15 days;
- (9) San Diego, California shall be the venue of the arbitration hearing and

any court proceedings;

- (10) The decision of the Superior Court in any proceeding to confirm, correct, or vacate the award shall be final, and the parties to said arbitration waive any rights to appeal therefrom, as provided in Sections 1294 and 1294.2, or otherwise; and
- (11) The parties shall bear their costs, fees, and expenses incurred in connection with said arbitration, in accordance with the provisions of Section 1284.2.
- (h) Notice of Foreclosure Sale. Said Consented-to-Lender shall include a statement in any Notice of Foreclosure Sale covering the foregoing requirements for Lessor's consent to an assignment upon said foreclosure.
- (i) Subsequent Encumbrance. Except for subleases, utility easements, and other necessary rights-of-way, Lessor shall not expressly consent to a subsequent lien or encumbrance against the Leased Premises without said Consented-to-Lender's prior written consent, not to be unreasonably withheld.
- (j) Assignment of Security Interest. Said Consented-to-Lender shall not assign its security interest in the Leased Premises in whole or in part without Lessor's prior written consent, in each instance. Provided, however, Lessor's consent to such an assignment shall be deemed granted (and such assignee will for all purposes of this Lease be deemed to be a Consented-to-Lender) if the assignment is to:
 - (1) A Financial Institution in good legal standing under the laws of its jurisdiction of incorporation having assets exceeding Two Hundred and Fifty Million Dollars (\$250,000,000); or
 - (2) The United States of America or any state thereof, or any agency thereof; or
 - (3) An assignee by operation of law; e.g., a state insurance department engaged in supervising the liquidation or rehabilitation of an insurance company lender.

Provided, however, for purposes of the foregoing provisions "Financial Institution" shall mean: (i) an insurance company qualified to do business in the state of California; or (ii) a federally- or state-chartered bank, savings bank, or savings and loan association; or (iii) a pension or retirement fund operated for the employees and former employees of, and regulated and controlled by, the United States of America or any state thereof, or any agency thereof; e.g., the California State Teachers' Retirement System; or (iv) a finance company; or (v) an investment company, money management firm, or "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act of 1933, as amended, or

an institutional "accredited investor" within the meaning of Regulation D under the Securities Act of 1933, as amended; or (vi) a real estate investment trust; or (vii) a combination of two or more of the preceding entities; or (viii) an entity controlled by, controlling or under common control with one or more of the preceding entities (provided that at least one participant, constituent, member or partner thereof meets the \$250,000,000 threshold set forth above). In this context "controlled" "controlling" or "under common control" shall be deemed to be either or both (i) the ownership of more than fifty percent (50%) of the stock or other voting interest of the subject entity or the ownership of beneficial interests in the subject entity, or (ii) the power to direct the management of the subject entity with respect to major decisions of the subject entity, whether through voting interests or by way of agreement.

Provided, further, no subsequent assignment by such assignee will be permitted unless:

- (1) The assignment conforms to all requirements of this Paragraph 8;
- (2) A duplicate original(s) of such assignment is furnished Lessor; and
- (3) In case of an assignment where Lessor's consent is deemed granted:
 - (i) assignee promptly furnishes Lessor reasonably satisfactory evidence that said assignee complies with the foregoing requirements, and
 - (ii) said assignee expressly agrees to take such assignment subject to all Lessor's rights under this Lease.

8.1 LESSOR'S PARTICIPATION IN REFINANCE PROCEEDS

Upon Lessor's consent to a Lease encumbrance other than the construction financing of the initial development of the Improvements, Lessee shall pay to Lessor a fee (the "Financing Participation Fee") in an amount equal to two and one-half percent (2.5%) of the Net Proceeds of such transaction. Prior to Lessor's consent to any Financing Transaction, Lessee shall deliver to Lessor a written statement showing the calculation of the Financing Participation Fee owed to Lessor from Lessee based on the terms of the Financing Transaction. The statement of the calculation of the Financing Participation Fee shall contain such detail as may be reasonably requested by Lessor to verify the calculation of the Financing Participation Fee. The Financing Participation Fee due Lessor shall be payable in full to Lessor concurrent with the completion of the Financing Transaction. When owed, the Financing Participation Fee shall constitute additional rent.

For the purposes of this Paragraph 8.1, the term "Net Proceeds" shall mean with respect to a Financing Transaction, the difference between (a) the loan amount and (b) the total of the outstanding indebtedness being paid off by the Financing Transaction and the portion (if any) of the debt under the Financing Transaction to be expended on improving the Improvements, less any customary costs or fees of the Financing Transaction payable by Lessee [provided that the total amount of such costs and fees shall not exceed two percent (2%) of the actual gross proceeds of the subject transaction].

9. ASSIGNMENT – SUBLEASE:

Lessee shall not, without the prior written consent of Lessor:

- (a) Assign or transfer the whole or any part of this Lease or any interest therein;
- (b) Sublease (which shall also include management and/or operating agreements covering the Leased Premises) the whole or any part of the Leased Premises;
- (c) Permit transfer of the Lease or possession of the Leased Premises by merger, consolidation, or dissolution of Lessee;
- (d) Permit hypothecation, pledge, encumbrance, transfer or sale, voluntary or involuntary, in whole or in part, of this Lease or any interest therein other than to a Consented-to-Lender; or
- (e) Permit the occupancy of the whole or any part of the Leased Premises by any other person or entity other than a Consented-to-Lender.

Notwithstanding the foregoing, nothing herein shall be construed to prevent the occupancy of said Leased Premises by any employee or business invitee of Lessee.

Further, Lessee shall not, without the prior written consent of Lessor:

- (a) Permit assignment, hypothecation, withdrawal, admittance, dissolution, change, pledge, encumbrance, transfer or sale, voluntary or involuntary, of a any interest of a member's managing interests, limiting interests or membership interests;
- (b) Contract for the management or operation of the whole or any part of the Leased Premises; or
- (c) Permit the transfer of the Lease or possession of the Leased Premises by any changes in the respective interests of the parties comprising Lessee.

It is mutually agreed that the personal qualifications of the parties controlling the corporation named herein as Lessee are a part of the consideration for granting this Lease. Said parties do hereby specifically agree to maintain active control and supervision of the operations conducted on the Leased Premises.

In the event Lessee requests Lessor's consent to any Lease assignment, Lease transfer, Lease amendment, and/or sublease, Lessee shall reimburse Lessor for all Lessor's reasonable costs and expenses associated with such Lease assignment, Lease transfer, Lease amendment, and/or sublease. Said costs shall include reasonable legal fees and disbursements relating to or arising out of any such Lease assignment, Lease transfer,

Lease amendment, and/or sublease, regardless of whether such Lease assignment, Lease transfer, Lease amendment, and/or sublease is consummated.

In the event Lessor consents to any Lease assignment or transfer, said consent shall be conditioned upon the following: (i) if, on the effective date of such proposed assignment or transfer, the rent being paid under this Lease is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent; (ii) assignee shall agree and assume each and every obligation under the Lease; (iii) if deemed necessary by Lessor, a Lease amendment shall be executed which will include new or revised lease provisions; and (iv) assignee shall comply with other conditions and qualifications determined by the Board of Port Commissioners of Lessor. Notwithstanding, items (i), (iii), and (iv) shall not apply in the event of: (a) a Lease assignment or transfer to a third party from a Consented-to-Lender which acquired title to the Lease by foreclosure or deed in lieu of foreclosure or a new Lease pursuant to the provisions of Paragraph 10 herein, or (b) assignment or transfer of the Lease to a Consented-to-Lender by deed in lieu of foreclosure, or to a Consented-to-Lender or a third party as the successful bidder at a foreclosure sale. Upon the effective date of any said consented-to Lease assignment or transfer, assignee shall thereafter pay to Lessor the market rent as referenced herein, subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein.

In the event Lessor consents to any sublease, said consent shall be conditioned upon the following: (i) if, upon the effective date of any said consented-to sublease, the rent being paid for the sublease area is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent for the sublease area as long as said sublease is in effect; (ii) if deemed necessary by Lessor, a Lease amendment shall be executed which shall include new or revised lease provisions; and (iii) Lessee shall comply with other conditions and qualifications determined by the Board of Port Commissioners of Lessor. Furthermore, as long as said sublease is in effect, rent for the sublease area shall be subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein. **For purposes of this Paragraph 9, the term sublease shall not include the temporary and intermittent rental of boat slips and dock lockers to transient boaters (it is being understood that Lessor's consent shall not be required with respect hereto).**

In the event of a consented-to assignment or sublease, if the parties cannot agree to an amount that is equal to the market rent, the rent shall be determined by the arbitration procedure described in Paragraph 3.2 herein, except that the award shall be effective and retroactive to the effective date of the assignment or sublease. Because of this provision, underpayment of rent, if any, shall be paid to Lessor within ten (10) days of the date that the market rent is determined by said arbitration procedure.

9.1 ASSIGNMENT PARTICIPATION FEE

- (a) Upon each (i) Assignment of this Lease pursuant to Paragraph 9 to a Third Party (as defined below), (ii) a change in the composition of the direct or indirect ownership of Lessee by which a Third Party (as defined below)

acquires any direct or indirect interest in Lessee other than pursuant to a transfer of ownership interests traded on a recognized public exchange, and (iii) Sublease of all or substantially all of the Premises to a Third Party, Lessee shall pay to Lessor a fee (the "Assignment Participation Fee") in an amount equal to two and one-half percent (2.5%) of the Gross Proceeds of such transaction. Prior to Lessor's consent to any transaction subject to an Assignment Participation Fee, Lessee shall deliver to Lessor a written statement showing the calculation of the Assignment Participation Fee owed to Lessor from Lessee based on the terms of the transaction. The statement of the calculation of the Assignment Participation Fee shall contain such detail as may be reasonably requested by Lessor to verify the calculation of the Assignment Participation Fee. The Assignment Participation Fee due to Lessor shall be payable in full to Lessor concurrent with the completion of the transaction and shall be a joint and several obligation of the transferee and transferor. When owed, the Assignment Participation Fee shall constitute Additional Rent.

- (b) For the purposes of this Paragraph 9.1, the term "Third Party" shall mean any person or entity other than (i) Westgroup Kona Kai, LLC, a Delaware limited liability company (the "Approved Parent") or an entity who is directly or indirectly controlled by, [one or more of] the Approved Parent[s], (ii) a Consented-to-Lender or (iii) an assignee of a Consented-to-Lender (whether the Consented-to-Lender acquires the leasehold interest under this Lease by foreclosure or deed-in-lieu of foreclosure or pursuant to a new lease); provided, however, that if the Gross Proceeds paid by the assignee exceed the Aggregate Debt Amount (as defined below), then such assignee of the Consented-to-Lender shall be a Third Party. The term "Aggregate Debt Amount" shall mean the aggregate amount of the outstanding principal, interest and other amounts secured by the applicable Permitted Encumbrance at the time of acquisition by the Consented-to-Lender of the leasehold interest in the Premises.
- (c) For the purposes of this Paragraph 9.1, with respect to an assignment of this Lease or sublease of all or substantially all of the Premises or a change in the composition of the direct or indirect ownership of Lessee, the term "Gross Proceeds" shall mean the purchase price or other consideration paid (either in cash or by an assumption of debt or other consideration and, if paid over time, the present value of the total consideration using the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%)) to the Lessee and/or holders of direct or indirect interests in Lessee in connection with the subject transaction less the sum of (x) any prorations, closing costs or other customary deductions to the purchase price for which the seller is responsible [*provided that the total amount of such*

items shall not exceed two (2%) of the actual gross proceeds of the subject transaction] and (y) if the Third Party is the assignee of a Consented-to-Lender, the Aggregate Debt Amount.

- (d) Upon the request of Lessor from time to time (which request shall be no more frequent than once per year), Lessee shall provide Lessor with a schedule listing the names and mailing address of all holders of direct or indirect (at all levels) interests in Lessee other than holders of interests traded on a recognized public exchange. In the event that such shareholder, partner, member or other interest holder is a trust, Lessee shall include in such schedule the name and mailing address of each trustee of said trust, together with the names and mailing addresses of each beneficiary of said trust.

10. DEFAULTS AND REMEDIES:

- (a) Defaults. The occurrence of any one (1) or more of the following events shall constitute a default hereunder:
- (1) Abandonment of the Leased Premises. Abandonment is herein defined to include, but is not limited to, any absence by Lessee from the Leased Premises for ten (10) consecutive days or longer.
 - (2) Failure by Lessee to pay, when due, any Lease-required rent, other payment, and/or charge herein, where such failure continues for a period of ten (10) days after written notice thereof. Provided, however, any such notice provided in this Paragraph 10(a)(2) or in subsequent Paragraph 10(a)(3) shall be in lieu of, and not in addition to, any notice required under Section 1161 of the California Code of Civil Procedure, as amended.
 - (3) Failure by Lessee to perform any other express or implied covenants requirements, obligations, or conditions in this Lease (other than any breach under Paragraph 9, for which immediate notice of termination may be given), should such failure continue for thirty (30) days after written notice thereof.
 - (4) Subject to any restrictions or limitations placed on Lessor by applicable laws governing bankruptcy. Lessee's: (a) applying for, consenting to, or suffering the appointment of a receiver, trustee, or liquidator for all or a substantial portion of its assets; (b) making a general assignment for the benefit of creditors; (c) admitting in writing its inability to pay its debts or its willingness to be adjudged a bankrupt; (d) becoming unable to, or failing to, pay its debts as they mature; (e) being adjudged a bankrupt; (f) filing a voluntary petition or suffering an involuntary petition under any bankruptcy, arrangement, reorganization, or insolvency law (unless in the case of an involuntary

petition, the same is dismissed within thirty (30) days of such filing); (g) convening a meeting of its creditors, or any class thereof, for purposes of effecting a moratorium, extension, or composition of its debts; or (h) suffering, or permitting to continue unstayed and in effect for ten (10) consecutive days, any attachment, levy, execution, or seizure of all or a substantial portion of Lessee's assets or of Lessee's interest in this Lease.

This Paragraph 10(a)(4) shall not be applicable or binding on the beneficiary of any deed of trust, mortgage, or other security instrument on the Leased Premises which is of record with Lessor and is a Permitted Leasehold Deed of Trust, or to said beneficiary's successors in interest consented to by resolution of Lessor, as long as there remains any monies to be paid by Lessee to such beneficiary under the terms of such deed of trust; provided that such beneficiary or its successors in interest, continuously and timely pays to Lessor all rent due or coming due under the provisions of this Lease and the Leased Premises are continuously and actively used in accordance with Paragraph 14 of this Lease, and provided that said beneficiary agrees in writing to assume and perform each and every obligation under the Lease.

- (b) Remedies. In the event of any default, Lessor may exercise the following remedies:
- (1) Termination: Terminate Lessee's right to possession of the Leased Premises whereupon this Lease shall terminate and Lessee shall immediately surrender possession of the Leased Premises to Lessor. In such event, Lessor shall be entitled to recover from Lessee:
 - (i) The "Worth at the Time of Award", as hereinafter defined, of the unpaid rent which had been earned at the time of termination;
 - (ii) The "Worth at the Time of Award" of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided;
 - (iii) The "Worth at the Time of Award" of the amount by which the unpaid rent for the balance of the term of this Lease after the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided; and
 - (iv) Any other amount necessary to compensate Lessor for all the detriment proximately caused by Lessee's failure to perform its

obligations under this Lease, or which would ordinarily be likely to result therefrom, including but not limited to the cost of recovering possession of the Leased Premises, expenses of reletting (including necessary repair, renovation and alteration of the Leased Premises), reasonable attorneys' fees, and any other reasonable costs.

The "Worth at the Time of Award" of the amounts referred to in Paragraphs 10(b)(1)(i) and 10(b)(1)(ii) shall be computed by charging interest at ten percent (10%) per annum from the dates such amounts accrued to Lessor. The "Worth at the Time of Award" of the amount referred to in Paragraph 10(b)(1)(iii) shall be computed by discounting such amount at one (1) percentage point above the Discount Rate of the Federal Reserve Bank of San Francisco at the time of the award.

- (2) Reletting: Without terminating or effecting a forfeiture of the Lease, or otherwise relieving Lessee of any obligation herein, Lessor may, but need not, relet the Leased Premises or any portion thereof, at any time or from time to time, for such terms and upon such conditions and rent as Lessor, in its sole discretion, deems proper. Regardless of whether the Leased Premises are relet, Lessee shall continue to pay to Lessor all Lease-required amounts up to the date that Lessor terminates Lessee's right to possession of the Leased Premises; provided, however, following a default, Lessor shall not unreasonably withhold its consent to any Lessee-requested assignment of this Lease or subletting of the Leased Premises, unless Lessor shall also elect to terminate this Lease and Lessee's right to possession of the Leased Premises, as provided in Paragraph 10(b)(1). Such payments shall be due at the times provided in this Lease and Lessor need not wait until the termination of the Lease to recover said amounts. If Lessor relets the Leased Premises, or any portion thereof, such reletting shall not relieve Lessee of any obligations herein, except that Lessor shall apply the rent or other proceeds actually collected for such reletting against amounts due from Lessee herein, to the extent such proceeds compensate Lessor for Lessee's nonperformance of any obligation herein. Lessor may execute any lease made pursuant thereto in its own name. Further, Lessor shall be under no obligation to reveal to new lessee how these proceeds were applied, nor shall said new lessee have any right to collect any such proceeds. Lessor shall not, by any reentry or other act, be deemed to have accepted Lessee's surrender of the Leased Premises or Lessee's interest therein, nor be deemed to have terminated this Lease or to have relieved Lessee of any obligation herein, unless Lessor shall have furnished Lessee with express written notice of Lessor's election to do so, as set forth herein.

- (3) Other: Any and/or all other rights or remedies of Lessor specified elsewhere in this Lease or provided by law.

In the event Lessor has consented to an encumbrance of this Lease for security purposes in accordance with Paragraph 8 of this Lease, it is understood and agreed that Lessor shall furnish copies of all notice(s) of default(s) to the beneficiary or mortgagee under said encumbrance by certified mail (provided Lessee has delivered to Lessor written request, therefore, together with the name and address of any such beneficiary or mortgagee) contemporaneously with the furnishing of such notices to Lessee. Furthermore, in the event Lessee fails to cure such default(s) within the time permitted herein, said beneficiary or mortgagee shall be permitted to cure such default(s) at any time within thirty (30) days following the expiration of the period within which Lessee may cure said default(s) if the default is monetary in nature, or within sixty days (60) days following the expiration of the period within which Lessee may cure said default(s); provided, however, Lessor shall not be required to furnish any further notice(s) of default(s) to said beneficiary or mortgagee.

In the event this Lease is terminated pursuant to the provisions of this Paragraph 10, Lessor shall continue to have all rights provided in Paragraph 6 of this Lease.

Notwithstanding the foregoing, should a default not be cured within the cure periods referred to above, said Lease shall not be terminated as to said beneficiary or mortgagee unless Lessor first legally offers to enter into a valid lease with said beneficiary or mortgagee, and said offer is not accepted in writing within sixty (60) days after said offer is made. Furthermore, such new lease must be entered into as a condition concurrent with such termination for the then-remaining term of this Lease. Furthermore, the new lease must contain the same terms, conditions, and priority as this Lease, provided the mortgagee or beneficiary promptly cures all then-existing defaults under this Lease when and to the extent it is able to cure them. Such new lease may be entered into even though possession of the Leased Premises has not been surrendered by the defaulting Lessee. In such event, unless legally restrained, Lessor shall promptly proceed to obtain possession of the Leased Premises and to deliver possession to said mortgagee or beneficiary as soon as the same is obtained. Should the mortgagee or beneficiary fail to accept said offer in writing within said sixty (60) day period, or, having so accepted said offer, should it fail promptly to cure all existing defaults under this Lease when and to the extent it is able to cure them, then such termination shall also be effective as to said mortgagee or beneficiary. Furthermore, in the event this Lease is rejected in a bankruptcy proceeding, Lessor shall, within thirty (30) days thereafter, offer in writing to said beneficiary or mortgagee to enter into a valid lease in the same manner and under the same terms, covenants and conditions as provided for with respect to a new lease entered into in the event of a termination of this Lease as provided in the immediately preceding provisions.

11. BANKRUPTCY:

Lessor shall have the right to declare this Lease in default if Lessee: (i) becomes insolvent; (ii) makes an assignment for the benefit of creditors; (iii) becomes the subject of a

bankruptcy proceeding, reorganization arrangement, insolvency, receivership, liquidation, or dissolution proceeding; or in the event of any judicial sale of Lessee's leasehold interest.

The conditions of this Paragraph shall not be applicable or binding on: (1) Lessee; or (2) the beneficiary in any deed of trust, mortgage, or other security instrument encumbering the leasehold interest which Lessor has consented to in writing; or (3) the aforesaid beneficiary's successors in interest which Lessor has consented to in writing, as long as there remains any monies to be paid by Lessee to such beneficiary under the terms of such deed of trust; provided Lessee, such beneficiary, or such beneficiary's successors in interest continuously pay to Lessor all rent due or coming due under the provisions of this Lease, and the Leased Premises are continuously and actively used in accordance with Paragraph 14 herein.

12. EMINENT DOMAIN:

If any public authority takes the whole or a substantial part of the Leased Premises under the power of eminent domain, then the term of this Lease shall cease as to the part so taken from the day the possession of that part is taken. Further, the rent shall be paid up to that day. Lessee shall then have the right either to: (i) cancel this Lease and declare the same null and void; or (ii) continue in possession of the remainder of the Leased Premises under the then-current Lease terms. Provided, however, the Minimum Annual Rent shall be reduced in proportion to the value of the portion of the Leased Premises taken. All damages awarded for such taking shall belong to and be the property of Lessor, whether such damages shall be awarded as compensation for diminution in value to the leasehold or to the fee of the Leased Premises. Provided, however, Lessor shall not be entitled to any award made for the taking of any of Lessee's installations or improvements on the Leased Premises.

13. TERMINATION OF PRIOR AGREEMENTS:

It is mutually agreed that, on the Commencement Date of this Lease, that certain Lease Document No. 61760 made and entered into on the 1st day of May, 2014; that certain Lease Document No. 47503 made and entered into on 25th day of May, 2004; that certain Reciprocal Easement Agreement Document No. 47504 made and entered into on 2nd day of July 2004; and that certain Sublease Agreement Document No. 47515 made and entered into on 2nd day of July 2004, are hereby terminated. Any rights, duties, and obligations of the parties, if any, pursuant to the terms, covenants, and conditions in such hereby terminated lease shall remain enforceable and subject to all defenses, including without limitation any applicable statute of limitations. Further, said statute shall not be waived or extended because of this Lease. Nothing herein is intended nor shall be construed as a waiver of any such rights, or as a release of any such duties or obligations, whether known or unknown at this time or upon the effective date of this Lease.

14. USE OBLIGATION:

Lessee shall actively and continuously use and operate the Leased Premises for the limited particular exclusive use expressly provided for in Paragraph 2, herein, except for failure to

so use caused by wars, strikes, riots, civil commotion, acts of public enemies, and acts of God. Said active and continuous use and operation enhances the value of the lands within Lessor's jurisdiction; provides needed public service; and provides additional employment, taxes, and other benefits to the general economy of the area. Lessee, however, shall not and is expressly prohibited from using the Leased Premises for any other purpose or use whatsoever, whether it is purported to be in addition to or in lieu of the particular exclusive use expressly provided in Paragraph 2, herein.

15. MAINTENANCE AND REPAIR:

As part of the consideration for this Lease, Lessee shall assume full responsibility for operation and maintenance of the Leased Premises throughout the term and without expense to Lessor. Lessee shall perform all maintenance, which includes all painting, repairs, and replacements, including in-water dredging, necessary to maintain and preserve the Leased Premises in a good, safe, healthy, and sanitary condition, satisfactory to Lessor and in compliance with all applicable laws. Provided, however, prior to Lessee performing any extraordinary repairs, plans and specifications must first be submitted to Lessor and receive Lessor approval, pursuant to the procedures provided in Paragraph 4 herein. Further, Lessee shall provide approved containers for trash and garbage and keep the Leased Premises free and clear of rubbish, litter, and any other fire hazards. Lessee waives all rights to make repairs at the expense of Lessor, as provided in Section 1942 of the California Civil Code, and all rights provided by Section 1941 of said Code.

For the purpose of keeping the Leased Premises in a good, safe, healthy, and sanitary condition, Lessor always shall have the right but not the duty to enter, view, inspect, determine the condition of, and protect its interests in the Leased Premises. Provided, however, Lessor or its representatives shall: (a) conduct such entry in a manner that causes the least inconvenience and disruption to Lessee's operation as practicable; and (b) comply with all safety and security requirements of Lessee. It is not intended, however, that Lessee's safety and security requirements be used to bar Lessor's right of inspection. Further, Lessee shall provide Lessor reasonable access to the Leased Premises for such purpose.

If inspection discloses the Leased Premises are not in the condition required herein, Lessee immediately must commence the necessary maintenance work, and complete said work within ten (10) days after written notice from Lessor. Further, if at any time Lessor determines the Leased Premises are not in the condition required herein, Lessor may require Lessee to file and pay for a faithful performance bond to assure prompt correction, without additional notice. The amount of said bond shall be adequate, in Lessor's opinion, to correct all unsatisfactory conditions.

Notwithstanding, Lessor shall not be required to perform any maintenance, including painting, repairs, or replacements; or to make any improvements whatsoever on or for the benefit of the Leased Premises.

The rights reserved in this Paragraph shall not create any obligations or increase any obligations for Lessor elsewhere in this Lease.

15.1 MARINA AUDITS:

The parties hereby acknowledge that Lessor typically limits the term for leases entered into primarily for marina operations to a shorter term than this lease. However, because the Leased Premises under this Lease contains both a marina and a hotel, Lessor has agreed to a longer lease term based upon Lessee's assurance that it will keep and maintain the marina portion of the Leased Premises in good condition and repair at all times during the lease term. Commencing November 1, 2022 and every five (5) years thereafter, Lessee shall perform a maintenance audit in accordance with the following provisions (the "Audit Process"):

- (a) Lessee shall, at Lessee's cost, engage a reasonably qualified contractor or engineer (with experience in the development and/or maintenance of marinas), to be approved by Lessor, to provide Lessee with a written audit report that identifies in reasonable detail (i) any repair and maintenance items which the auditor reasonably determines must be completed immediately in order to cause such marina portion to be in the condition required by this Lease ("Required Work"), (ii) any repair and maintenance items which the auditor reasonably determines must be completed within a specified period of time in order for such marina portion to remain in such condition for at least five (5) years after the date of such audit report ("Recommended Work")., and (iii) any other repairs or maintenance items which the auditor suggests could improve the Marina operations "Suggested Work")
- (b) Within thirty (30) business days after Lessee's receipt of Lessor's notice, Lessee shall provide to Lessor a copy of such written audit report. Lessee shall thereafter cause to be performed any work identified as Required Work in such report (unless Lessor waives such requirement) on a schedule consistent with such report's recommendations. If Lessee fails to perform such work, then Lessor can require Lessee to set up a Reserve Account. Lessee will be required to deposit 3% of marina revenues annually. Such funds will be used to pay for Required Work. The Reserve Account will be held in Lessee's name at a qualified financial institution, as defined in Paragraph 8(j)(3) above.

Thereafter, Lessor may invoke such Audit Process (1) in the event of a transfer of Lessee's interest in this Lease which requires Lessor's consent pursuant to Section 9 above or (2) at any time following the fifth anniversary of the last Audit Process request.

If the Lease is assigned, Lessor may require the Assignee to set up a Reserve Account as described in paragraph 15.1(b) above.

16. PERFORMANCE BOND:

Lessee shall not commence any major construction upon the Leased Premises until performance bonds in the amount of the total estimated construction cost of the proposed improvements have been secured and submitted to Lessor. In lieu of said performance bonds, the Executive Director of Lessor may, in his sole discretion, accept performance and labor and material bonds supplied by Lessee's contractor or subcontractors, performance guarantees, or other satisfactory evidence that said construction will be timely completed. Said bonds must be in a form acceptable to Lessor and have been issued by a company qualified to do business in the state of California.

17. TAXES AND UTILITIES:

This Lease may result in a taxable possessory interest and be subject to the payment of property taxes. Lessee shall pay before delinquency all taxes and assessments of any kind assessed or levied upon Lessee or the Leased Premises by reason of: (i) this Lease; (ii) any buildings, machines, or other improvements of any nature whatsoever erected, installed, or maintained by Lessee; or (iii) the business or other activities of Lessee upon or in connection with the Leased Premises. Lessee also shall pay any fees imposed by law for licenses or permits for any business or activities of Lessee upon the Leased Premises, or under this Lease, and shall pay before delinquency any and all charges for utilities at or on the Leased Premises.

18. CONFORMANCE WITH LAWS AND REGULATIONS:

Lessee agrees that, in all activities on or in connection with the Leased Premises, and in all uses thereof, including the making of any alterations, changes, installations, or other improvements, it will abide by and conform to all Applicable Laws. Said Applicable Laws shall include, but are not limited to those prescribed by the San Diego Unified Port District Act; any ordinances of the city in which the Leased Premises are located, including the Building Code thereof; any ordinances and general rules of Lessor, including tariffs; and any applicable laws of the state of California and federal government, as any of the same now exist or may hereafter be adopted or amended. In particular and without limitation, Lessee shall have the sole and exclusive obligation and responsibility to comply with the requirements of: (i) Article 10 of Lessor Code entitled "Stormwater Management and Discharge Control," and (ii) the Americans With Disabilities Act of 1990, as amended, including but not limited to regulations promulgated thereunder, and Lessor shall have no such obligations or responsibilities as to the Leased Premises.

Lessee acknowledges that on December 10, 2013 Lessor adopted a climate action plan, a copy of which is available on-line at <http://www.portofsandiego.org/environment/3414-port-of-san-diego-adopts-climate-action-plan.html>, (the "CAP") and that the CAP is a framework document which provides as one of its goals the adoption by Lessor of a Sustainable Leasing Policy (the "SLP"). Lessee also acknowledges that Lessor desires that leases and lease amendments that it enters into prior to adoption of a SLP include specific operations requirements which reflect the goals of the CAP and which are likely to be the types of

operational requirements required under the SLP when adopted. At any time during the term of this lease, if an amendment to this Lease is required, Lessee and Lessor shall negotiate an amendment for the purpose of adding as a Tenant obligation the adoption, implementation and monitoring of specific operational requirements of the type generally described in the CAP and consistent with the objectives of the CAP provided, however, such requirements must be commercially reasonable and feasible and consistent with both the CAP and the allowable uses and terms and conditions of this Lease. The requirements agreed to by Lessor and Lessee may by their terms include a procedure for the review of the sustainability measures including their effectiveness and actual costs and, in connection with such review, Lessor may agree to modify such measures in its reasonable discretion. Such requirements will be distinct and separate from any environmental mitigation required under CEQA or other laws, rules, or regulations. Following the adoption of the SLP, Lessee agrees that the provisions of the SLP will be fully incorporated into the terms of any future amendments to this Lease.

19. EQUAL EMPLOYMENT OPPORTUNITY AND NONDISCRIMINATION:

Lessee shall comply with Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1991; the California Constitution; the California Fair Employment and Housing Act; the Americans with Disabilities Act of 1990; and any other applicable federal, state, or local laws and regulations now existing or hereinafter enacted, requiring equal employment opportunities or prohibiting discrimination. This shall include without limitation, laws and regulations prohibiting discrimination because of race, color, religion, sex, national origin, ancestry, physical or mental disability, veteran status, medical condition, marital status, age, sexual orientation, pregnancy, or other non-job related criteria. In complying with all such laws, including without limitation the Americans with Disabilities Act of 1990, Lessee shall be solely responsible for such compliance and required programs, and there shall be no allocation of any such responsibility between Lessor and Lessee.

Annually, Lessee shall formulate and file with Lessor an approved: (i) "Equal Employment Opportunity and Nondiscrimination Program," and (ii) "Statement of Compliance" for the promotion of equal employment opportunities and nondiscrimination. Lessee shall make such progress reports as required by Lessor, and, upon Lessor's reasonable notice, Lessee shall make available for inspection and copying all of its records relevant to compliance with this Paragraph. Provided, however, Lessee is only required to file the Program and Statement when the average annual employment level operating on the Leased Premises exceeds fifty (50) employees. Provided further, should Lessee be subject to a federally-mandated affirmative action program for employees, Lessee may, in lieu of filing the Program and Statement, annually certify in writing to Lessor that Lessee is subject to such a program, and, upon Lessor's request, Lessee shall furnish evidence thereof.

For the purposes and provisions of this Paragraph, a sublessee shall be considered the Lessee should the sublessee become the prime operator of the Leased Premises.

Lessee's compliance with this Paragraph is an express condition hereof, and any failure by Lessee to so comply and perform shall be a default as provided in this Lease, and Lessor may exercise any right as provided herein, and as otherwise provided by law.

20. NONDISCRIMINATION - INTENTIONALLY OMITTED

21. COMPLIANCE WITH EMPLOYMENT AND LABOR REQUIREMENTS:

Lessee shall comply with the Federal fair Labor Standards Act of 1938; the Federal Labor-Management Reporting and Disclosure Act of 1959; the Occupational Safety and Health Act of 1970; the California Constitution; and any other applicable federal, state, or local laws and regulations now existing or hereinafter enacted, regarding employment and labor practices. Lessee shall also comply with the National Labor Relations Act, including the provisions with respect to the rights of employees to organize. Additionally, Lessee shall file a "statement of compliance" providing that Lessee shall comply with the above-referenced state and federal labor employment laws. Provided, however, Lessee is only required to file the Statement when the average annual employment exceeds fifty (50) employees.

22. PARTIAL INVALIDITY:

If any term, covenant, condition, or provision of this Lease is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions herein shall remain in full force and effect, and shall in no way be affected, impaired, or invalidated thereby.

23. HOLD HARMLESS:

Lessee shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless Lessor and its officers, employees, and agents (collectively "Indemnitees") for any and all liability, claims, judgments, damages, proceedings, orders, directives, costs, causes of action, suits, rights, expenses, provisional relief, fees (including reasonable attorneys' fees), or demands, including, without limitation, any and all claims for compensation, reimbursement, or contributions whatsoever, (collectively, "Claims") arising directly or indirectly out of the obligations undertaken in connection with this Lease, or Lessee's use, occupancy, possession or operation of the Leased Premises, except claims or litigation arising through the sole negligence or willful misconduct of Lessor. It is the intent of this Paragraph that Lessee indemnify and hold harmless Lessor and Indemnitees for any actions of Lessee or Lessor, including duties that may be legally delegated to Lessee or to third parties, except for those arising out of the sole negligence or willful misconduct of Lessor. This indemnity obligation shall apply for the entire time that any third party can make a claim against or sue Lessor for liabilities arising out of Lessee's use, occupancy, possession or operation of the Leased Premises, or arising from any defect in any part of the Leased Premises.

In the event Lessee proposes a Redevelopment Project to Lessor, Lessee agrees to indemnify and hold harmless Lessor and Indemnitees from any and all Claims arising directly or indirectly out of Lessor's review, analysis or approval(s) related to the

Redevelopment Project, including, but not limited to, all specifications, plans, and reports, any third party challenges to an environmental document, mitigation and/or monitoring plan, or determinations conducted and adopted pursuant to CEQA for the Redevelopment Project, any third party challenges to any Lessor issued permits and other approvals, including, but not limited to, CDPs, PMPAs, concept design, working drawings, subleases, assignments and assumption agreements, letter agreements, memorandum of understanding, operating contracts, estoppel certificates, and any and all amendments or addendum to the same, and/ Lessee's development and operation of such Redevelopment Project.

In the event such Claims arise, Lessor may, in its sole and absolute discretion, participate in the defense of any Claims and the Lessee shall reimburse Lessor for said defense, including, but not limited to reimbursement for outside attorneys' and experts' fees and other costs. The Lessor's participation shall not relieve the Lessee of any of its obligations under this Paragraph 23. In the Lessor's sole and absolute discretion, the counsel of the Lessor or its Indemnitees may also jointly represent the Lessee. The Lessor shall promptly notify the Lessee of its receipt of any Claims.

24. SUCCESSORS IN INTEREST:

Unless otherwise provided in this Lease, the terms, covenants, conditions, and agreements herein shall apply to and bind the heirs, successors, executors, administrators, and assigns of all the parties hereto, all of whom shall be jointly and severally liable hereunder.

25. EASEMENTS:

This Lease and all rights granted hereunder are subject to all easements and rights-of-way previously granted or reserved by Lessor in, upon, over, and across the Leased Premises for any purpose whatsoever. Said Lease and granted rights shall be subject to future easements and rights-of-way for access, gas, electricity, water, sewer, drainage, telephone, telegraph, television transmission, and such other Lessor or public facilities as Lessor may determine from time to time to be in the best interests of the development of the lands within Lessor's jurisdiction. Lessor agrees to make an effort to locate future easements and rights-of-way, and to install associated public facilities, so as to produce a minimum amount of interference with Lessee's business. Further, Lessee shall not be entitled to any monetary payment or other remuneration for any such future easements and rights-of-way.

26. TITLE OF LESSOR:

Lessor's title is derived from the provisions of the San Diego Unified Port District Act, Appendix 1, Harbors & Navigation Code, and is subject to the provisions of said Act. This Lease is granted subject to the terms and conditions of said Act.

27. INSURANCE:

Lessee shall maintain insurance acceptable to Lessor in full force and effect throughout the term of this Lease. The policies for said insurance shall, as a minimum, provide the following:

(a) Forms of Coverage

- (1) "OCCURRENCE" form Commercial General Liability covering the Leased Premises, operations, and contractual liability assumed by Lessee in this Lease in the amount of not less than Ten Million Dollars (\$10,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage. The general aggregate shall be Twenty Million Dollars (\$20,000,000) unless a Ten Million Dollars (\$10,000,000) per location aggregate limit is provided separate by endorsement.

If alcoholic beverages are served or sold on the Leased Premises, Liquor Liability coverage in the amount of not less than Five Million Dollars (\$5,000,000) shall be obtained. If no alcoholic beverages are served or sold on the Leased Premises, the proof of insurance shall so state.

- (2) All Risk Property Coverage, including water damage and debris cleanup provisions, in an amount not less than the full replacement value of all improvements located within the Leased Premises without deduction for depreciation of the covered items and in amounts that meet any co-insurance clauses of the policies of insurance and shall include business interruption and extra expense for full recovery of the net profits and continuing expenses (including the rent to Lessor) for the duration of the period of restoration, a vandalism and malicious mischief endorsement, sprinkler leakage coverage, flood, and earthquake coverage. The coverage policies shall be endorsed with a Loss Payee endorsement in favor of Lessor. It is agreed that any insurance proceeds in excess of Twenty-Five Thousand Dollars (\$25,000) resulting from a loss under said policies shall be payable jointly to Lessor and Lessee to ensure that said proceeds will be reinvested in rebuilding and/or repairing the damaged portions of the Leased Premises and any damaged or destroyed improvements located thereon. However, if there is a Permitted consented-to-encumbrance held by a Financial Institution (as defined in Paragraph 8) encumbering the leasehold, then all proceeds from such policies of insurance shall be payable in trust with safeguards reasonably acceptable to Lessor to the Consented-to-Lender which is a Financial Institution (as defined in Paragraph 8) to be disbursed for the repair

and restoration of the Premises (or, if there is no Consented-to-Lender, or the Consented-to-Lender declines to hold and disburse such proceeds, to a bank or trust company doing business in the County of San Diego agreed upon by the parties, or if the parties fail to agree, to Bank of America, N.A., or its successor, which proceeds shall be deposited in interest bearing accounts or deposits agreed upon by the parties, or if the parties fail to agree, then in the bank's regular passbook savings account). All interest shall be added to the trust funds to be disbursed with the principal. All proceeds shall be disbursed in progress payments for the payment of the cost of repairing or restoring the property so damaged or destroyed. The specific manner of holding such proceeds and the method and conditions of disbursement shall be subject to the prior written approval of Lessor so as to ensure the application of such proceeds in compliance with this Lease.

- (i) In the event that this Lease is terminated with consent of both Lessor and said mortgagee or beneficiary, and the improvements are not reconstructed, repaired, or replaced, the insurance proceeds shall be retained, without liability, by said mortgagee or beneficiary to the extent necessary to fully discharge the debt secured by said mortgage or deed of trust. Furthermore, said mortgagee or beneficiary shall hold the balance thereof to restore the Leased Premises to a neat and clean condition. Any remaining funds shall lastly be paid to Lessor and Lessee, as their interests may appear.
- (3) In the event underground storage tanks are located on the Leased Premises, Lessee is required to comply with Code of Federal Regulations, Title 40, Chapter I, Subchapter H or Title 23, Division 3, Chapter 18 of California Code of Regulations, collectively, herein "UST Law." At the time Lessee is required to comply with any provisions of UST Law requiring financial assurance mechanisms, Lessee shall provide Lessor with a certified copy of its Certification of Financial Responsibility. If Lessee's program for financial responsibility requires insurance, then Lessee's policy(ies) shall name Lessor and its officers, employees, and agents as additional insureds, and all other terms of Subparagraph (b), below, shall apply. Should Lessee change its financial assurance mechanisms, Lessee shall immediately provide Lessor with a certified copy of its revised Certification of Financial Responsibility.
 - (4) Marina operator liability insurance, in the amount of not less than Two Million Dollars (\$2,000,000).

(b) General Requirements

- (1) All required insurance shall be in force the first day of the term of this Lease, and shall be maintained continuously in force throughout the term of this Lease. In addition, the cost of all required insurance shall be borne by Lessee. During the entire term of this Lease, Lessee shall provide Lessor with certificates, in a form acceptable to Lessor, evidencing the existence of the necessary insurance policies and original endorsements effecting coverage required by this Paragraph. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind insurance on its behalf. Notwithstanding the forgoing, Lessor reserves the right to require complete, certified copies of all required policies at any time.
- (2) All liability insurance policies shall name, or be endorsed to name Lessor and its officers, employees, and agents as additional insureds and protect Lessor and its officers, employees, and agents against any legal costs in defending claims. All liability policies shall provide cross-liability coverage. All insurance policies shall be endorsed to state that coverage will not be suspended, voided, cancelled, or reduced in coverage or in limits, except after Lessee has furnished Lessor with thirty (30) days' prior written notice by certified mail. All insurance policies shall be endorsed to state that Lessee's insurance is primary and not excess or contributory to any insurance issued in the name of Lessor. Further, all insurance companies must be satisfactory to Lessor.
- (3) Any deductibles or self-insured retentions must be declared and acceptable to Lessor. If the deductibles or self-insured retentions are unacceptable to Lessor, then Lessee shall have the option to either: (i) reduce or eliminate such deductibles or self-insured retentions as respects the Lessor and its officers, employees, and agents; or, (ii) procure a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses.
- (4) Lessor shall retain the right at any time to review the coverage, form, and amount of insurance required herein. If, in the opinion of Lessor, the insurance provisions in this Lease do not provide adequate protection for Lessor and/or members of the public using the Leased Premises or using services connected with Lessee's use or occupancy of the Leased Premises, Lessor may require Lessee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. Lessor's requirements shall be reasonable, but shall be designed to ensure protection from and against the kind and extent of risks that exist at the time a change in insurance is required.

- (5) Lessor may require that Lessee obtain and maintain additional or increased insurance from time to time. Lessor shall notify Lessee in writing of changes in the insurance requirements. With respect to changes in insurance requirements that are available from Lessee's then-existing insurance carrier, Lessee shall deposit certificates evidencing acceptable insurance policies with Lessor incorporating such changes within sixty (60) days of receipt of such notice. With respect to changes in insurance requirements that are not available from Lessee's then-existing insurance carrier, Lessee shall deposit certificates evidencing acceptable insurance policies with Lessor, incorporating such changes, within one hundred twenty (120) days of receipt of such notice. In the event Lessee fails to deposit insurance certificates as required herein, this Lease shall be in default without further notice to Lessee, and Lessor shall be entitled to exercise all legal remedies. Without limitation of the foregoing, Lessee agrees that if Lessee does not take out and maintain such insurance or furnish Lessor with renewals or binders in a timely manner, Lessor may (but shall not be required to), procure said insurance on Lessee's behalf and charge Lessee the cost thereof, which amount shall be payable by Lessee within thirty (30) days of written demand with interest at the Default Rate from the date such sums are expended. For purposes of this Subparagraph 27(b)(5), "Default Rate" shall mean an annual rate equal to the lesser of (i) the annual "Bank Prime Loan" rate cited in the Federal Reserve Statistical Release Publication H.15(519), published weekly (or such other comparable index as Lessor and Lessee shall reasonably agree upon if such rate ceases to be published), plus four (4) percentage points, and (ii) the highest rate permitted by applicable law.
- (6) If Lessee fails or refuses to maintain insurance as required in this Lease, or fails to provide proof of insurance, Lessor has the right to declare this Lease in default without further notice to Lessee, and Lessor shall be entitled to exercise all legal remedies.
- (7) The procuring of such required policies of insurance shall not be construed to limit Lessee's liability hereunder, nor to fulfill the indemnification provisions and requirements of this Lease. Notwithstanding said policies of insurance, Lessee shall be obligated for the full and total amount of any damage, injury, or loss caused by negligence or neglect connected with this Lease, or with the use or occupancy of the Leased Premises.
- (8) Lessee agrees not to use the Leased Premises in any manner, even if use is for purposes stated herein, that will result in the cancellation of any insurance Lessor may have on the Leased Premises or on

adjacent premises, or that will cause cancellation of any other insurance coverage for the Leased Premises or adjoining premises. Lessee further agrees not to keep on the Leased Premises or permit to be kept, used, or sold thereon, anything prohibited by any fire or other insurance policy covering the Leased Premises. Lessee shall, at its sole expense, comply with all reasonable requirements for maintaining fire and other insurance coverage on the Leased Premises.

28. COMPLIANCE WITH PREVAILING WAGE LAWS

Lessee acknowledges and agrees that:

- (1.1) Lessor makes no representation concerning the applicability of any wage laws, including, but not limited to California Labor Code §§ 1720 through 1815, et seq. (PWL) To the extent Lessee intends to perform any construction, alteration, demolition, installation or repair work (Construction) on the Premises, Lessee warrants and acknowledges that: (1) Lessor is not paying for or subsidizing, in whole or in part, any such Construction; and (2) Lessee shall make its own determination regarding the applicability of any PWL to such Construction. Lessee assumes any and all risk in connection with the application of PWL to any Construction performed on the Premises on behalf of Lessee. Lessee agrees that Lessor may direct Lessee to seek a determination from the California State Department of Industrial Relations as to the applicability of PWL for any Construction performed pursuant to the Lease, and that Lessor shall have the ability to fully participate in that process at no out of pocket expense to the Lessor. As required by Section 18 Lessee acknowledges its obligation to pay any and all costs including but not limited to wages, interest, penalties and/or attorneys' fees and costs related to or arising out of PWL compliance.
- (1.2) Lessee's violations of PWL may constitute an Event of Default under this Lease.

29. WARRANTIES-GUARANTEES-COVENANTS:

Lessor makes no warranty, guarantee, covenant, including but not limited to covenants of title and quiet enjoyment, or averment of any nature whatsoever concerning the condition of the Leased Premises, including the physical condition thereof, or any condition which may affect the Leased Premises. It is agreed that Lessor will not be responsible for any loss, damage, and/or costs, which may be incurred by Lessee by reason of any such condition or conditions.

30. DAMAGE TO OR DESTRUCTION OF LEASED PREMISES:

Should Lessee-owned improvements be: (i) damaged or destroyed by fire, the elements, acts of God, or by any other cause; or (ii) declared unsafe or unfit for occupancy or use by a

public entity with the appropriate authority, (i) and/or (ii) hereinafter "event," Lessee shall, within ninety (90) days of such event, commence and diligently pursue to completion the repair, replacement, or reconstruction of the improvements necessary to permit full occupancy and use of the Leased Premises for the uses required herein. Repair, replacement, or reconstruction of such improvements shall be accomplished in a manner and according to Plans approved by Lessor. Provided, however, Lessee shall not be obligated to repair, reconstruct, or replace the improvements following their destruction in whole or substantial part, except to the extent the loss is covered by insurance required pursuant to Paragraph 27 herein (or would be covered regardless of whether such required insurance is actually in effect).

If Lessee elects not to restore, repair, or reconstruct as herein required, then this Lease shall terminate. Further, Lessor shall have any rights to which it would be entitled under the provisions of Paragraph Nos. 6 and 27 herein.

No event described herein shall relieve Lessee of its obligations to pay all rent and other amounts otherwise due hereunder.

31. QUITCLAIM OF LESSEE'S INTEREST UPON TERMINATION:

Upon termination of this Lease for any reason, including but not limited to termination because of default by Lessee, Lessee shall execute, acknowledge, and deliver to Lessor within thirty (30) days after receipt of written demand therefore a good and sufficient deed whereby all Lessee's right, title, and interest in the Leased Premises is quitclaimed to Lessor. Should Lessee fail or refuse to deliver the required deed to Lessor, Lessor may prepare and record a notice reciting the failure of Lessee to execute, acknowledge, and deliver such deed. Said notice shall be conclusive evidence of the termination of this Lease and of all right of Lessee, or those claiming under Lessee, in and to the Leased Premises.

32. PEACEABLE SURRENDER:

Upon expiration of this Lease or earlier termination or cancellation thereof, as herein provided, Lessee shall peaceably surrender the Leased Premises to Lessor in as good condition as the Leased Premises were at the Commencement Date of this Lease, except as the Leased Premises were repaired, rebuilt, restored, altered, or added to as permitted or required by the provisions of this Lease, ordinary wear and tear excepted, and subject to Paragraph 6 herein. If Lessee fails to surrender the Leased Premises at the expiration of this Lease or the earlier termination or cancellation thereof, Lessee shall defend and indemnify Lessor from all liability and expense resulting from the delay or failure to surrender, including without limitation any succeeding lessee claims based on Lessee's failure to surrender.

33. WAIVER:

Should either Lessor or Lessee waive any breach by the other of any Lease covenant, condition, or agreement, such waiver shall not be, nor be construed to be, a waiver of any subsequent or other breach of the same or any other Lease covenant, condition, or

agreement. Further, failure on the part of either party to require or exact the other's full and complete compliance with any of the Lease covenants, conditions, or agreements shall not be, nor be construed as in any manner changing the terms, or preventing the enforcement in full, of the provisions hereof. In addition, Lessor's subsequent acceptance of rent hereunder shall not be deemed to be a waiver of any preceding Lessee breach of any Lease term, covenant, or condition, other than Lessee's failure to pay the particular rent so accepted, regardless of Lessor's knowledge of Lessee's preceding breach at the time rent is accepted.

34. HOLDOVER:

This Lease shall terminate without further notice at expiration of the term. Any holding over by Lessee after either expiration or termination shall not constitute a renewal or extension, or give Lessee any rights in or to the Leased Premises.

If Lessee, with Lessor's consent, remains in possession of the Leased Premises after Lease expiration or termination, such possession shall be deemed a month-to-month tenancy terminable upon thirty (30) days' notice furnished at any time by either party to the other. In addition, all provisions of this Lease, except those pertaining to term, shall apply to the month-to-month tenancy, and Lessee shall continue to pay all rent required by this Lease. Provided, however, if percentage rent is required by this Lease, it shall be paid monthly on or before the tenth (10th) day of each month, including the tenth (10th) day of the month following the expiration of any such holdover period.

35. PARAGRAPH HEADINGS:

The Table of Contents and Paragraph Headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision thereof.

36. ENTIRE UNDERSTANDING:

This Lease contains the entire understanding and agreement of the parties. Lessee acknowledges there is no other written or oral understanding or agreement between the parties with respect to the Leased Premises, and that this Lease supersedes all prior negotiations, discussions, obligations, and rights of the parties hereto. No waiver, modification, amendment, or alteration of this Lease shall be valid unless it is expressly in writing and signed by authorized representatives of the parties hereto. Each of the parties to this Lease acknowledges that no other party, agent, or representative has made any promise, representation, waiver, or warranty whatsoever, expressed or implied, which is not expressly contained in writing in this Lease. Each party further acknowledges it has not executed this Lease in reliance upon any collateral promise, representation, waiver, or warranty, or in reliance upon any belief as to any fact not expressly recited in this Lease.

37. TIME IS OF THE ESSENCE:

Time is of the essence of each and all of the terms and provisions of this Lease. This Lease shall inure to the benefit of and be binding upon the parties hereto and any

successors of Lessee as fully and to the same extent as though specifically mentioned in each instance. All covenants, conditions, and agreements in this Lease shall extend to and bind any assigns and sublessees of Lessee.

38. NOTICES:

All notices provided for by this Lease or by law to be given or served upon Lessor or Lessee shall be in writing and: (i) personally served upon Lessor or Lessee, or any person hereafter authorized by either party in writing to receive such notice, or (ii) served by certified letter addressed to the appropriate address hereinafter set forth, or to such other address designated in writing by the respective party.

To Lessor

Executive Director
San Diego Unified Port District
Post Office Box 120488
San Diego, CA 92112-0488

To Lessee

Westgroup Kona Kai, LLC
600 6th St. South
Kirkland, WA 98033

Should any consented-to assignee, consented-to purchaser, or Consented-to-Lender notify Lessor in writing of its desire to receive notices, such party shall also be personally served, or served by certified letter at such appropriate address designated in writing by the respective party.

Any notice or notices given or served as provided herein shall be effectual and binding for all purposes upon the parties so served; provided, however, if served by certified mail, service will be considered completed and binding on the party served forty-eight (48) hours after deposit in the U.S. Mail.

39. REMOVAL OF MATERIALS:

Lessee shall, upon expiration of this Lease or sooner termination as herein provided, remove within sixty (60) days all materials, including without limitation all ships, vessels, barges, hulls, debris, and surplus and salvage items, hereinafter "Materials," from the Leased Premises and adjacent property, so as to leave the same in as good condition as when first occupied by Lessee, subject to reasonable wear and tear. Provided, however, if Lessee fails to remove all Materials within sixty (60) days, Lessor may remove, sell, or destroy said Materials at the expense of Lessee. Further, Lessee agrees to pay Lessor the reasonable cost of such removal, sale, or destruction; or, at the option of Lessor, said Materials not removed, sold, or destroyed by Lessee shall become the property of Lessor, without cost to Lessor, and without any payment to Lessee.

During any period of time required to remove said Materials, or to test for and/or remediate Hazardous Materials as required in Paragraph 44 herein, Lessee shall continue to pay the full rent to Lessor in accordance with this Lease, which said rent shall be prorated daily.

40. WASTE/NUISANCE:

Lessee shall not use the Leased Premises in a manner that constitutes waste or nuisance.

41. NUMBER AND GENDER:

Words of any gender used in this Lease shall include any other gender and each word in the singular number shall include the plural whenever the tense requires.

42. APPLICABLE LAW:

The Lease will be governed by and construed and enforced in accordance with the laws of the State of California.

43. ATTORNEY FEES:

Should any suit be commenced to enforce, protect, or establish any right or remedy of any of the terms and conditions hereof, including without limitation a summary action commenced by Lessor under the laws of the state of California relating to the unlawful detention of property, the prevailing party shall be entitled to have and recover from the losing party reasonable attorney fees and costs of suit.

44. HAZARDOUS MATERIALS:

- (a) Definition of "Hazardous Material." The term "Hazardous Material" shall mean any pollutant, contaminant, or hazardous, dangerous, or toxic chemical, material, or substance, including oil and petroleum products, which now or in the future may be within the meaning of any applicable, federal, state, or local law, regulation, ordinance, or requirement at any concentration that is or has become regulated by the United States, the State of California, or any local government authority having jurisdiction over the Leased Premises.
- (b) Lessee Use of Hazardous Materials. Lessee shall not cause or permit any Hazardous Material, or products or materials which include any hazardous substance as a component, to be generated, brought onto, used, stored, emitted, released or disposed of in or about the Leased Premises by Lessee or its agents, employees, contractors, sublessees, or invitees unless expressly approved, at Lessor's sole discretion, in writing by Lessor after submittal by Lessee of Material Safety Data Sheets ("MSDS") or other information requested by Lessor. Limited quantities of equipment, materials and supplies customarily used in connection with the construction of improvements and standard office, food service and janitorial supplies customarily used in places of business which contain chemicals categorized as Hazardous Material are excluded from this requirement. Lessee shall use, store, and dispose of all such Hazardous Materials in strict compliance with all applicable statutes, ordinances, regulations, and other requirements in effect during the Lease Term that relate to public health and safety and

protection of the environment (“Environmental Laws”); and shall comply at all times with all Environmental Laws.

- (c) **Notice of Release or Investigation.** If during the term of this Lease (including any extensions), Lessee becomes aware of (i) any actual or threatened release of any Hazardous Material on, in, under, from, or about the Leased Premises; or (ii) any inquiry, investigation, proceeding, or claim (collectively “Inquiry”) by any government agency or other person regarding the presence of any Hazardous Material on, in, under, from or about the Leased Premises, Lessee shall give Lessor written notice of the release or Inquiry within five (5) days after Lessee learns or first has reason to believe there has been a release or Inquiry and shall simultaneously furnish to Lessor copies of any claims, notices of violation, reports, warning or other writings received by Lessee that concern the release or Inquiry.
- (d) **Lessor Right to Inspect.** If Lessee has in the past or continues to use, dispose, generate, or store Hazardous Materials on the Leased Premises, Lessor or its designated representatives, at Lessor's sole discretion, may at any time during the term of this Lease, but is no way obligated to, enter upon the Leased Premises and make any inspections, tests or measurements Lessor deems necessary to determine if a release of Hazardous Materials has occurred. Lessor shall furnish Lessee a minimum of twenty-four (24) hours' notice in writing prior to conducting any inspections or tests, unless, in Lessor's sole judgment, circumstances require otherwise. Such tests shall be conducted in a manner so as to attempt to minimize any inconvenience and disruption to Lessee's operation as is practicable. If such tests indicate a release of Hazardous Materials, then Lessor, at Lessor's sole discretion, may require Lessee, at Lessee's sole expense and at any time during the term of this Lease, to have such tests for such Hazardous Materials conducted by a qualified party or parties on the Leased Premises. If Lessor has reason to believe any Hazardous Materials originated from a release on the Leased Premises have contaminated any area outside the Leased Premises, including but not limited to surface and groundwater, then Lessor, at Lessor's sole discretion, may require Lessee, at Lessee's sole expense and at any time during the term of this Lease, to have tests for such Hazardous Materials conducted by a qualified party or parties on said area outside the Leased Premises. Lessor's failure to inspect, test or take other actions pursuant to this Paragraph 44(d) regarding the Leased Premises, shall in no way relieve Lessee of any responsibility for a release of a Hazardous Material.
- (e) **Clean-up Obligations.** If the presence of any Hazardous Material brought onto the Leased Premises by Lessee or Lessee's employees, agents, sublessees, contractors, or invitees, or generated by same, results in contamination of the Leased Premises, adjacent properties or the San Diego Bay, Lessee shall promptly take all necessary actions, at Lessee's sole

expense, to remove or remediate such Hazardous Materials. Lessee shall provide notice to Lessor prior to performing any removal or remedial action. Lessee shall not propose nor agree to any covenant of use restriction as part of any removal or remediation required as a result of this Paragraph 44(e). To the extent Lessor incurs any costs or expenses in performing Lessee's obligation to clean-up contamination resulting from Lessee's operations or use of the Leased Premises, Lessee shall promptly reimburse Lessor for all costs and expenses incurred within thirty (30) days. Any amounts not so reimbursed within thirty (30) days after Lessee's receipt of an itemized statement therefore shall bear interest at the Prime Rate plus Five Percent (5%) per annum compounded monthly. This provision does not limit the indemnification obligation set forth in Paragraph 44(f). The obligations set forth in this Paragraph 44(e) shall survive any expiration or other termination of this Lease.

- (1) Clean-up Extending Beyond Lease Term. Should any clean-up of Hazardous Materials for which Lessee is responsible not be completed prior to the expiration or sooner termination of the Lease, including any extensions thereof, then: (A) Lessee shall deposit into an escrow account an amount of money equal to the balance of the estimated costs of the clean-up, together with instructions for the disbursement of such amount in payment of the costs of any remaining clean-up as it is completed, and (B) if the nature of the contamination or clean-up required of Lessee is of such a nature as to make the Leased Premises untenable or unleaseable, then Lessee shall be liable to Lessor as a holdover lessee until the clean-up has been sufficiently completed to make the Leased Premises suitable for lease to third parties. The estimated cost of the clean-up shall require approval of the Lessor.
 - (2) Financial Security. If Lessor determines, in its reasonable discretion, that Lessee does not have insurance or other financial resources sufficient to enable Lessee to fulfill its obligations under this Paragraph 44(e), whether or not accrued, liquidated, conditional, or contingent, then Lessee shall, at the request of Lessor, procure and thereafter maintain in full force and effect such environmental impairment liability and/or pollution liability insurance policies and endorsements, or shall otherwise provide such collateral or security reasonably acceptable to Lessor as is appropriate to assure that Lessee will be able to perform its duties and obligations hereunder.
- (f) Indemnification. Lessee shall, at Lessee's sole expense and with counsel reasonably acceptable to Lessor, indemnify, defend, and hold harmless Lessor and Lessor's directors, officers, employees, partners, affiliates, agents, successors, and assigns with respect to all losses, including

reasonable attorneys' and environmental consultants' fees, arising out of or resulting from Lessee's occupancy or use of the Leased Premises, or the violation of any Environmental Law, by Lessee or Lessee's agents, assignees, sublessees, contractors, or invitees. This indemnification applies whether or not the concentrations of any such Hazardous Material is material, the concentrations exceed state or federal maximum contaminant or action levels, or any government agency has issued a clean-up or other order. This indemnification shall survive the expiration or termination of this Lease. This indemnification includes, but is not necessarily limited to:

- (1) Losses attributable to diminution in the value of the Leased Premises;
- (2) Loss or restriction of use of rentable space(s) in the Leased Premises;
- (3) Adverse effect on the marketing of any space(s) in the Leased Premises;
- (4) All other liabilities, obligations, penalties, fines, claims, actions (including remedial or enforcement actions of any kind and administrative or judicial proceedings, orders, or judgments), damages (including consequential and punitive damages), and costs (including attorney, consultant, and expert fees and expenses) resulting from the release or violation; and,
- (5) All costs (including reasonable attorneys' fees, consulting fees and subcontracted costs) incurred by Lessor in undertaking any assessment or remediation of the Leased Premises that might not have been fully resolved by Lessee by the time this Lease terminates or expires.

Lessor shall have a direct right of action against Lessee even if no third party has asserted a claim. Furthermore, Lessor shall have the right to assign said indemnity.

- (g) Termination of Lease. Upon the expiration or earlier termination of the term of the Lease, Lessee shall: (i) cause all Hazardous Materials previously owned, stored, or used by Lessee to be removed from the Leased Premises and disposed of in accordance with all applicable provisions of law; (ii) remove any underground or aboveground storage tanks or other containers installed or used by Lessee, or its predecessors, to store any Hazardous Material on the Leased Premises, and repair any damage to the Leased Premises caused by such removal; (iii) cause any soil or other portion of the Leased Premises which has become contaminated by any Hazardous Material stored or used by Lessee, or its predecessors, to be decontaminated, detoxified, or otherwise cleaned-up in accordance with the

applicable requirements of any relevant government authorities; and (iv) surrender possession of the Leased Premises to Lessor free of contamination attributable to Hazardous Materials generated or used by Lessee or stored or disposed of by any party other than Lessor in or on the Leased Premises.

45. STORAGE TANKS:

- (a) **Underground Storage Tanks.** No underground storage tanks (“USTs”) shall be permitted to be installed on the Leased Premises during the term of this Lease without the prior written consent of the Lessor’s Executive Director in his or her sole and absolute discretion. In the event Lessee obtains such approval to install a UST on the Leased Premises, Lessee shall be responsible for complying with all laws and regulations pertaining to such UST, including tank monitoring of such UST as required by the County of San Diego Hazardous Material Management Division (HMMD) or any other responsible agency. Lessee further agrees to take responsibility for reporting unauthorized releases from USTs to HMMD and the Lessor within twenty-four (24) hours of such unauthorized release. Lessee will be responsible for all fees and costs related to the unauthorized release of any Hazardous Material including, but not limited to: investigative, surface and groundwater clean-up, and expert and agency fees. Lessee shall maintain evidence of financial responsibility for taking corrective action and for compensating third parties for bodily injury and/or property damage caused by a release from a UST. Lessee further agrees to be responsible for maintenance and repair of the USTs; obtaining tank permits; filing a business plan with HMMD or other responsible agency; and for paying UST fees, permit fees, and other regulatory agency fees relating to USTs.

Lessee agrees to keep complete and accurate records on the Leased Premises for a period of not less than thirty-six (36) months from the applicable events including, but not limited to, permit applications, monitoring, testing, equipment installation, repairing and closure of the USTs, and any unauthorized releases of Hazardous Materials. Lessee also agrees to make such records available for Lessor or responsible agency inspection. Lessee further agrees to include a copy of Health and Safety Code, Chapter 6.7, Section 25299, as part of any agreement between Lessee and any operator of USTs.

Furthermore, Lessee shall be responsible for compliance with all other laws and regulations presently existing, or hereinafter enacted, applicable to USTs, including without limitation any such laws and regulations which alter any of the above requirements.

- (b) **Aboveground Storage Tanks.** No aboveground storage tanks (“ASTs”) shall be permitted to be installed on the Leased Premises during the term of this

Lease without the prior written consent of the Lessor's Executive Director in his or her sole and absolute discretion. In the event Lessee obtains such approval to install an AST, Lessee shall be responsible for complying with all laws and regulations pertaining to such AST. Lessee shall, in accordance with this Lease and applicable laws and regulations, secure and pay for all necessary permits and approvals, prepare a spill prevention control counter measure plan and conduct periodic inspections to ensure compliance therewith, including conformance with the latest version of said applicable laws and regulations. In addition, Lessee shall maintain and repair said tanks to conform and comply with all other applicable laws and regulations for ASTs, including without limitation all of the requirements of Health & Safety Code, Chapter 6.67, Sections 25270 through 25270.13 as presently existing or as hereinafter amended, including without limitation conducting daily visual inspection of said tanks, allowing the San Diego Regional Water Quality Control Board ("SDRWQCB"), Lessor, and/or responsible agency, to conduct periodic inspections. Lessee also shall comply with valid orders of the SDRWQCB, filing the required storage tank statement and payment of the fee therefore, establishing and maintaining the required monitoring program and systems, reporting spills as required, and payment of lawfully imposed penalties as provided therein and as otherwise provided by law. The Lessee shall be responsible for all costs associated with any unauthorized release from ASTS, including but not limited to, investigative, surface and groundwater clean-up, and expert and agency fees.

46. ENVIRONMENTAL DISCLOSURES:

Lessee understands and agrees that the Leased Premises are being leased in an "as is, with all faults" condition and that improvements, grading, filling, removal of existing improvements, and relocation of utility lines shall be made and performed by Lessee at the sole cost and expense of Lessee. Lessee further understands and agrees that the "as-is, with all faults" condition of the Leased Premises includes any contamination of the Leased Premises, including structures, soils, groundwater, and adjacent San Diego Bay water and sediment, and that information received from Lessor regarding such matters may not be complete or accurate and should not be accepted as such.

Lessee hereby acknowledges that excavation of soils from the Leased Premises could result in exportation of a regulated waste requiring appropriate characterization, handling, transport and disposal (together "Regulated Waste Removal"). Lessor takes no responsibility and assumes no liability whatsoever for Regulated Waste Removal. Accordingly, Lessee hereby waives any claim, or potential claim, it may have to recover costs or expenses arising out of or associated with Regulated Waste Removal and agrees to indemnify, defend and hold harmless Lessor from and against any and all claims, liabilities, losses, damages, costs, and expenses arising from, out of, or in any way related to Regulated Waste Removal.

Lessor accepts no liability or responsibility for ensuring that Lessee's workers, including without limitation those conducting testing, construction and maintenance activities on the Leased Premises, are satisfactorily protected from residual contaminants in 29 Code of Federal Regulations ("CFR"). Lessee shall assess all human health risks from vapor transport or direct contact with residual hazardous substances or contaminants and incorporate such engineering and institutional controls as may be required to sufficiently protect human health of onsite workers and transient visitors. Lessee hereby waives any claim, or potential claim, it may have to recover any damages, losses, costs and expenses related to worker exposure or alleged exposure to any residual onsite contamination and to indemnify, defend and hold harmless Lessor from and against any and all such claims, liabilities, losses, damages, costs, and expenses.

47. "AS-IS" LEASE AND WAIVERS:

Lessee's execution of the Lease shall fully and finally constitute:

- (a) Lessee's Acknowledgment. Lessee's acknowledgment that Lessor has given to Lessee sufficient opportunity to consider, inspect and review, to Lessee's complete satisfaction: (1) any and all rights, appurtenances, entitlements, obligations, and liabilities concerning the Leased Premises; (2) the physical condition of the Leased Premises, including, without limitation, the condition of the buildings (if any) and the soils, subsoil media, and groundwaters at or under the Leased Premises; (3) the effect upon the Leased Premises of any and all applicable federal, state or local statutes, ordinances, codes, regulations, decrees, orders, laws or other governmental requirements (collectively, "Applicable Laws"); (4) the development potential of the Premises including without limitation on the preceding clause (3), the effect of all Applicable Laws concerning land use, environmental quality and maintenance, endangered species, and traffic regulation; (5) the financial prospects of the Leased Premises and local market conditions; (6) Lessee's determination of the feasibility of Lessee's intended use and enjoyment of the Leased Premises; and (7) all other facts, circumstances, and conditions affecting, concerning or relating to the Leased Premises. The land use; the environmental, biological, physical and legal condition of the Leased Premises; the feasibility of Lessee's intended use and enjoyment of the Leased Premises and such other facts, circumstances and conditions being collectively referred to herein as the "Condition of the Leased Premises"; and, without limitation on any other provision of this Lease, Lessee expressly assumes the risk that adverse conditions affecting the Leased Premises have not been revealed by Lessee's investigations.
- (b) Only Lessor's Express Written Agreements Binding. Lessee acknowledges and agrees that no person acting on behalf of Lessor is authorized to make, and that except as expressly set forth in this Lease, neither Lessor nor anyone acting for or on behalf of Lessor has made, any representation,

warranty, statement, guaranty or promise to Lessee, or to anyone acting for or on behalf of Lessee, concerning the Condition of the Leased Premises or any other aspect of the Leased Premises. Lessee further acknowledges and agrees that no representation, warranty, agreement, statement, guaranty or promise, if any, made by any person acting on behalf of Lessor which is not expressly set forth in this Lease will be valid or binding on Lessor.

- (c) **As-Is Lease.** Lessee further acknowledges and agrees that Lessee's execution of this Lease shall constitute Lessee's representation, warranty and agreement that the Condition of the Leased Premises has been independently verified by Lessee to its full satisfaction, and that, except to the extent of the express covenants of Lessor set forth in this Lease, Lessee will be leasing the Leased Premises based solely upon and in reliance on its own inspections, evaluations, analyses and conclusions, or those of Lessee's representatives; and that LESSEE IS LEASING THE LEASED PREMISES IN ITS "AS-IS, WITH ALL FAULTS" CONDITION AND STATE OF REPAIR INCLUSIVE OF ALL FAULTS AND DEFECTS, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE LESSEE'S EXECUTION OF THIS LEASE. Without limiting the scope or generality of the foregoing, Lessee expressly assumes the risk that the Leased Premises do not or will not comply with any Applicable Laws now or hereafter in effect.
- (d) **Waivers, Disclaimers and Indemnity.**
- (1) **Waiver and Disclaimer.** Lessee hereby fully and forever waives, and Lessor hereby fully and forever disclaims, all warranties of whatever type or kind with respect to the Leased Premises, whether expressed, implied or otherwise including, without limitation, those of fitness for a particular purpose, tenant ability, habitability or use.
- (2) **Lessor's Materials.** Lessee further acknowledges that any information and reports including, without limitation, any engineering reports, architectural reports, feasibility reports, marketing reports, soils reports, environmental reports, analyses or data, or other similar reports, analyses, data or information of whatever type or kind which Lessee has received or may hereafter receive from Lessor or its agents or consultants have been furnished without warranty of any kind and on the express condition that Lessee will make its own independent verification of the accuracy, reliability and completeness of such information and that Lessee will not rely thereon. Accordingly, subject to terms of Paragraph 48(e) below, Lessee agrees that under no circumstances will it make any claim against, bring any action, cause of action or proceeding against, or assert any liability upon, Lessor or any of the persons or entities who prepared or furnished any of the above information or materials as a result of the inaccuracy,

unreliability or incompleteness of, or any defect or mistake in, any such information or materials and Lessee hereby fully and forever releases, acquits and discharges Lessor and each person furnishing such information or materials of and from, any such claims, actions, causes of action, proceedings or liability, whether known or unknown.

(e) Release and Waiver.

- (1) Release. Except to the extent of Claims (as defined below) against Lessor arising from any breach by Lessor of its covenants and obligations expressly provided in this Lease, Lessee, on behalf of Lessee, its successors and assigns, hereby fully and forever releases, acquits and discharges Lessor of and from, and hereby fully forever waives:

Any and all claims, whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent, that Lessee or any of Lessee's successors or assigns now has or may have or which may arise or be asserted in the future arising out of, directly or indirectly, or in any way connected with: (A) any act or omission of Lessor (or any person acting for or on behalf of Lessor or for whose conduct Lessor may be liable), whether or not such act be the active, passive or sole negligence of Lessor, in connection with prior ownership, maintenance, operation or use of the Leased Premises; (B) any condition of environmental contamination or pollution at the Leased Premises (including, without limitation, the contamination or pollution of any soils, subsoil media, surface waters or groundwaters at the Leased Premises); (C) to the extent not already included in clause (B) above, the prior, present or future existence, release or discharge, or threatened release, of any Hazardous Materials at the Leased Premises, (including, without limitation, the release or discharge, or threatened release, of any Hazardous Materials into the air at the Leased Premises or into any soils, subsoils, surface waters or groundwaters at the Leased Premises); (D) the violation of, or noncompliance with, any Environmental Requirement or other Applicable Law now or hereafter in effect, however and whenever occurring; (E) the condition of the soil at the Leased Premises; (F) the condition of any improvements located on the Leased Premises including, without limitation, the structural integrity and seismic compliance of such improvements; (G) any matters which would be shown on an accurate ALTA land survey of the Leased Premises (including, without limitation, all existing easements and encroachments, if any); (H) all Applicable Laws now or hereafter in effect; (I) matters which would be apparent from a visual inspection of the Leased Premises; or (J) to the extent not already covered by any

of the foregoing clauses (A) through (I) above, the use, maintenance, development, construction, ownership or operation of the Leased Premises by Lessor or any predecessor(s)-in-interest in the Leased Premises of Lessor.

- (2) Waiver of Civil Code Section 1542. With respect to all releases made by Lessee under or pursuant to this Paragraph 47, Lessee hereby waives the application and benefits of California Civil Code § 1542 and hereby verifies that it has read and understands the following provision of California Civil Code § 1542:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor."

Lessee: _____

48. JOINT AND SEVERAL LIABILITY:

If Lessee, as a party to this Lease, is a partnership; joint venture; or is comprised of more than one party or entity, or a combination thereof; the obligations imposed on Lessee under this Lease shall be joint and several, and each general partner, joint venturer, party or entity of Lessee shall be jointly and severally liable for said obligations. Furthermore, nothing herein shall be deemed or construed as creating a partnership or joint venture between Lessor and Lessee, or between Lessor and any other entity or party, or cause Lessor to be responsible in any way for the debts or obligations of Lessee, or any other party or entity.

49. DISPUTE RESOLUTION:

Except for (i) a dispute or disagreement as to the amount of rent that Lessee is to pay Lessor or (ii) a default in the payment of rent, all other disputes or disagreements between or among the parties arising out of or relating to the terms, conditions, interpretation, performance, default or any other aspect of this Lease, such parties shall first attempt to resolve the dispute informally. In the event the dispute is not resolved informally, prior to and as a precondition to the initiation of any legal action or proceeding, the parties shall refer the dispute to mediation before a retired State or Federal judge mutually selected by the parties. The dispute shall be mediated through informal, nonbinding joint conferences or separate caucuses with an impartial third party mediator who will seek to guide the parties to a consensual resolution of the dispute. The mediation proceeding shall be conducted within thirty (30) days (or any mutually agreed longer period) after referral, and shall continue until any party involved concludes, in good faith, that there is no reasonable possibility of resolving the dispute without resort to a legal action or proceeding. All costs of the mediation shall be shared equally by the parties involved. Each party shall bear its own attorneys' fees and other costs incurred in connection with the mediation. In the event the

parties are unable to resolve the dispute through mediation, in addition to any other rights or remedies, any party may institute a legal action.

50. USA PATRIOT ACT

Lessee represents and warrants that (i) Lessee and each person or entity owning an interest in Lessee is not now, and shall not during the term of this Lease become, a person or entity with whom Lessor or any citizen of the United States is restricted from doing business with under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, H.R. 3162, Public Law 107-56 (commonly known as the "USA Patriot Act") and regulations promulgated pursuant thereto, or under any successor statutes or regulations, including, without limitation, persons and entities ("Prohibited Persons") named on the Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Assets Control, Department of the Treasury ("OFAC") and/or on any other similar list pursuant to any authorizing statute, executive order or regulation, nor a person or entity (also, a "Prohibited Person") with whom a citizen of the United States is prohibited to engage in transactions by any trade embargo, economic sanction, or other prohibition of United States law, regulation, or Executive Order of the President of the United States, (ii) none of the funds or other assets of Lessee constitute property of, or are beneficially owned, directly or indirectly, by any Prohibited Person, (iii) no Prohibited Person has any interest of any nature whatsoever in Lessee (whether directly or indirectly), (iv) none of the funds of Lessee have been derived from any unlawful activity with the result that the investment in Lessee is prohibited by law or that the Lease is in violation of law, and (v) Lessee has implemented procedures, and will consistently apply those procedures, to ensure the foregoing representations and warranties remain true and correct at all times.

(MEMORANDUM OF LEASE FOLLOWS)

51. MEMORANDUM OF AMENDED, RESTATED AND COMBINED LEASE:

This is the final Paragraph and Memorandum of Amended, Restated and Combined Lease ("Lease"), hereinafter "Memorandum," dated _____, 20__, between SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, Lessor, and WESTGROUP KONA KAI, LLC., a Delaware limited liability company, dba Kona Kai Resort and Marina, Lessee, concerning the Leased Premises described in Exhibits "A" and "B," attached hereto and by this reference made a part hereof.

For good and adequate consideration, Lessor leases the Leased Premises to Lessee, and Lessee hires them from Lessor, for the term and on the provisions contained in the Lease dated _____, 20__, including without limitation provisions prohibiting assignment, subleasing, and encumbering said leasehold without the express written consent of Lessor in each instance, all as more specifically set forth in said Lease, which said Lease is incorporated in this Memorandum by this reference.

The term is **INSERT REMAINING TERM ON HOTEL LEASE** (__) years subject to the potential increase in term to **INSERT REMAINING TERM ON HOTEL LEASE PLUS 15 YEARS** (__) years, beginning _____, 20__, and ending April 30, 2064.

This Memorandum is not a complete summary of the Lease. Provisions in this Memorandum shall not be used in interpreting the Lease provisions. In the event of conflict between this Memorandum and other parts of the Lease, the other parts shall control. Execution hereof constitutes execution of the Lease itself.

Port Attorney

SAN DIEGO UNIFIED PORT DISTRICT

By _____

By _____

Shaun Sumner
Assistant Vice President
Real Estate Development

**WESTGROUP KONA KAI, LLC,
a Delaware limited liability company
dba KONA KAI RESORT AND MARINA**

By _____

Signature

PRINT NAME _____

PRINT TITLE _____

GUARANTY

_____, hereinafter "Guarantor," whose address is _____, as a material inducement to and in consideration of the SAN DIEGO UNIFIED PORT DISTRICT, hereinafter "Lessor," entering into a written Amended, Restated and Combined Lease, hereinafter "the Lease" with WESTGROUP KONA KAI, LLC, hereinafter "Lessee," dated the same date as this Guaranty, pursuant to which Lessor leased to Lessee, and Lessee leased from Lessor, premises located in the city of San Diego, County of San Diego, California, in accordance with the Lease on file in the Office of the Clerk of Lessor, Document No. _____, attached to this Guaranty, and made a part of it, unconditionally guarantees and promises to and for the benefit of Lessor, that Lessee shall perform the provisions of the Lease for which it is responsible.

If Guarantor is more than one person, Guarantor's obligations are joint and several, and are independent of Lessee's obligations. A separate action may be brought or prosecuted against any Guarantor, whether the action is brought or prosecuted against any other Guarantor, Lessee, or all, or whether any other Guarantor, Lessee, or all are joined in the action.

Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this Guaranty.

The provisions of the Lease may be changed by agreement between Lessor and Lessee at any time, without the consent of or without notice to Guarantor. The Guarantor shall guaranty the performance of the Lease, as changed. Assignment of the Lease (as permitted by the Lease) shall not affect this Guaranty. Lessor's failure or delay in the enforcement of any of its rights also shall not affect this Guaranty.

If Lessee defaults under the Lease, Lessor can proceed immediately against Guarantor, Lessee, or both, or Lessor can enforce against Guarantor, Lessee, or both, any rights that it has under the Lease or pursuant to applicable laws. If the Lease terminates and Lessor has any rights it can enforce against Lessee after termination, Lessor can enforce those rights against Guarantor without giving prior notice to Lessee, Guarantor, or both, or without making any demand on either of them.

Guarantor waives the right to require Lessor to: (1) proceed against Lessee; (2) proceed against or exhaust any security that Lessor holds from Lessee; or (3) pursue any other remedy in Lessor's power. Guarantor waives any defense by reason of any disability of Lessee, and waives any other defense based on the termination of Lessee's ability from any cause.

Until all Lessee's obligations under the Lease have been discharged in full, Guarantor has no right of subrogation against Lessee. Guarantor waives: (i) its right to enforce any remedies that Lessor now has, or later may have, against Lessee; (ii) any right to participate in any security now or later held by Lessor; (iii) all presentments, demand for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, and notices of acceptance of this Guaranty; and (iv) all notices of the existence, creation, or incurrence of new or additional obligations.

If Lessor is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay Lessor all costs incurred, including but not limited to reasonable attorney fees.

Guarantor's obligations under this Guaranty shall be binding on any successor of Guarantor. As used herein, a successor of Guarantor shall mean any assignee, transferee, personal representative, heir, or other person or entity succeeding lawfully, and pursuant to the provisions of said Lease, to the rights or obligations of Guarantor.

Also as used herein, Lessor shall mean Lessor's successors and assigns, if any.

DATED: _____, 20__

GUARANTOR'S NAME

By _____
Signature

PRINT NAME _____

PRINT TITLE _____

CO-GUARANTOR'S NAME

By _____
Signature

PRINT NAME _____

PRINT TITLE _____

DRAFT

(FOR USE BY WESTGROUP KONA KAI)

(STATE OF WASHINGTON)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of

(COUNTY OF KING)

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

OPTIONAL

Though the information below is not required by law, it may prove valuable to person relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name _____

- Individual
- Corporate Officer --Title(s): _____
- Partner -- Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

Signer's Name _____

- Individual
- Corporate Officer --Title(s): _____
- Partner -- Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

(FOR USE BY SAN DIEGO UNIFIED PORT DISTRICT)

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

OPTIONAL

Though the information below is not required by law, it may prove valuable to person relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name _____

- Individual
Corporate Officer --Title(s):
Partner -- Limited General
Attorney in Fact
Trustee
Guardian or Conservator
Other:

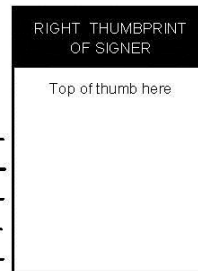
Signer is Representing: _____



Signer's Name _____

- Individual
Corporate Officer --Title(s):
Partner -- Limited General
Attorney in Fact
Trustee
Guardian or Conservator
Other:

Signer is Representing: _____



**Legal Description for
Westgroup Kona Kai, LLC
Drawing No. 001-037**

All that certain portion of land conveyed to the San Diego Unified Port District by that certain Act of Legislature of the State of California pursuant to Chapter 67, Statutes of 1962, First Extraordinary Session, as amended, and delineated on that certain Miscellaneous Map No. 564, filed in the Office of the San Diego County Recorder on May 28, 1976, File No. 76-164686, in the City of San Diego, County of San Diego, State of California, and more particularly described as follows:

Parcel No. 1

Commencing at a 3" diameter brass disk monument stamped "SDUPD-003" as shown on Record Of Survey Map No. 16668, filed in the Office of the San Diego County Recorder on July 25, 2000; thence leaving said monument South 70°41'12" West a distance of 424.00 feet (calc.) to the **True Point of Beginning**; thence South 36°04'50" West a distance of 770.96 feet to the beginning of a tangent 1,148.00 foot radius curve, concave northwesterly; thence southwesterly along the arc of said curve through a central angle of 30°02'38" an arc distance of 601.97 feet to the beginning of a 295.00 foot radius compound curve, concave northerly, a radial bearing to said point bears South 23°52'32" East; thence southwesterly along the arc of said curve through a central angle of 49°56'50" an arc distance of 257.16 feet; thence North 63°55'42" West a distance of 145.64 feet; thence North 00°01'12" West a distance of 197.88 feet to a point on the southeasterly property line of San Diego Unified Port District Parcel No. 2 as further described in this document; thence along said southeasterly property line the following courses: North 87°16'45" East a distance of 96.25 feet; thence North 79°36'54" East a distance of 145.13 feet; thence North 74°25'56" East a distance of 210.37 feet; thence North 46°33'13" East a distance of 70.77 feet; thence South 43°26'47" East a distance of 10.00 feet; thence North 46°33'13" East a distance of 7.00 feet; thence North 43°26'47" West a distance of 10.00 feet; thence North 46°33'13" East a distance of 60.77 feet; thence North 40°10'01" East a distance of 98.00 feet; thence North 41°17'31" East a distance of 350.28 feet; thence South 48°42'29" East a distance of 10.00 feet; thence North 41°17'31" East a distance of 7.00 feet; thence North 48°42'29" West a distance of 10.00 feet; thence North 41°17'31" East a distance of 360.28 feet; thence North 42°49'46" East a distance of 75.35 feet; thence leaving said southeasterly property line South 53°56'00" East a distance of 206.65 feet to the **True Point of Beginning**, containing 428,927 square feet or 9.85 acres of tidelands area.

Parcel No. 2


Commencing at a 3" diameter brass disk monument stamped "S.D.U.P.D.-003" as shown on Record Of Survey Map No. 16668, filed in the Office of the San Diego County Recorder on July 25, 2000; thence leaving said monument North 00°39'12" West a distance of 539.83 feet to the **True Point of Beginning**; thence South 46°07'37" West a distance of 550.02 feet; thence South 43°52'23" East a distance of 10.00 feet; thence South 44°28'55" West a distance of 7.00 feet; thence North 47°10'14" West a distance of 10.00 feet; thence South 42°49'46" West a distance of 309.55 feet; thence South 41°17'31" West a distance of 360.28 feet; thence South 48°42'29" East a distance of 10.00 feet; thence South 41°17'31" West a distance of 7.00 feet; thence North 48°42'29" West a distance of 10.00 feet; thence South 41°17'31" West a distance of 350.28 feet; thence South 40°10'01" West a distance of 98.00 feet; thence South 46°33'13" West a distance of 60.77 feet; thence South 43°26'47" East a distance of 10.00 feet; thence South 46°33'13" West a distance of 7.00 feet; thence North 43°26'47" West a distance of 10.00 feet; thence South 46°33'13" West a distance of 70.77 feet; thence South 74°25'56" West a distance of 210.37 feet; thence South 79°36'54" West a distance of 145.13 feet; thence South 87°16'45" West a distance of 96.25 feet; thence North 00°01'12" West a distance of 613.00 feet to a point of intersection with

the U.S. Pierhead Line, as said U. S. Pierhead Line is now established for the Bay of San Diego and delineated on map entitled "Harbor Lines, San Diego Bay, California, File No. (D.O. Series) 426", approved by the Secretary of the Army, April 29, 1963, and filed in the Office of the District Engineer, Los Angeles, California; thence along said U.S. Pierhead Line North 47°27'48" East a distance of 1,785.14 feet; thence South 42°32'12" East a distance of 556.08 feet to the **True Point of Beginning**, containing 1,235,218 square feet or 28.36 acres of water area.

The above described land area is delineated on the San Diego Unified Port District Drawing No. 001-037, dated 21 September 2016 and made a part of this agreement.

All bearings and distances in the above legal descriptions are grid and based upon the California Coordinate System of 1983, Zone 6, Epoch 1991.35, in accordance with Section 8801-8819 of the California Public Resources Code.

This legal description was prepared by me or under my direction in conformance with the Land Surveyors Act.



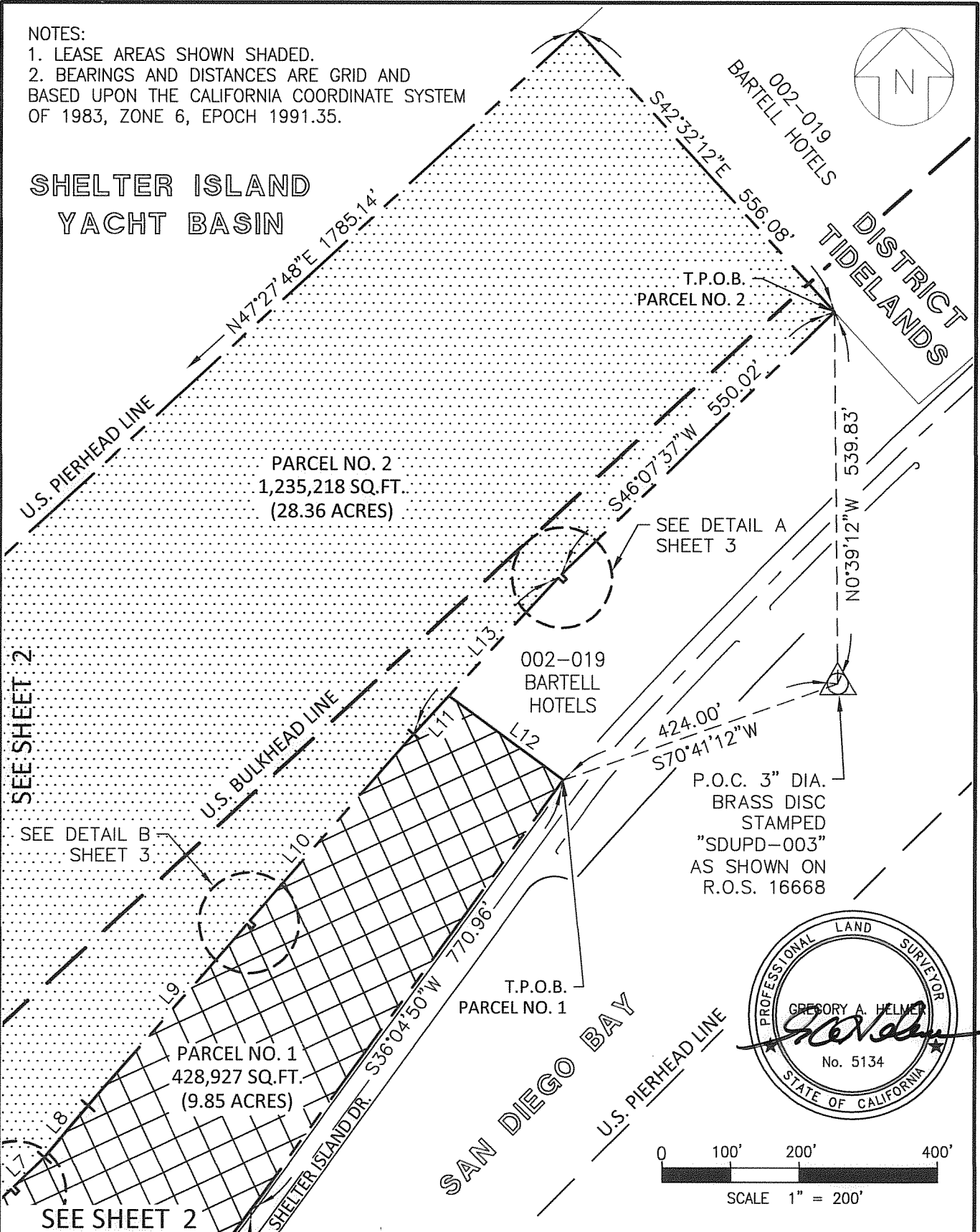
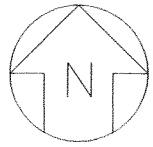
Gregory A. Helmer, L.S. 5134 9/21/16
Date



NOTES:

1. LEASE AREAS SHOWN SHADED.
2. BEARINGS AND DISTANCES ARE GRID AND BASED UPON THE CALIFORNIA COORDINATE SYSTEM OF 1983, ZONE 6, EPOCH 1991.35.

SHELTER ISLAND
YACHT BASIN



SEE SHEET 2

SEE DETAIL B SHEET 3

SEE SHEET 2

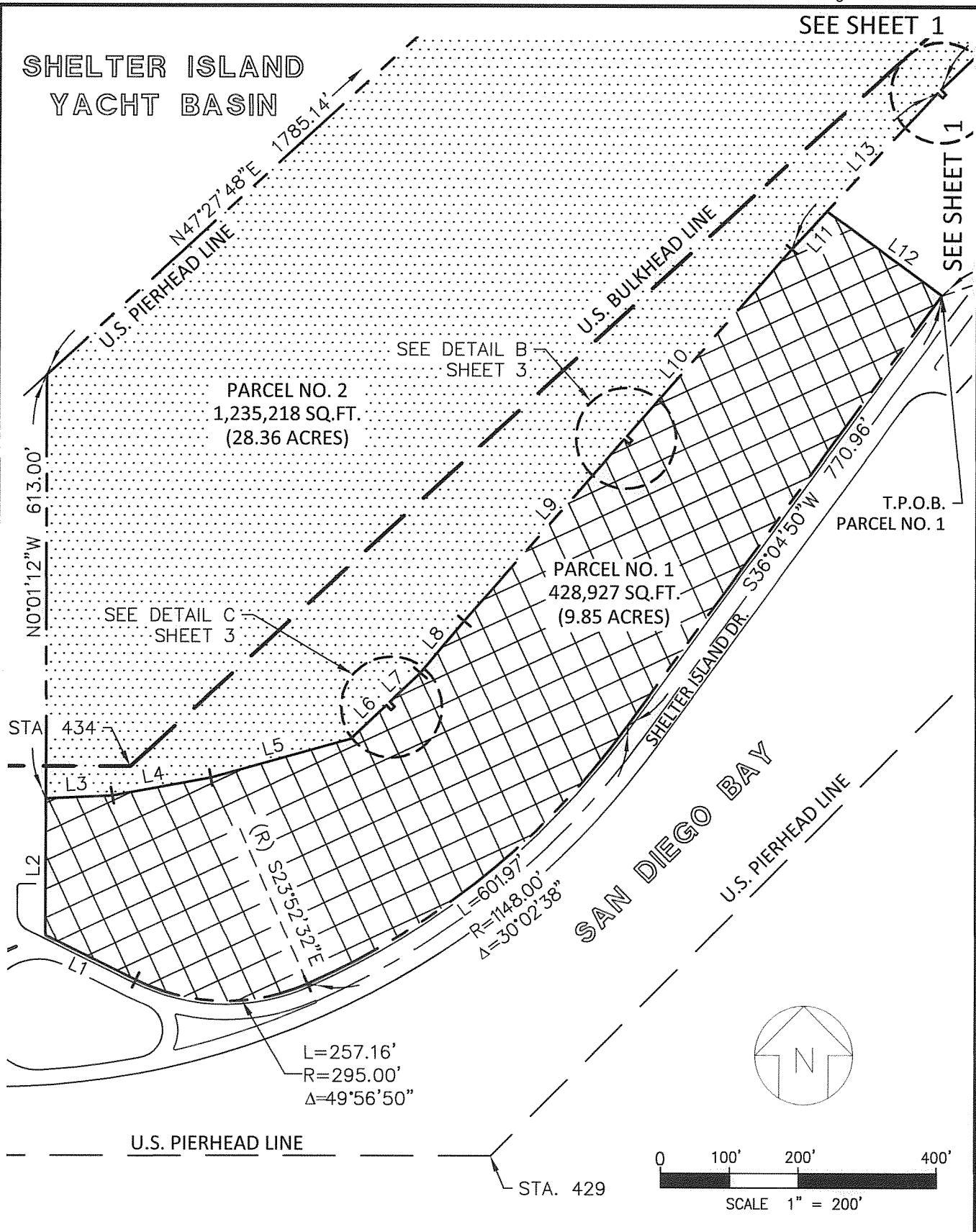
DRAWN WMJ
 CHECKED JRN
 REVIEWED GAH

SAN DIEGO UNIFIED PORT DISTRICT
TIDELAND LEASE
 WITHIN CORPORATION LIMITS OF SAN DIEGO
WESTGROUP KONA KAI, LLC

DATE 09/21/2016
 SCALE 1" = 200'
 REF. _____
 DRAWING NO.
001-037
 SHEET 1 OF 3

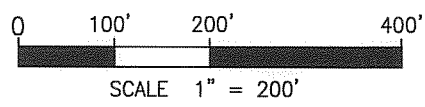
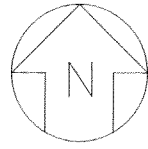
SHELTER ISLAND YACHT BASIN

SEE SHEET 1



SEE SHEET 1

T.P.O.B.
PARCEL NO. 1



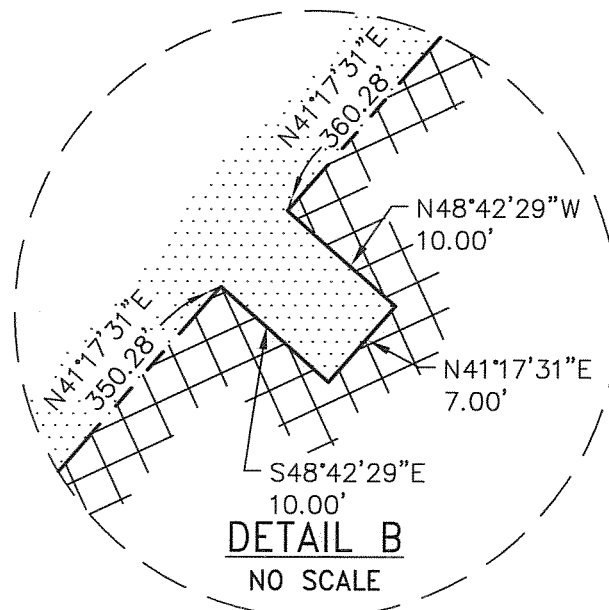
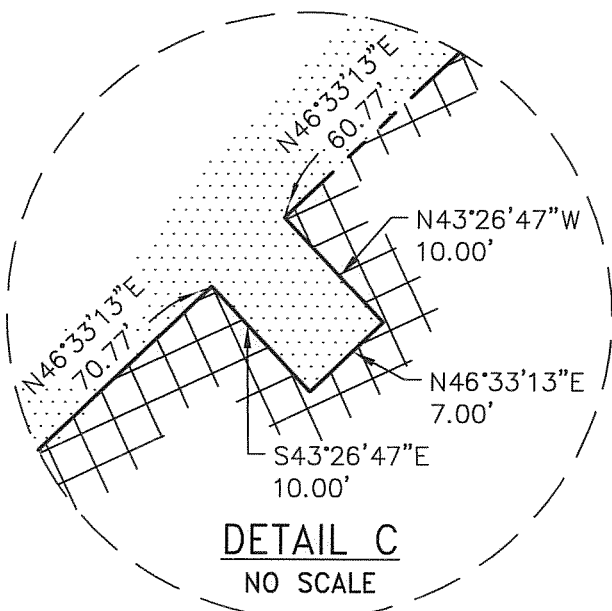
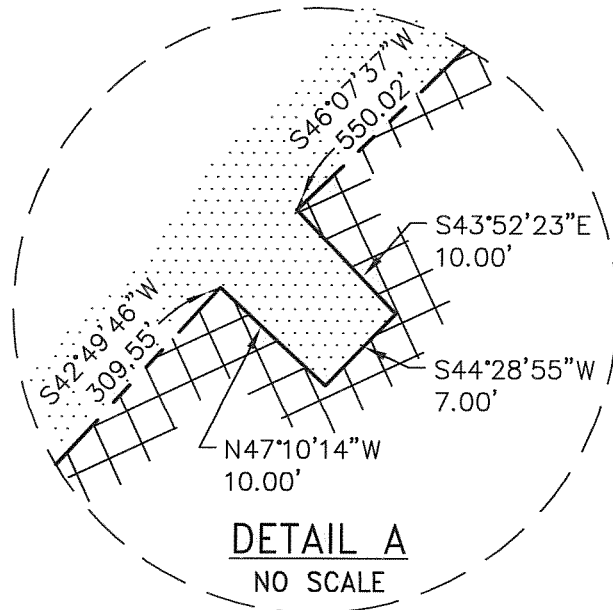
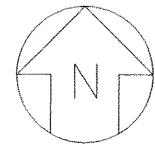
DRAWN WMJ
CHECKED JRN
REVIEWED GAH

SAN DIEGO UNIFIED PORT DISTRICT
TIDELAND LEASE
WITHIN CORPORATION LIMITS OF SAN DIEGO
WESTGROUP KONA KAI, LLC

DATE 09/21/2016
SCALE 1" = 200'
REF. _____

DRAWING NO.
001-037
SHEET 2 OF 3

LINE DATA TABLE		
LINE #	LENGTH	BEARING
L1	145.64'	N63°55'42"W
L2	197.88'	N0°01'12"W
L3	96.25'	N87°16'45"E
L4	145.13'	N79°36'54"E
L5	210.37'	N74°25'56"E
L6	70.77'	N46°33'13"E
L7	60.77'	N46°33'13"E
L8	98.00'	N40°10'01"E
L9	350.28'	N41°17'31"E
L10	360.28'	N41°17'31"E
L11	75.35'	N42°49'46"E
L12	206.65'	S53°56'00"E
L13	309.55'	S42°49'46"W



DRAWN WMJ
 CHECKED JRN
 REVIEWED GAH

SAN DIEGO UNIFIED PORT DISTRICT
 TIDELAND LEASE
 WITHIN CORPORATION LIMITS OF SAN DIEGO
WESTGROUP KONA KAI, LLC

DATE 09/21/2016
 SCALE 1" = 200'
 REF. _____

DRAWING NO.
001-037
 SHEET 3 OF 3