

**Final Form Draft**

**SAN DIEGO UNIFIED PORT DISTRICT**

**AMENDED, RESTATED, AND COMBINED LEASE TO**

**BARTELL HOTELS**

**OF PROPERTY LOCATED AT**

**1901 TO 2051 SHELTER ISLAND DRIVE**

**SAN DIEGO, CALIFORNIA**

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## LEASE

THIS AMENDED, RESTATED, AND COMBINED LEASE ("Lease") is entered into as of \_\_\_\_\_, 20\_\_\_\_ by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation ("Landlord") and BARTELL HOTELS, a California Limited Partnership ("Tenant").

WHEREAS, Landlord and Tenant, on the 12<sup>th</sup> day of January, 1999, entered into a lease ("Best Western Island Palms Lease") of certain tidelands in the city of San Diego, California, which Best Western Island Palms Lease is on file in the Office of the Clerk of Landlord bearing Document No. 38474; and

WHEREAS, Landlord and Tenant, on the 4<sup>th</sup> day of May, 1999, entered into an Agreement for Amendment of Best Western Island Palms Lease, Amendment No. 1 ("Amendment No. 1 to Best Western Island Palms Lease"), which Amendment No. 1 to Best Western Island Palms Lease is on file in the Office of the Clerk of Landlord bearing Document No. 39004; and

WHEREAS, Landlord and Tenant, on the 16<sup>th</sup> day of January, 2014, entered into an amended and restated lease ("Best Western Island Palms AR Lease") of certain tidelands in the city of San Diego, California, which Best Western Island Palms AR Lease is on file in the Office of the Clerk of Landlord bearing Document No. 61061; and

WHEREAS, Landlord and Tenant, on the 8<sup>th</sup> day of September, 2015, entered into an Agreement for Amendment of Best Western Island Palms AR Lease, Amendment No. 1 ("Amendment No. 1 to Best Western Island Palms AR Lease"), which Amendment No. 1 to AR Lease is on file in the Office of the Clerk of Landlord bearing Document No. 64031; together with Best Western Island Palms AR Lease and Amendment No. 1 to Best Western Island Palms AR Lease, the ("Current Best Western Island Palms Lease"); and

WHEREAS, Landlord and Tenant, on the 1<sup>st</sup> day of May, 2008, entered into a lease ("Island Palms Lease") of certain tidelands in the city of San Diego, California, which Island Palms West Lease is on file in the Office of the Clerk of Landlord bearing Document No. 53352; and

WHEREAS, Landlord and Tenant, on the 5<sup>th</sup> day of May, 2009, entered into an Agreement for Amendment of Island Palms West Lease, Amendment No. 1 ("Amendment No. 1 to Island Palms West Lease"), which Amendment No. 1 to Island Palms West Lease is on file in the Office of the Clerk of Landlord bearing Document No. 55023; and

WHEREAS, Landlord and Tenant, on the 3<sup>rd</sup> day of November, 2009, entered into an Agreement for Amendment of Island Palms West Lease, Amendment No. 2 ("Amendment No. 2 to Island Palms West Lease"), which Amendment No. 2 to Island Palms West Lease is on file in the Office of the Clerk of Landlord bearing Document No. 55729; and

WHEREAS, Landlord and Tenant, on the 15<sup>th</sup> day of September, 2015, entered into an amended and restated lease ("Island Palms West AR Lease") of certain tidelands in the city of San Diego, California, which Island Palms West Lease is on file in the Office of the Clerk of Landlord bearing Document No. 64032; and

WHEREAS, Landlord and Tenant have mutually agreed to extend the term of the Current Best Western Island Palms Lease by Nine (9) Years and Five (5) Months for a fee of One Million Four Hundred Thousand (\$1,400,000) Dollars paid by Tenant along with the execution of an amended, restated, and combined lease; and

WHEREAS, Landlord and Tenant are mutually desirous of amending, restating, and combining said Current Best Western Island Palms Lease and Island Palms West AR Lease into one lease ("Amended, Restated, and Combined Lease");

For good and valuable consideration, Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, for the Term and upon the terms and conditions hereinafter set forth, the Premises described in Section 1.2 below, and, subject to the terms of the Article 23 of this Lease, Landlord conveys to Tenant and Tenant accepts from Landlord, all of Landlord's right, title and interest in and to the Existing Improvements and Landlord and Tenant hereby agree as follows:

## **1. BASIC LEASE PROVISIONS**

The following basic lease terms are referred to in other provisions of this Lease and constitute a part of this Lease and are to be read together with and constitute a part of the terms of this Lease.

### **1.1 Term (See Article 3):**

Forty (40) years as follows; provided, however, if there are Options to Extend provided below, the "Term" includes the applicable Option Term following exercise of the Option to Extend in accordance with the terms of this Lease:

**1.1.1 Commencement Date:** MAY 1, 2018

**1.1.2 Expiration Date:** APRIL 30, 2058

### **1.2 Premises:**

The Premises consist of the real property more particularly described in Exhibit "A" attached hereto and depicted in Exhibit "B" consisting of approximately 276,876 square feet of land area and approximately 467,650 square feet of water area located at 1901 to 2051 Shelter Island Drive, in the City of San Diego, California, more particularly described and delineated as Parcel Nos. 1 and 2 on Drawing No. XXXXXX. The Existing Improvements consist of: one three-story guest room building, three two-story guest room buildings, restaurant, meeting rooms, pool and Jacuzzi, outdoor deck, marina offices and facilities, dock and pier system, landscaping, fencing, signage, and parking.

### **1.3 Permitted Use (See Article 4):**

The Premises shall only be used as follows and for no other purpose (the "Permitted Use"): (i) a hotel and marina (the "Primary Use"), (ii) all uses which are normally and customarily ancillary or incidental to the Primary Use, and (iii) parking spaces serving the foregoing uses, and (iv) any other use of the Premises approved by the Landlord in writing provided such use is not restricted by the CDP, any Laws or the certified Port Master Plan ("PMP").

### **1.4 Rent Commencement Date and Rental Periods (See Section 5.1):**

The Rental Periods under the Lease shall be as follows:

**RENT COMMENCEMENT DATE - MAY 1, 2018**

**MAY 1, 2018 – APRIL 30, 2023**

**MAY 1, 2023 – APRIL 30, 2028**

**MAY 1, 2028 - APRIL 30, 2033**

**MAY 1, 2033 - APRIL 30, 2038**

**MAY 1, 2038 - APRIL 30, 2043**

**MAY 1, 2043 - APRIL 30, 2048**

**MAY 1, 2048 - APRIL 30, 2053**

**MAY 1, 2053 - APRIL 30, 2058**

**1.5 Minimum Annual Rent (See Article 5): The Minimum Annual Rent shall be as follows:**

First (1<sup>st</sup>) Lease Year through Fifth (5<sup>th</sup>) Lease Year: One Million Forty-Two Thousand Two Hundred and Thirty-One Dollars (\$1,042,231);

Commencing on the beginning of the sixth (6<sup>th</sup>) Lease Year, Minimum Annual Rent shall be as provided in Section 5.4 of this Lease.

**1.5.1 Minimum Rent CPI Adjustment Dates:**

**MAY 1, 2023**

**MAY 1, 2028**

**MAY 1, 2033**

**MAY 1, 2038**

**MAY 1, 2043**

**MAY 1, 2048**

**MAY 1, 2053**

**1.5.2 Minimum Rent Look Back Adjustment Dates (See Section 5.4.2):**

**MAY 1, 2023**

**MAY 1, 2028**

**MAY 1, 2033**

**MAY 1, 2038**

**MAY 1, 2043**

**MAY 1, 2048**

**MAY 1, 2053**

**1.6 Percentage Rent Rates (See Article 5):**

The Percentage Rent Rates are set forth in Section 5.5.1.

**1.7 Term Extension Rent (See Article 5):**

The Term Extension Rent shall be One Hundred Forty-One Thousand Seven Hundred Sixty-Eight Dollars (\$141,768) per Lease Year (Eleven Thousand Eight Hundred and Fourteen Dollars (\$11,814) per month) commencing on December 1, 2018 and shall continue for a period

of fifteen (15) years at which point the tenant's obligation to pay Term Extension Rent shall terminate.

## **1.8 Insurance (See Article 18):**

### **1.8.1 Commercial General Liability:**

Not less than Five Million Dollars (\$5,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage. The general aggregate shall be not less than Ten Million Dollars (\$10,000,000) unless a Five Million Dollars (\$5,000,000) per location aggregate limit is provided by separate endorsement.

### **1.8.2 Liquor Liability:**

Liquor Liability coverage in the amount of not less than Two Million Dollars (\$2,000,000) shall be obtained.

### **1.8.3 Marina Operator's Liability Insurance:**

Marina Operator's Liability Insurance in the amount of not less than Two Million Dollars (\$2,000,000) shall be obtained.

## **1.9 Notice Addresses (See Article 27):**

To Tenant:

Richard Bartell, President  
Bartell Hotels  
dba Best Western Island Palms  
4875 North Harbor Drive, 5<sup>th</sup> Floor  
San Diego, CA 92106

To Landlord:

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

## **2. GENERAL DEFINITIONS**

Certain initially capitalized terms used in this Lease are more particularly defined or are cross-referenced in the Definitions Addendum attached to this Lease. The definitions set forth in the Definitions Addendum are incorporated herein by this reference.

## **3. TERM**

### **3.1 Term.**

The "Term" of this Lease shall be the period commencing on the Commencement Date and ending on the Expiration Date as described in Section 1.1, unless sooner terminated or extended as provided in this Lease. The Term is set forth in Section 1.1.

### **3.2 Demolition and Remediation Security Amount.**

If a Demolition and Remediation Security Amount has been established pursuant to Section 7.4.2 prior to the expiration of the Initial Term and an Option to Extend exists and is

exercised, then, Tenant shall pay monthly as Additional Rent concurrent with the monthly payment of Greater of Rent, an amount required for the Demolition and Remediation Security Amount to grow by three percent (3%) per annum on a compounded basis during the Option Term.

### **3.3 Prior Agreements.**

Any and all existing entry agreements, permits, licenses, leases, or rental agreements between Landlord and Tenant relating to the Premises which have not already expired or terminated, are hereby terminated as of the date of this Lease. Notwithstanding the foregoing, any obligations of Tenant under such agreements accruing or arising on or prior to such termination, or which are otherwise required to be performed in connection with such termination or surrender of the Premises, or which by their terms survive such termination, shall remain enforceable by Landlord.

## **4. USE**

### **4.1 Permitted Use.**

Tenant agrees that the Premises shall be used only and exclusively for the Permitted Use described in Section 1.3 and for no other purpose whatsoever. This restriction on use of the Premises absolutely prohibits a change in use. Tenant acknowledges that the only parking it has a right to utilize in connection with the Permitted Use is the parking located on the Premises. Tenant acknowledges and agrees that with respect to any public parking located adjacent or proximate to the Premises, Tenant has only the rights of a member of the public notwithstanding any regular or long standing use of such parking by Tenant and / or its employees, visitors and patrons.

### **4.2 Hotel and Marina Use**

Tenant agrees that the Premises shall be used only and exclusively for an approximately 222-guest room hotel and a 188-slip marina, providing for the following ancillary uses conducted on or from the Premises

- (a) Rental of guest rooms;
- (b) Rental of banquet and conference rooms of approximately 4,000 square feet;
- (c) Full-service restaurant of approximately 96 seats including cocktail lounge on Parcel 1, and full-service restaurant of approximately 1,330 square feet on Parcel 2;
- (d) Health, recreational, and tennis facilities, including recreational lessons, for hotel guests and customers only;
- (e) Bicycle rentals for hotel customers and guests only;
- (f) Vending machines, including telephones;
- (g) Parking for hotel customers, boat slip renters, marina customers and guests only;
- (h) Office and counter areas for hotel management, for tourism/visitor-serving businesses and for maritime-related businesses;
- (i) 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. Boat Slip Renters shall be prohibited from renting or chartering 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 Tenant, or a subtenant approved by Landlord, as distinguished from a Boat Slip Renter, may rent or charter boats to the public for recreational use, but not for any other commercial purposes or activities as referenced in Section 4.2.3.

- (j) Rental of dock lockers, dinghy racks, and dry storage spaces to Boat Slip Renters only;
- (k) Boat launching and retrieving services for Boat Slip Renters only;
- (l) "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;
- (m) Office, storage, lockers, bathrooms, showers and laundry facilities for the adjacent marina;
- (n) Sailing school;
- (o) Sale of new and used boats;
- (p) Boat and breakfast operations with no more than six (6) guests per boat, the guest stays limited to seven (7) days in duration, no cooking on open flames permitted on said boats, the number of marina slips devoted to the boat and breakfast operations shall not exceed four percent (4%) of the total marina slips, and Tenant shall submit monthly written documentation to Landlord of the waste pump-out of said boats;
- (q) Installation of telecommunications equipment with prior written Landlord approval.

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

Tenant further agrees to comply with all project conditions and mitigation measures contained in the final Mitigated Negative Declaration for "Island Palms West Hotel Project," (UPD#83356-MND-682; Document #51133), and the resolution certifying said Negative Declaration, Resolution No. 2006-166, adopted by the Board of Port Commissioners on October 10, 2006.

#### Dock & Dine

During those periods of time, if any, that Landlord has in effect a policy, resolution, ordinance, statute, code or any other type of regulation relating to docking a boat in order to access restaurants, shopping or other types of facilities ("Recreational Dockage Requirement"), Tenant agrees to be in full compliance with such Recreational Dockage Requirement at all times during the Term of the Lease.

#### **4.2.2 Within Premises.**

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

#### **4.2.3 Specific Prohibited Uses.**

Furthermore, among the other prohibited uses under this Lease, 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 Premises.

#### **4.2.4 No Use Other Than Permitted Use.**

Except as expressly described in Section 4.1, Tenant shall not use or permit the Premises to be used for any other uses or purposes whatsoever. These restrictions on use of the Premises absolutely prohibit a change in use.

#### **4.3 Continuous Operations.**

From and after the Rent Commencement Date, Tenant shall actively and continuously use and operate the entire Premises and Improvements for the Permitted Use, except to the extent unable to do so by reason of a Force Majeure Event and except for temporary interruptions reasonably and directly related to Major Alterations permitted under Section 6.1 (provided an interruption in use and operation related to a Major Alteration shall not exceed one (1) year in the aggregate). Without limitation of the foregoing, at a minimum, the Premises shall be continuously open for business, appropriately staffed with personnel, on such days and for such hours as is customary for similar business operations in San Diego County, California. Tenant acknowledges and agrees that said active and continuous use and operation enhances the value of the lands within Landlord's jurisdiction; provides needed public service; and provides additional employment, taxes, and other benefits to the general economy of the area.

If the Permitted Use includes sewer pump-out facilities for vessels, said facilities shall be continuously open and available for use by the general public and Tenant may, but is not required to, charge a fee for such service.

#### **4.4 Compliance with Laws.**

Tenant agrees that, in all activities on or in connection with the Premises, and in all uses thereof, including without limitation the Permitted Use and any construction of Improvements or the making of any Alterations, it will abide by and comply with, and cause Tenant Parties to abide by and comply with, all applicable Laws at Tenant's sole cost and expense, and Landlord shall not have any obligations or responsibilities to comply with any applicable Laws as to the Premises or any use thereby by Tenant. In particular and without limitation, Tenant shall have the sole and exclusive obligation and responsibility, at Tenant's sole cost and expense, to comply with the requirements of: (i) the San Diego Unified Port District Code, including without limitation, Article 10 (Stormwater Management and Discharge Control), (ii) the ADA, including but not limited to regulations promulgated thereunder, (iii) applicable federal, state and local laws and regulations regarding employment and labor practices, including, without limitation, the provisions of Section 6.6 and Article 17 below, (iv) any Coastal Development Permit ("CDP") (including any conditions of approval or mitigation measures or project changes pursuant to the environmental review under the California Environmental Quality Act ("CEQA")) or any other California Coastal Commission ("CCC") regulations or local, state or Federal requirements now or hereafter affecting the Premises or the Improvements including the use or development thereof, and (v) any other development permits or approvals required by Landlord.

In addition, Tenant shall comply with and abide by such guidelines and requirements established by Landlord from time to time pursuant to the terms of the Lease upon written notice by Landlord to Tenant. Without limitation of the foregoing, any failure of Tenant to fully satisfy and fulfill the requirements and conditions under any CDP (including any conditions of approval or mitigation measures or project changes pursuant to the environmental review under CEQA) or any other CCC regulations or local, state or Federal requirements now or hereafter affecting the Premises or the Improvements including the use or development thereof shall constitute a default under this Lease.

#### **4.5 Green/Sustainable Leasing**

Among other things, when Tenant is replacing equipment, Tenant shall replace it, if feasible, with the most energy efficient equipment that is California Energy Star rated or the environmental equivalent.

#### **4.6 Waste or Nuisance.**

Tenant shall not use, or fail to maintain, the Premises in a manner that constitutes waste or nuisance.

#### **4.7 Reservations.**

Landlord reserves the right and power to grant easements and licenses on, over, under and across the Premises to others, and the right and power for Landlord or the grantee to enter the Premises, for purposes such as constructing, installing, maintaining, repairing, replacing and removing utility systems and equipment and public improvements within the Premises. Should Landlord so request, Tenant shall promptly join with Landlord in the execution of such documents as may be requested by Landlord to create or accommodate such grant. Landlord 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 Tenant's business. Further, Tenant shall not be entitled to any monetary payment or other remuneration for any such future easements and rights-of-way.

### **5. RENT**

Tenant agrees to pay to Landlord Improvement Rent (if applicable), Construction Period Rent (if applicable), Greater Of Rent and Additional Rent (collectively "Rent") in accordance with this Article 5. All payments of Rent and other sums due Landlord hereunder shall be paid in legal tender of the United States, without notice, invoice, setoff, deduction or demand, except as otherwise expressly provided herein. No payment by Tenant or receipt or acceptance by Landlord of a lesser amount than the Rent shall be deemed to be a waiver of any current or preceding breach by Tenant of any provision hereof. No endorsement or statement on any check or any letter accompanying any check or payment as Rent shall be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such Rent or pursue any other remedy in this Lease, at law or in equity. Tenant waives all rights that it may have under present or future law to designate the items to which any payments made by Tenant are to be credited. Tenant agrees that Landlord may apply any payments made by Tenant to such items of Rent as Landlord designates, irrespective of any designation or request by Tenant as to the items to which such payments should be credited.

All payments of Rent shall be delivered to and statements required in Section 5.5.3 below shall be filed with Landlord's Treasurer. Checks shall be made payable to the San Diego Unified Port District and mailed to the San Diego Unified Port District, Finance Department, Post Office Box

120488, San Diego, California 92112-0488, or delivered to the San Diego Unified Port District, Finance Department, 3165 Pacific Highway, San Diego, California 92101. Landlord may change the designated place of payment or filing at any time upon ten (10) days' written notice to Tenant. Tenant assumes all risk of loss and responsibility for Late Charges and interest at the Default Rate for late payments, as hereinafter described.

### **5.1 Rental Periods.**

The Term of this Lease shall be divided into the "Rental Periods" described in Section 1.4.

### **5.2 Term Extension Rent.**

Tenant shall In addition to the Greater Of Rent and as consideration for extending the term of the Lease for an additional Nine Years and Five Months pursuant to the granting clause of this Lease, on or before the twentieth (20<sup>th</sup>) day of each month during the Term, and on or before the 20th day following the last day of the month in which this Lease is terminated or expires, Tenant shall pay to Landlord the monthly Term Extension Rent described in Section 1.7 for the purchase of Nine Years and Five Months of additional Lease term. The terms of this Section 5.2 shall survive the expiration or earlier termination of this Lease.

### **5.3 Greater Of Rent.**

Commencing with the Rent Commencement Date, the "Greater Of Rent" for each Lease Year shall be the greater of (i) the Minimum Annual Rent for such Lease Year as periodically adjusted as provided in Section 5.4, and (ii) the cumulative total of the Percentage Rent for such Lease Year as provided in Section 5.5 below.

#### **5.3.1 Monthly Payments of Greater Of Rent.**

(a) *Calculation of Payments.* Concurrently with the delivery of each monthly report described in Section 5.5.3(a) below, but in no event later than the twentieth (20<sup>th</sup>) day of each month during the Term following the Rent Commencement Date, and on or before the twentieth (20<sup>th</sup>) day following the last day of the month in which this Lease is terminated or expires, Tenant shall pay to Landlord the greater of the following two amounts as and for the Greater Of Rent due with respect to the immediately preceding month:

(i) The total Percentage Rent computed for that portion of the Lease Year ending with and including the last day of the preceding month [Section 5.5.3(a)(ii) below], less total Percentage Rent and monthly Minimum Annual Rent previously paid for the Lease Year [Section 5.5.3(a)(iii) below], or

(ii) One-twelfth (1/12<sup>th</sup>) of the Minimum Annual Rent, multiplied by the number of full calendar months from the beginning of the Lease Year to and including the preceding month, plus the amount of Minimum Annual Rent due with respect to any initial partial month in the first Lease Year, less the total Percentage Rent and monthly Minimum Annual Rent previously paid for the Lease Year [Section 5.5.3(a)(iii) below].

(b) *Survival.* The terms of this Section 5.3.1 shall survive the expiration or earlier termination of this Lease.

### **5.4 Minimum Annual Rent.**

Minimum Annual Rent for each Lease Year of the first Rental Period is described in Section 1.5. Thereafter, Minimum Annual Rent shall be periodically adjusted by the following two (2) adjustments: (i) the "Minimum Rent CPI Adjustments" described in Section 5.4.1, which

shall occur on the "Minimum Rent CPI Adjustment Dates" described in Section 1.5.1, and (iii) the "Minimum Annual Rent Look Back Adjustments" described in Section 5.4.2, which shall occur on the "Minimum Rent Look Back Adjustment Dates" described in Section 1.5.2. In the event the Minimum Annual Rent is to be adjusted for any Lease Year by more than one (1) of the foregoing adjustment procedures, the Minimum Annual Rent shall be the higher of the amounts calculated in accordance with such procedures.

#### **5.4.1 Minimum Rent CPI Adjustments.**

(a) *CPI Calculations.* Commencing on the first Minimum Rent CPI Adjustment Date and on each Minimum Rent CPI Adjustment Date thereafter, the Minimum Annual Rent payable immediately prior to the relevant Minimum Rent CPI Adjustment Date shall be adjusted by the increase, if any, in the CPI as follows.

The Minimum Annual Rent payable immediately prior to the relevant Minimum Rent CPI Adjustment Date shall be multiplied by a fraction, the numerator of which shall be the CPI for the calendar month which is three (3) months prior to the Minimum Rent CPI Adjustment Date under consideration, and the denominator of which shall be the CPI for the calendar month which is three (3) months prior to (i) the Commencement Date with respect to the first Minimum Rent CPI Adjustment Date, and (ii) the immediately preceding Minimum Rent CPI Adjustment Date with respect to all subsequent Minimum Rent CPI Adjustment Dates. The new Minimum Annual Rent shall be the product so calculated to reflect the increase in the CPI as provided above. In no event shall such new Minimum Annual Rent be less than the Minimum Annual Rent payable immediately preceding said Minimum Rent CPI Adjustment Date.

For purposes of example only, the new Minimum Annual Rent shall be calculated as follows:

$$\text{New Minimum Annual Rent} = \frac{A}{B} \times C; \text{ where}$$

"A" is the CPI for the calendar month which is three (3) months prior to the Minimum Rent CPI Adjustment Date under consideration;

"B" is the CPI for the calendar month which is three (3) months prior to (i) in the case of the first Minimum Rent CPI Adjustment Date, the Commencement Date, and (ii) in the case of all subsequent Minimum Rent CPI Adjustment Dates, the immediately preceding Minimum Rent CPI Adjustment Date; and

"C" is the Minimum Annual Rent payable immediately prior to the relevant Minimum Rent CPI Adjustment Date.

Notwithstanding the above, the Minimum Rent CPI Adjustments shall not be less than 10% per Rental Period and not greater than 20% per Rental Period.

(b) *Substitution of Index.* In the event the CPI is no longer published, the index for the Minimum Rent CPI Adjustment Date shall be the one reported in the U. S. Department of Labor's comprehensive official index determined by Landlord to be the one most nearly corresponding to the CPI. If the Department of Labor indices are no longer published, another index generally recognized as authoritative shall be substituted by Landlord in the exercise of Landlord's good faith discretion.

(c) *Retroactive Adjustment.* Notwithstanding the publication dates of the CPI, the Minimum Annual Rent shall be adjusted to be effective on the Minimum Rent CPI Adjustment Dates. Until said Minimum Annual Rent adjustment can be reasonably determined by CPI publication, payments of Rent due shall be calculated utilizing the Minimum Annual Rent

payable immediately prior to such Minimum Rent CPI Adjustment Date. Within ten (10) days following calculation of the CPI adjustment, any underpayments of Rent by reason of the delay in the availability of the CPI information shall be paid to the Landlord.

#### **5.4.2 Minimum Annual Rent Look Back Adjustments.**

The Minimum Annual Rent shall be subject to adjustment on each Minimum Rent Adjustment Date set forth in Section 1.5.2 as follows. Within thirty (30) days following each Minimum Rent Adjustment Date, Landlord shall determine, and provide to Tenant a written statement setting forth the calculation of, the average annual Greater Of Rent that was payable by Tenant (i) during the period from the Rent Commencement Date until the first Minimum Rent Adjustment Date and (ii) with respect to all subsequent Minimum Rent Look Back Adjustment Dates, during the period between the applicable Minimum Rent Adjustment Date and the prior Minimum Rent Adjustment Date. Effective as of the applicable Minimum Rent Adjustment Date, Minimum Annual Rent shall be adjusted to an amount equal to seventy-five percent (75%) of such average annual Greater Of Rent, provided that in no event shall such new Minimum Annual Rent be less than the Minimum Annual Rent payable for the Lease Year immediately preceding such Minimum Rent Adjustment Date. Immediately following the determination of the new Minimum Annual Rent, any underpayments of Minimum Annual Rent shall be paid to Landlord.

#### **5.5 Percentage Rent.**

"Percentage Rent" is the product of the applicable percentage ("Percentage Rent Rate") set forth in Section 5.5.1 below multiplied by the Gross Income with respect to the applicable category described in Section 5.5.1 below. Percentage Rent shall be calculated on a monthly basis as provided in this Section 5.5 below and shall be paid in accordance with Section 5.3 above.

##### **5.5.1 Percentage Rent Categories.**

Percentage Rents shall be based on the following percentages of the Gross Income, whether collected, uncollected, received, payable or accrued.

(a) Seven and One-Quarter Percent (7.25%) of the Gross Income commencing May 1, 2018 and ending April 30, 2028, Seven and One-Half Percent (7.5%) of the Gross Income commencing May 1, 2028 and ending April 30, 2038, Seven and Three-Quarter Percent (7.75%) of the Gross Income commencing May 1, 2038 and ending April 30, 2048, and Eight Percent (8.0%) of the Gross Income commencing May 1, 2048 and ending April 30, 2058 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;

(b) 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);

(c) Three Percent (3%) of the Gross Income commencing May 1, 2018 and ending April 30, 2038, and Three and One-Half Percent (3.5%) commencing May 1, 2038 and ending April 30, 2058 from sale of food and nonalcoholic beverages (including, without limitation, coffee, tea or milk) sold in conjunction with food;

(d) Five Percent (5%) of the Gross Income commencing May 1, 2018 and ending April 30, 2038, and Five and One-Half Percent (5.5%) commencing May 1, 2038 and

ending April 30, 2058 from sale of nonalcoholic beverages (including, without limitation, coffee, tea or milk) not served in conjunction with food for consumption on the Premises;

(e) Five Percent (5%) of the Gross Income commencing May 1, 2018 and ending April 30, 2038, and Five and One-Half Percent (5.5%) commencing May 1, 2038 and ending April 30, 2058 from sale of alcoholic beverages for consumption on the Premises;

(f) Three Percent (3%) of the Gross Income from sale of packaged alcoholic and nonalcoholic beverages for consumption off of the Premises;

(g) 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;

(h) 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;

(i) 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 5.5.1(h) herein;

(j) Six Percent (6%) of the Gross Income from sale of fishing bait and sale or rental of fishing equipment;

(k) 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 subparagraph 5.5.1(h) herein

(l) Fifteen Percent (15%) of the Gross Income from rental of bicycles and other recreational equipment, and rental of recreational facilities;

(m) Ten Percent (10%) of the Gross Income from sailing school operations, in addition to the Percentage Rent required in subparagraph 5.5.1(h) herein;

(n) Ten Percent (10%) of the Gross Income from sale of recreation lessons;

(o) Four Percent (4%) of the Gross Income from sale of ship chandlery merchandise;

(p) Five Percent (5%) of the Gross Income from sale of Minor Marine Services to Boat Slip Renters;

(q) Fifteen Percent (15%) of the Gross Income from sale of parking services (including valet services) or rental of parking spaces;

(r) One-half Percent (0.5%) of the Gross Income from sale of any and all California State Lottery tickets;

(s) Ten Percent (10%) of the Gross Income from the rental of office space to tourism/visitor-serving tenants and maritime related tenants;

(t) 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 Tenant or Subtenant;

(u) 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 Tenant or Subtenant;

(v) Fifty percent (50%) of the Gross Income 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, paging antennas and cell phone equipment, excluding telecommunications uses that exclusively serve the uses on the Premises;

(w) Ten percent (10%) of the Gross Income from sale of business services wherever provided on the Premises including, without limitation, the sale of internet access or other telecommunication services (including, without limitation, sale of internet access or other telecommunication services in connection with the rental of guest rooms and conference and banquet facilities, unless such internet access or other telecommunication services are not separately charged and are incorporated within the rental charge of the relevant guest room, conference room or banquet facility);

(x) Ten Percent (10%) of Gross Income relating to any commissions, "mark-ups," income, fees and commissions that Tenant receives as compensation for handling and/or selling tickets sold for activities or events occurring outside Landlord's jurisdiction and in which neither Tenant nor any affiliated Person has a direct or indirect ownership interest (for example, admission tickets to the San Diego Zoo Safari Park located in the City of Escondido);

(y) 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;

(z) 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.

### **5.5.2 Gross Income.**

(a) *Definition.* "**Gross Income**" shall include all Revenue without any deductions or exclusions except as provided in Section 5.5.2(b) below resulting from, directly or indirectly, or connected to or generated from, the occupancy or use of the Premises, or any business conducted on or in connection with the Premises in any manner, whether conducted by a Tenant Party, whether for cash or credit, whether collected or uncollected, received, payable or accrued and from whatever source derived, including, but not limited to any type of sales (whether such sales occur with respect to the Premises or elsewhere) arising from Tenant's customers receiving services, products or benefits on or from (i) the Premises, (ii) any property within Landlord's jurisdiction (unless such Revenue is the subject of a separate lease with Landlord), or (iii) in connection with any vessel going to or from the Premises while in San Diego Bay (including, without limitation, any vessel traversing or utilizing San Diego Bay in connection with commercial operations). Without limitation of the foregoing, Gross Income shall be construed to include, without limitation, the entire amount of the actual sales price (including all finance charges by Tenant or a Tenant Party), of all sales, rentals, leases and licenses or for other transfer of merchandise or services, and other receipts whatsoever, including, without limitation, agency sales and all mail, catalogue, computer, facsimile, telephone, telecommunication, electronic and other orders filled, transmitted or received through any media. 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, whether or not the amount of such excise tax is stated as a separate charge.



(b) *Exclusions.* Refunds for goods returned shall be deducted from current Gross Income upon their return. Bad debt losses shall not be deducted from Gross Income. Gross Income shall not include any of the following.

- (i) sales of United States postage;
- (ii) any sales or transient occupancy tax payable by Tenant or a Tenant Party to any government 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;
- (iii) gratuities, provided the customer voluntarily determines the amount of said gratuity to be paid, or the customer is aware that Tenant or a Tenant Party 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; or
- (iv) any commission or fee paid to a travel agency or other rental agent if such commission or fee is included in the gross room revenue and subsequently paid to said agency or agent provided, however, that such deductions shall not exceed five percent (5%) of Lessee's total gross room revenue and provided further that no deductions shall be made for fees paid to any such agency in which Lessee has any financial or managerial interest.

### **5.5.3 Reports of Gross Income.**

(a) *Monthly Reports.* On or before the twentieth (20<sup>th</sup>) day of each month following the Rent Commencement Date, and on or before the twentieth (20<sup>th</sup>) day following the last day of the month in which this Lease is terminated or expires, Tenant shall deliver to Landlord, in a form prescribed by Landlord, a detailed cumulative report of Gross Income for that portion of the Lease Year which ends with and includes the last day of the previous calendar month. Each report shall be signed by Tenant or an authorized representative of Tenant under penalty of perjury and shall include the following:

- (i) The total Gross Income for said portion of the Lease Year, itemized as to each of the Percentage Rent categories for which a separate Percentage Rent Rate (or per unit charge, if applicable) is established.
- (ii) The related itemized amounts of Percentage Rent computed, as herein provided, and the total thereof.
- (iii) The total Minimum Annual Rent and Percentage Rent previously paid by Tenant for the Lease Year within which the preceding month falls.
- (iv) A detailed calculation of the Greater Of Rent due for the preceding calendar month determined in accordance with the terms of Section 5.3.1(a).

(b) *Record Keeping.* Tenant 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 pursuit of the rights granted herein (whether conducted by or on behalf of Tenant or a Tenant Party). 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 periodically but not less often than annually. All sales and other financial transactions shall be recorded by means of a comprehensive system which includes sufficient business processes to ensure that

all Gross Income is clearly and accurately recorded and documented by reports and other original source documents. The system shall provide reporting and distinction of all sales and other income and Revenue categories and shall generate an audit trail of all transactions. Any recordation system for sales or other income and Revenue transactions shall be subject to the written approval of the Landlord. Contracts, bills, invoices, sales, receipts or other similar-type documents evidencing transactions between any parties doing business under this Lease (including each Tenant Party) shall in no event identify Rent due to Landlord as a separate charge, fee or tax. In addition to the above, in the event of admission or cover charges, Tenant 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, Tenant shall issue or cause to be issued preprinted serially numbered rental agreements for each such rental transaction. Tenant shall keep or cause to be kept a sequential record of said tickets and agreements, both issued and unissued, and shall retain all voids. The terms of this Section 5.5.3(b) shall survive the expiration or earlier termination of this Lease.

(c) *Maintenance of Records; Audit.* All of Tenant's books of account, records, financial statements, and documentation related to this Lease or to business operations conducted within or from the Premises, shall be kept either at the Premises or at such other locations in San Diego County as are reasonably acceptable to Landlord. Without limitation of the foregoing, if there is any Tenant Party occupying or operating from any portion of the Premises, the books and records also shall include any occupancy, licensing, permit or operating agreements pertaining to such Tenant Party, as well as the books of account, records, financial statements, and documentation, relating to the operations of such Tenant Party. Upon at least forty-eight (48) hours prior notice to Tenant, Landlord shall have the right to examine and audit said books, records, financial statements, and documentation (the "**Tenant Records**"), including, 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 Landlord. Landlord's audit rights shall apply to the current Lease Year and all prior Lease Years and Tenant waives the right to assert any statute of limitations in connection with any audit or any underpayment disclosed pursuant to such audit. In the event that the business operations conducted within or from the Premises are part of a larger business operation, and any part of the Tenant Records herein is prepared only for the larger operation, and not solely for the business operations of the Premises, then Landlord shall also have the right to examine and audit that part of said books, records, financial statements, and documentation of the larger business operation. If Tenant assigns its interest under this Lease, Tenant shall deliver to the Transferee the originals (or complete copies) of the Tenant Records which will be retained by Transferee and available to audit on the same terms as under this Section 5.5.3(c).

(d) *Failure to Maintain Records.* Tenant's failure to keep or cause to be kept Tenant Records and make them available for inspection by Landlord is a default under this Lease. Landlord shall have the discretion to require the installation of any additional accounting methods or controls he or she may deem necessary, subject to prior written notice. In the event the Tenant does not make available the original Tenant Records at the Premises or within the limits of San Diego County in a location reasonably acceptable to Landlord, and if Landlord in its sole discretion consents in writing to such original Tenant Records to be maintained elsewhere, Tenant agrees to pay all travel and other expenses incurred by Landlord Parties in conducting an audit at the location where the Tenant Records are maintained.

(e) *Underpayment/Overpayment.* If the audit conducted by Landlord under Section 5.5.3(c) above reveals an underpayment or an overpayment of the Rent due, Tenant shall pay to Landlord the amount of the underpayment within thirty (30) days following written

notice to Tenant, or Landlord will refund the amount of the overpayment within thirty (30) days following the determination of such overpayment (or, at Landlord's option, Landlord will credit the overpayment against the installment of Greater Of Rent first coming due after such thirty (30) day period). If the audit reveals a discrepancy of three percent (3%) or more between the Rent due as reported by Tenant and the Rent due as determined by the audit, and/or Tenant has failed to maintain (or failed to cause to be maintained) complete and accurate Tenant Records as described in this Section 5.5 above, then Tenant shall also pay the cost of the audit within thirty (30) days after written notice from Landlord.

#### **5.6 Late Charges.**

Tenant hereby acknowledges that late payment by Tenant to Landlord of Rent will cause Landlord to incur costs not contemplated by this Lease. Accordingly, in the event Tenant is delinquent in rendering to Landlord an accounting of Rent due or in remitting the Rent due on the date due in accordance with the provisions of this Lease, Tenant shall pay, in addition to the unpaid Rent, five percent (5%) of the Rent due. If Rent is still unpaid at the end of ten (10) days after the date due, Tenant shall pay an additional five percent (5%) (collectively, "Late Charges"). The parties hereby agree that said Late Charges are Additional Rent and are not interest and that the Late Charges apply whether or not Tenant receives notice of its failure to pay Rent, and that said Late Charges are appropriate to compensate Landlord 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 One Hundred Dollars (\$100). Acceptance of such Late Charges and any portion of the late payment by Landlord shall in no event constitute a waiver of Tenant's default with respect to such overdue amount, nor prevent Landlord from exercising any of its other rights and remedies. In addition to the application of a Late Charge, if Tenant fails to pay any Rent when due, the unpaid amount shall accrue interest at the Default Rate from the date due until paid and such interest shall itself be Additional Rent.

#### **5.7 Net Lease.**

Tenant acknowledges that the Rent will be absolutely net of any costs or expenses to Landlord relating to Premises or any Improvements and acknowledges and agrees that Landlord shall not be responsible for any costs, charges, expenses and outlays of any nature whatsoever arising from or relating to the Premises or any Improvements or the Project or any Project Improvements during the Term, whether foreseen or unforeseen and whether or not within the contemplation of the parties at the commencement of the Term, except as shall be otherwise expressly provided in this Lease. Without limitation of the foregoing, Landlord shall not be required to construct, install, provide or arrange for any utilities, roadway, docks, tide walls, drainage or other improvements of any nature on, in, under or above the Premises or any other location.

#### **5.8 Reimbursement.**

If under the terms of this Lease an amount expended by Landlord is to be reimbursed by Tenant pursuant to the "Reimbursement Procedure" then Tenant shall reimburse Landlord for the subject amount within fifteen (15) days of Tenant's receipt of an invoice or statement from Landlord for the subject amount and, if applicable, copies of any applicable third party invoices, work description and/or other reasonable evidence of the work performed for or by, and costs incurred by, Landlord. Any amounts owed to Landlord pursuant to the Reimbursement Procedure shall constitute Additional Rent and shall accrue interest at the Default Rate from the

date due until paid if not paid within the time period permitted under the Reimbursement Procedure.

## 6. ALTERATION OF IMPROVEMENTS

### 6.1 Alterations.

#### 6.1.1 Major Alterations.

The term "**Major Alterations**" means all Alterations other than Minor Alterations (as such term is defined in Section 6.1.2 below). Tenant shall comply with all Laws, at its sole cost and expense, including without limitation, obtaining any governmental permits and approvals required for the Major Alterations. Tenant may not make any Major Alterations without the prior written consent of Landlord in each instance, which consent may be granted or withheld in Landlord's sole discretion. Landlord may condition its approval of a Major Alteration on compliance with the Laws and Tenant obtaining insurance coverages in addition to those required under Article 18 if such additional coverage is customarily obtained in connection with work similar in scope to the Major Alteration. All Major Alterations shall be in accordance with plans and specifications, including but not limited to working drawings (collectively, "**Alteration Plans**") submitted to and approved in writing by Landlord prior to the commencement of the Major Alterations. Following approval by Landlord, any changes in the Alteration Plans are subject to Landlord's approval, in Landlord's sole discretion. Provided Landlord approves the Alteration Plans, if Tenant elects to proceed with the Major Alterations, Tenant must construct and complete all of the Major Alterations set forth in the Alteration Plans in one (1) integrated construction project with all due diligence.

#### 6.1.2 Minor Alterations.

The term "**Minor Alterations**" means Alterations that satisfy all of the following requirements: (i) they are made solely to the interior of the Project Improvements; (ii) no discretionary permit or approval is required from any government agency to perform the Alteration and no CEQA review is needed in connection with the permits that are to be issued in connection with the Alteration; (iii) they do not require or involve structural modifications or affect in any material way the building systems within the Improvements or the portions of the Improvements generally accessible to the public such as the lobby area of a hotel; (iv) they do not trigger any stormwater construction BMP permit or permanent structural BMP permit or alterations to existing permanent structural BMPs; (v) they are consistent with the Permitted Use; and (vi) following the Completion of the Alterations, the Premises and Improvements have a fair market value, quality and utility that is not less than the fair market value, quality and utility of the Premises and Improvements immediately prior to the commencement of the Alterations. Tenant may make Minor Alterations without Landlord's written consent provided that Tenant gives Landlord at least thirty (30) days' prior written notice of the Minor Alterations, which notice describes the Minor Alterations in sufficient detail in order for Landlord to confirm that such Minor Alterations satisfy the requirements of this Section 6.1.2 and within such thirty (30) day period Landlord does not object to Tenant's determination that the subject Alterations are Minor Alterations.

#### 6.1.3 Diligent Construction; Continuous Operations.

Once construction of any Alteration is commenced, Tenant shall diligently prosecute construction of the Alterations to Completion. Tenant shall continue to operate the Premises and Improvements for the Permitted Use during the course of construction of the Major Alterations to the greatest extent feasible.

#### **6.1.4 Construction Requirements.**

In constructing any Alterations, Tenant shall comply with all Construction Requirements and all Laws, including, without limitation, any PMP requirements, mitigation measures or conditions of approval under the terms of any of the governmental approvals of the Project, including any CDP applicable to the Premises or the use or development thereof and any conditions of approval or mitigation measures or project changes pursuant to any environmental review under CEQA.

#### **6.2 Cost Reporting.**

With respect to the Project Improvements and any Major Alterations, within sixty (60) days following Completion of the Project Improvements or Completion of the Major Alterations, as applicable, Tenant shall furnish Landlord with an itemized statement of the Construction Costs incurred and paid by Tenant. The statement shall be sworn to and signed, under penalty of perjury, by Tenant or its authorized representative. Tenant shall maintain true, accurate, and complete records to support said itemized 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 Tenant perform any construction with its own personnel, Tenant shall substantiate the actual work performed by maintaining the following records: 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 Premises or at such other location in San Diego County, California as is agreeable to Landlord. Further, Landlord 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 Tenant does not make available the original books and records at the Premises or within the limits of San Diego County, Tenant agrees to pay all expenses incurred by Landlord Parties in conducting an audit at the location where said books and records are maintained in accordance with Section 5.5.3.

#### **6.3 Force Majeure Event.**

"Force Majeure Event" means actual delay in Tenant's construction or interference with Tenant's ability to operate actually caused by: (a) a strike or labor dispute other than a strike or dispute which would have been avoided had Tenant complied with Laws and any agreements it has entered into with the striking union or parties; (b) inclement weather (that causes a suspension of work) in excess of the ten (10) year average for the area within Landlord's jurisdiction during the month or months when work was suspended; (c) a fire, an earthquake or other natural disaster resulting in suspension of work or causing material damage to previously constructed Project Improvements; (d) inability to procure or general shortage of labor, equipment, materials, or supplies in the open market, or failure of transportation (but, in each case, not attributable to a mere increase in price or Tenant's acts or failure to act); (e) acts of a public enemy, insurrections, riots, mob violence, sabotage, acts of terrorism, and malicious mischief; (f) casualty causing material damage to previously constructed Project Improvements; or (g) delays in the issuance of any governmental approvals or authorizations from government agencies other than Landlord necessary to proceed with development or operation of the Project Improvements (provided that Tenant has timely and properly filed all applications, submitted all required documents and fees and taken all other actions necessary to obtain such governmental approvals or authorizations and that Tenant is not responsible in any way for the delay in the issuance of such governmental approvals or authorizations). In order to extend the time for commencement or Completion of the Project Improvements for Force Majeure Event or

claim an excuse of failure to operate, Tenant must notify Landlord in writing within twenty (20) days of the commencement of any Force Majeure Event and describe in such notice the Force Majeure Event creating delay or interference, why such delay or interference is occurring, the expected duration of such delay or interference and the best efforts Tenant is taking to minimize the period of delay or interference. Any period of applicable Force Majeure Event shall be added to the times for the commencement; provided, however, in no event shall the period of excused delay exceed 365 days in the aggregate. Tenant covenants to make best efforts to minimize and otherwise overcome the impact on Tenant's construction schedule or operation caused by any Force Majeure Event and, in addition to Tenant's initial notice described above, on Landlord's request from time to time, shall provide Landlord with a report on the status of the Force Majeure Event, its expected duration, Tenant's construction schedule and Tenant's best efforts to minimize and otherwise overcome the impact on Tenant's construction schedule or operation caused by any Force Majeure Event.

#### **6.4 Signs and Flags.**

All signs visible from outside the Project Improvements must be expressly approved by Landlord prior to installation. All signage in the Landlord's jurisdiction is subject to San Diego Unified Port District Code Section No. 8.30, BPC Policy No. 770 and Tenant Signage Guidelines (January 2012). If Landlord hereafter adopts any other ordinance or policy governing signage, Tenant shall also comply with such ordinance or policy subject to any grandfathering terms thereof. Tenant agrees that no banners, balloons, inflatables, pennants, flags, signs, digital displays, spinners, or other advertising devices, nor any temporary signs, shall be flown, installed, placed, or erected on the Premises in a manner or location clearly visible from outside the Premises without Landlord's prior written consent. Landlord acknowledges that the comprehensive sign program depicted in Exhibit G attached hereto have been approved by landlord.

#### **6.5 Tenant Percent for Art.**

Tenant acknowledges and agrees that any requests for proposed Alterations during the Term of the Lease may be conditioned on the payment of additional commissions or purchases of artwork and/or in-lieu contributions. If Tenant elects to make an in-lieu contribution, such in-lieu contribution shall be paid by Tenant to Landlord prior to receipt of the final Certificate of Occupancy for the Project Improvements.

#### **6.6 Prevailing Wage.**

##### **6.6.1 Tenant acknowledges and agrees that:**

(a) Landlord 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 Tenant intends to perform any construction, alteration, demolition, installation or repair work ("**Construction**") on the Premises, Tenant warrants and acknowledges that: (1) Landlord is not paying for or subsidizing, in whole or in part, any such Construction; and (2) Tenant shall make its own determination regarding the applicability of any PWL to such Construction. Tenant assumes any and all risk in connection with the application of PWL to any Construction performed on the Premises on behalf of Tenant.

(b) Tenant's violations of PWL shall constitute a default under this Lease.

#### **6.7 Historical Designation.**

**Neither Tenant nor Landlord shall designate, cause anyone to designate, submit or support any application to designate, the Premises or any Improvements on the Premises as a federal, state or local historical landmark or as a historical resource. The terms of this Section 6.7 shall survive the expiration or earlier termination of this Lease.**

## **7. TITLE TO AND REMOVAL OF ALTERATIONS AND IMPROVEMENTS**

### **7.1 Title.**

All Improvements which may be installed or placed in, on, over or under the Premises, from time to time by Tenant as permitted by the terms of this Lease or with Landlord's prior written consent, (i) shall be so installed or constructed at the sole cost of Tenant, (ii) shall remain Tenant's property during the Term, and (iii) at the expiration or earlier termination of the Term, those Improvements which are to remain on the Premises pursuant to Section 7.2. shall automatically become the property of Landlord without additional compensation from Landlord; provided that, subject to Section 7.3 below, Tenant's trade fixtures (fixtures relating uniquely to Tenant and which are removable without non-repairable damage to the other Improvements), furnishings and moveable equipment shall remain the property of Tenant and shall be removed by Tenant as provided in Section 7.3. Upon Landlord's request, following the Expiration Date or earlier termination of this Lease, Tenant covenants and agrees to execute and deliver (at no cost or expense to Landlord) a quitclaim deed as provided in Article 23 to confirm Landlord's ownership of the Improvements which are to remain on the Premises pursuant to Section 7.2, which covenant shall survive the expiration or earlier termination of this Lease. Notwithstanding the foregoing, if title to artwork in fulfillment of the tenant percent for art requirement created in compliance with Section 6.5 is governed by a separate agreement between Tenant and the artist, such agreement shall govern over this Lease relative to the title to the artwork following the expiration or termination of this Lease.

### **7.2 Removal of Improvements.**

At any time during the Term of this Lease, Landlord may notify Tenant in writing of what Improvements Landlord requires (in its sole discretion) to be removed from the Premises at the end of the Term (such election is referred to herein as the "Landlord End of Term Election"). If Landlord has not provided the Landlord End of Term Election by three hundred and sixty five (365) days prior to the end of the Term, the same shall be deemed to be an election by Landlord for all Improvements to remain upon and be surrendered with the Premises as part thereof, and title to such Improvements shall vest in Landlord as described in Section 7.1 and Article 23 (but Tenant shall remain responsible for any remedial work that may be required by Section 21.3). If Landlord shall elect to have Tenant remove any or all of the Improvements and/ or Tenant is required to perform remedial work pursuant to Section 21.3, (i) the Term of this Lease shall be extended as provided in Section 7.5, (ii) to the greatest extent possible, Tenant shall obtain all permits required to perform such work in advance of the end of the Term and, if not possible, as promptly as possible after the end of the Term (meaning prior to extension pursuant to Section 7.5), and (iii) subject to terms of Section 7.5 requiring such work to commence sooner, as promptly as possible after the end of the Term (meaning prior to extension of the Term pursuant to Section 7.5), remove such Improvements and perform and complete any remedial work that may be required by Section 21.3. Tenant acknowledges that demolition of the Improvements and razing the Premises and/or the remediation work pursuant to Section 21.3 may require Tenant to obtain permits, certain of which may be discretionary. Tenant shall repair any damage to the Premises (and the Improvements which Landlord is not requiring Tenant to remove) caused by such removal, and, unless such requirement is waived by Landlord, Tenant shall surrender the portion of the Premises to be demolished to Landlord in

a razed and buildable condition. For this purpose, a "buildable condition" means the removal of any subsurface Improvements (including foundations and pilings and public and private utilities unless otherwise agreed to by Landlord), any Hazardous Materials arising from Tenant's use or possession of the Premises, any Pre-Existing Hazardous Material discovered in the course of demolition, demolition of the Improvements and removal of any debris resulting from demolition and leaving the areas affected by the demolition in a smooth graded condition with soils compacted pursuant to specifications and in compliance with a stormwater site stabilization plan acceptable to Landlord in its sole discretion so that such areas are suitable for subsequent construction of improvements thereon. In addition, and without limitation of Landlord's other remedies, if any Improvements are not in full compliance with Article 6 or Article 15, Landlord may require, at Tenant's sole cost and expense, that such Improvements be modified to a state and condition which complies with Article 6 and Article 15 as determined by Landlord. If Tenant fails to complete such removal and remediation and/or to repair any damage caused by the removal of any Improvements or to perform modifications required pursuant to the preceding sentence within the period allowed under Section 7.5, Landlord may do so and may charge the cost thereof to Tenant pursuant to the Reimbursement Procedure, together with Additional Rent for estimated administrative costs in the amount of twenty percent (20%) of such cost, and interest on all such sums at the Default Rate from the date incurred until paid. Nothing contained in this Section 7.2 shall be interpreted to limit Tenant's obligations under Section 21.3.

### **7.3 Removal of Personal Property.**

Except as provided below, all of Tenant's personal property including machines, appliances and equipment and trade fixtures (even though not personal property), located at or on the Premises shall be removed by Tenant by the Expiration Date or earlier termination of this Lease. Notwithstanding the foregoing, unless Landlord expressly elects within the same time periods to require Tenant to remove the same, any artworks that constitute personal property that were provided to comply with Law or Landlord's own requirements but which are not governed by a separate agreement between Tenant and the artist relating to the removal of the artwork as the end of the Lease Term, shall not be removed and remain located on the Premises. If requested by Landlord, Tenant shall deliver to Landlord Tenant's signed bill of sale in a form reasonably acceptable to Landlord for such left in place personal property. Without limitation of the foregoing, Tenant hereby appoints Landlord as Tenant's attorney-in-fact to execute such bill of sale in the name and on behalf of Tenant if Tenant shall fail to do so after Landlord's request. Tenant shall repair any damage to the Premises (and the Improvements which Landlord is not requiring Tenant to remove) caused by the removal of such personal property. If such personal property required to be removed is not removed by Tenant in accordance with this Section 7.3, the same may be considered abandoned and, at the option of Landlord, shall thereupon become the property of Landlord, without cost to Landlord and without any payment to Tenant, except that Landlord shall have the right to have such personal property removed and to repair any and all damage occasioned by their removal, all at the expense of Tenant pursuant to the Reimbursement Procedure.

### **7.4 Security for Cost of Demolition and Remediation Work.**

#### **7.4.1 Demolition and Remediation Report.**

Within one hundred and eighty (180) days of the receipt of the Landlord End of Term Election, but no sooner than six (6) years before the end of Lease Term, Tenant, at its own cost and expense, shall obtain and deliver to Landlord a report prepared by a contractor licensed in the State of California with expertise in demolition and remediation, which report details and



estimates the current cost and time period for completion of the removal and demolition work as if then required by Section 7.2 and any remedial work that may be required by Section 21.3 ("**Demolition and Remediation Report**"). The contractor licensed in the State of California with expertise in demolition and remediation selected by Tenant is referred to herein as the "**Demolition and Remediation Contractor**" and the time period for completion of the removal and demolition work as if then required by Section 7.2 and any remedial work that may be required by Section 21.3 is referred to herein as the "**Removal Period**".

#### **7.4.2 Demolition and Remediation Security Funding.**

The terms of this Section 7.4.2 will have no application and may be disregarded from and after a Landlord End of Term Election requiring all of the Improvements to remain in place or if the Landlord End of Term Election is not received and provided that the Demolition and Remediation Report and any reports required under the terms of Article 21 establishes that there is no known condition requiring remedial work. For the purpose of funding the cost of the demolition and remediation work that may be required under Section 7.2 and Section 21.3, beginning no later than sixty (60) months prior to the end of the Initial Term and continuing on the same day Greater of Rent for each month thereafter is due until such day of the \_\_\_\_\_ calendar month prior to the end of the Initial Term (the "**Demolition and Remediation Security Funding Period**") Tenant shall deposit with Landlord, or at Landlord's election, into an escrow account (with an escrow holder, and pursuant to escrow instructions, acceptable to Landlord in its sole discretion) a level sinking fund monthly dollar amount which will fully fund the Demolition and Remediation Security Amount by the end of the Demolition and Remediation Security Funding Period. The "**Demolition and Remediation Security Amount**" shall be the Estimated Demolition and Remediation Cost annually compounded at three percent (3%) over the Demolition and Remediation Security Funding Period. The "**Estimated Demolition and Remediation Cost**" shall be the total of (i) the demolition and remediation cost amount estimated by the Demolition and Remediation Report, and (ii) the product of (x) the number of months in the Removal Period and (y) the monthly Greater of Rent at the time the first monthly deposit is to be made. The determination of the monthly deposit amount shall be calculated by dividing the Estimated Demolition and Remediation Amount by the number of months in the Demolition and Remediation Security Funding Period. If the Demolition and Remediation Security Amount is held in escrow, any interest earned on the Demolition and Remediation Security Amount shall be added to the escrow fund, but shall not be treated as a credit against the Demolition and Remediation Security Amount deposits required to be made by Tenant pursuant to this Section 7.4.2. If Landlord holds the Demolition and Remediation Security Amount, Landlord shall not be required to keep the Demolition and Remediation Security Amount in trust, segregate it or keep it separate from Landlord's general funds, and Tenant shall not be entitled to payment of interest on the Demolition and Remediation Security Amount but such interest, if any, shall be applied toward the Demolition and Remediation Security Amount. In lieu of deposit of cash funds as required above, Tenant may propose a letter of credit, bond or other form of security in form and amount, and from an issuer, satisfactory to Landlord in Landlord's sole discretion. In no event shall Tenant's obligations under Section 7.2 or Section 21.3 or to pay Rent during the Removal Period be limited to the amount of the Demolition and Remediation Security Amount.

(a) *Update.* If the Landlord End of Term Election is for Tenant to remove any or all of the Improvements and/or Tenant is required to perform remedial work pursuant to Section 21.3, at least twelve (12) months prior to the expiration of the Term Tenant shall deliver to Landlord a report prepared by a Demolition and Remediation Contractor, which report updates the prior Demolition and Remediation Report for the purpose of providing a current estimate of the projected cost at the end of the Term of the demolition and remediation work

required by Section 7.2 above ("**Demolition and Remediation Report Update**"). If the current balance of the Demolition and Remediation Security Amount is less than the cost projected in the Demolition and Remediation Report Update, then, within thirty (30) days after delivering the Demolition and Remediation Report Update to Landlord, Tenant shall deposit in the escrow account or with Landlord, as applicable, additional funds so that the total Demolition and Remediation Security Amount is no less than the estimated cost of the demolition and remediation work as set forth in the Demolition and Remediation Report Update. If the current balance of the Demolition and Remediation Security Amount is more than the cost projected in the Demolition and Remediation Report Update, then, within sixty (60) days after Landlord's receipt of the Demolition and Remediation Report Update, Landlord shall refund the Tenant, as applicable, funds so that the total Demolition and Remediation Security Amount is no more than the estimated cost of the demolition and remediation work as set forth in the Demolition and Remediation Report Update.

(b) *Disbursement To Tenant.* If the Landlord End of Term Election is for Tenant to remove any or all of the Improvements and/or Tenant is required to perform remedial work pursuant to Section 21.3, then Landlord will release (or authorize the escrow holder to release, as applicable) the Demolition and Remediation Security Amount to fund the cost of the demolition and remediation work pursuant to customary construction draw procedures. However, Tenant shall remain responsible for the actual costs of the demolition and remediation work in excess of the Demolition and Remediation Security Amount. If the Landlord End of Term Election is for Landlord to remove any or all of the Improvements and Landlord does not diligently proceed to commence removal of the Improvements within 180 days, Landlord will release to Tenant (or authorize the escrow holder to release, as applicable) the unused portion of the Demolition and Remediation Security Amount. If the Landlord End of Term Election is for Tenant to remove any or all of the Improvements and Landlord decides to keep any or all of the Improvements, Landlord will release to Tenant (or authorize the escrow holder to release, as applicable) the unused portion of the Demolition and Remediation Security Amount.

(c) *Disbursement to Landlord.* If Tenant fails to perform the demolition and remediation work as and when required by the terms of Section 7.2, if Landlord elects to enforce Tenant's obligation, then in addition to all other remedies Landlord may have as a result of such failure, without limitation of Tenant's cost responsibility for the same, Landlord shall have the right to apply the Demolition and Remediation Security Amount to pay for the cost of performing the demolition and remediation work on Tenant's behalf. .

(d) *Landlord Security Interest.* Tenant grants to Landlord a security interest in the Demolition and Remediation Security Amount, and shall execute such documents as Landlord may request in order to perfect such security interest.

(e) *Demolition and Remediation Security Funding Tolling.* Landlord shall have the right, at its sole discretion, to toll the Demolition and Remediation Security funding within the last five years of the term of the Lease in order to consider a plan of redevelopment submitted by Tenant, upon delivery of a written notice to Tenant.

## **7.5 Removal Extension.**

If the Landlord End of Term Election requires Tenant to remove any or all of the Improvements and/or Tenant is required to perform remedial work pursuant to Section 21.3, then subject to the terms of this Section 7.5, solely for the purpose of completing such work and during such extension, the Term of the Lease shall be extended until the earlier of (i) six (6) months, and (ii) the completion of such work as evidenced by a certificate of completion from the Demolition and Remediation Contractor and copy of final lien releases in statutory form from the Demolition

and Remediation Contractor and all of its subcontractors. The period of such extension is referred to herein as the "Removal Extension". During the Removal Extension, the Premises and Improvements shall not be used by Tenant for any purpose other than the performance of the demolition and/or remediation work unless permitted by Landlord in writing in its sole discretion. During the Removal Extension, Tenant shall continue to pay the full Rent to Landlord in accordance with this Lease. If Tenant's removal and remediation work is not completed within the Removal Extension, the terms of Article 26 regarding Rent payable during holdover shall apply. Without relieving Tenant from its obligations under this Lease respecting the condition of the Premises at the end of the Term, all of the Tenant's obligations under this Lease (including Tenant's indemnification and insurance obligations but excluding any obligation to be open or operate) and Tenant's right to enter onto the Premises and perform the demolition and remediation work shall continue in full force and effect during the Removal Extension. Notwithstanding the foregoing, if the Landlord End of Term Election requires Tenant to remove any or all of the Improvements and/or Tenant is required to perform remedial work pursuant to Section 21.3 and the Demolition and Remediation Report indicates that the Removal Period is estimated to be greater than six (6) months, then Tenant shall commence such work sufficiently prior to the end of the Term (prior to extension as provided in this Section) so that such work is anticipated to be completed no later than six (6) months after the end of the Term (prior to the Removal Extension) (e.g., if the estimated Removal Period is ten (10) months, Tenant shall commence such work at least four (4) months prior to the end of the Term (prior to extension pursuant to this Section 7.5).

#### **7.6 Survival.**

The terms of this Article 7 shall survive the expiration or termination of this Lease.

### **8. ENTITLEMENTS**

#### **8.1 Entitlement Costs.**

If any discretionary approval, including without limitation environmental analysis under CEQA, the PMP, a Port Master Plan Amendment ("PMPA"), a CDP and/or a Coastal Act exclusion, are necessary in Landlord's sole and absolute determination in connection with any Project Improvements, Alterations, demolition or remediation work or other projects undertaken by Tenant on or at the Premises (collectively, the "Discretionary Project"), Tenant agrees to enter into agreements with the third party consultants preparing the reports and other materials required to process the Discretionary Project making Tenant directly responsible for the costs of such services and to reimburse Landlord pursuant to the Reimbursement Procedure for all costs and expenses incurred by Landlord in obtaining the necessary approval for the Discretionary Project, including but not limited to, the preparation and certification of any required CEQA document by the Landlord, the preparation and approval of the PMPA by the Landlord and the CCC, the preparation and approval or issuance of a CDP by the Landlord or, if appealed, the CCC, or the Coastal Act exclusion by the Landlord and any other costs and expenses arising out of the entitlement process in Landlord's sole and absolute determination. If Tenant fails to reimburse Landlord for such costs pursuant to the Reimbursement Procedure, in addition to any other remedies Landlord may have, Landlord may thereafter discontinue the processing of the Discretionary Project and Tenant shall be responsible for any costs and expenses incurred by Landlord related to such discontinuance as Additional Rent and such failure shall be a default of Tenant. Nothing herein shall obligate Landlord to seek, process or obtain any approvals or entitlements for the benefit of Tenant and Landlord makes no warranty or representation to Tenant that Tenant will obtain the entitlements and approvals required for Tenant's Discretionary Project.

## **8.2 Entitlements Indemnity.**

Without limitation of Tenant's other obligations under this Lease, Tenant agrees at its sole cost and expense and with counsel approved by Landlord in Landlord's sole discretion to indemnify, defend and hold harmless the Landlord Parties from any claims, demands, actions, causes of action, suits and Related Costs, arising out of Landlord's approval(s) of the Discretionary Project including without limitation any third party challenges to the approval of the Discretionary Project and any CEQA review, CCC review for a PMPA or appealable CDP or Coastal Act exclusion. The Landlord may, in its sole and absolute discretion, participate in the defense of any claims, demands, actions and causes of action, suits and Tenant shall reimburse the Landlord for all reasonable costs of defense incurred by the Landlord, including, without limitation reimbursement for attorneys' fees, experts' fees and other costs. The Landlord's participation shall not relieve the Tenant of any of its obligations under this Paragraph. The foregoing indemnity obligations of Tenant are in addition to, and not in limitation of, any other indemnity obligations of Tenant contained in this Lease.

## **8.3 Reservation of Discretion.**

Tenant acknowledges and agrees that, notwithstanding the terms and conditions of this Lease, Landlord reserves its discretion to approve or disapprove all actions, which require by Law the exercise of discretion, including without limitation all legislative and quasi-judicial actions and which Landlord cannot lawfully be committed to by contract (collectively, "Discretionary Action") and that nothing in this Lease will be construed as circumventing or limiting Landlord's discretion with respect to environmental review required by CEQA, approval of a PMPA, CDP, CDP exclusion, or other permits and entitlements, the exercise of eminent domain, code enforcement and the making of findings and determinations required by Law. Tenant acknowledges and agrees that any and all Discretionary Actions may be approved or denied by the Landlord, in its sole and absolute determination, and accepts the risk that the Landlord will deny any and all Discretionary Actions, and hereby waives any claims, demands, actions, causes of action, suits against the Landlord for said denial.

# **9. LIENS**

## **9.1 No Right to Bind Landlord.**

Neither Tenant, nor any Tenant Party, shall have any power or authority to do any act or thing, or to make any contract or agreement which will bind Landlord in any way whatsoever, and Landlord shall have no responsibility to Tenant, Tenant Party or other Person who performs, causes to perform, engages in or participates in any construction of any Improvements, Alterations or any other work on the Premises at the request of Tenant or Tenant Party or other Persons. Landlord shall not be required to take action to satisfy any such contract or agreement or to remove or satisfy any lien resulting therefrom.

## **9.2 Notice of Non-Responsibility.**

Tenant shall give written notice to all contractors, subcontractors and materialmen of Landlord's non-responsibility in connection with any Improvements or Alterations or other work on the Premises, and shall immediately provide Landlord with true copies of such notices not less than fifteen (15) days prior to the commencement of any work on the Premises.

## **9.3 Mechanic's Liens.**

Tenant shall timely pay or cause to be paid all costs for work, labor, services or materials supplied to or performed on the Premises. Tenant will keep the Premises free and clear of all

mechanic's liens and other liens on account of work done for or at the Premises. Tenant shall indemnify, defend, release and save Landlord free and harmless from and against any and all claims of lien of laborers or materialmen or others for work performed or materials or supplies furnished for or at the Premises and all Related Costs.

#### **9.4 Contest of Lien.**

If Tenant in good faith wishes to contest any claim of lien, Tenant shall be entitled to do so, provided that Tenant first records a surety bond sufficient to release the lien.

#### **9.5 Landlord's Right to Pay.**

If Tenant shall be in default in paying any charge for which a lien claim has been filed, and if Tenant shall not have recorded a surety bond as required under Section 9.4 above, Landlord may, but shall not be so obliged to, pay said lien claim and any costs, and the amount so paid, together with reasonable attorneys' fees incurred in connection therewith, shall be immediately due and owing from Tenant to Landlord, and Tenant shall pay the same to Landlord together with interest on the full amount thereof at the Default Rate from the dates of Landlord's payments until paid.

#### **9.6 Notice of Liens.**

Should any claims of lien be filed against the Premises or any action affecting the title to the Premises be commenced, the party receiving notice of such lien or action shall give the other party written notice thereof within five (5) business days of receipt.

#### **9.7 Right of Entry/ Notices of Non-Responsibility.**

Nothing herein shall imply any consent on the part of Landlord to subject Landlord's estate to liability under any mechanic's or other lien. Without limiting Tenant's responsibilities under Section 9.2 above, Landlord and the Landlord Parties shall have the right to enter upon and inspect the Premises at all times, without notice, and shall have the right to post and keep posted thereon notices of non-responsibility, or such other notices which Landlord may deem to be proper for the protection of Landlord's interest in the Premises. Tenant shall, before the commencement of any work which might result in any such lien, give Landlord written notice of its intention to commence such work in sufficient time (which in no event shall be less than the statutory period for posting notices of non-responsibility prior to the commencement of work) to give Landlord adequate opportunity to post and record such notices.

### **10. LEASE ENCUMBRANCE**

#### **10.1 Restrictions on Encumbrance.**

##### **10.1.1 Landlord's Consent.**

Tenant shall not encumber or hypothecate this Lease, Tenant's leasehold interest, or the Improvements thereon, or any part thereof or interest therein (such encumbrance or hypothecation being referred to herein as a "**Financing Transaction**"), without Landlord's prior written consent to the Financing Transaction in each instance, which consent, subject to the terms of Section 10.1.2, shall not be unreasonably withheld. Tenant shall submit its request for consent to the Financing Transaction in writing to Landlord, together with the required minimum documentation required pursuant to BPC Policy No. 355, or any other BPC policy then in effect governing Landlord's consent to a Financing Transaction. Within ten (10) days of receiving Tenant's request, Landlord may request from Tenant additional information regarding the lender

and/or the proposed financing. Landlord shall provide its response to Tenant's request for approval of the Financing Transaction within forty-five (45) days following Landlord's receipt of Tenant's request and all information requested by Landlord from Tenant. As a condition of approval, Tenant shall provide to Landlord a copy of the final loan documents for the Financing Transaction which conform to the terms set forth in the loan application or commitment delivered pursuant to Section 10.1.2(e) below, when such documents are available. Tenant shall reimburse Landlord pursuant to the Reimbursement Procedure for all Landlord's costs and expenses associated with its review of the Financing Transaction. Said costs shall include, without limitation, Landlord's legal fees (whether with in-house or outside counsel or both) and disbursements relating to or arising out of Landlord's review of any such Financing Transaction, regardless of whether such Financing Transaction is consummated or approved, and Landlord's transaction processing fees charged by Landlord for Landlord's analysis and processing of Tenant's request.

### **10.1.2 Conditions.**

Landlord's consent to any Financing Transaction may be conditioned upon, among other things, the following conditions and/or requirements, all of which Tenant acknowledges are reasonable given the context and terms and conditions of this Lease:

- (a) the lender shall be a Financial Institution;
- (b) a Lease amendment shall be executed to reflect updated or additional lease provisions for the purpose of conforming this Lease to Landlord's then standard leasing terms, practices, and policies,

Provided no such changes would result in any material adverse effect on tenant's obligations, liabilities or rights under this lease or under law except for rent, and such terms have been and are included in substantially all similar leases or amendments entered into by landlord at or around the time of the proposed modification or, in the case of a newly adopted term, practice or policy, such terms will be included in future similar leases or amendments entered into by landlord.

- (c) the maximum loan proceeds secured by the encumbrance shall not be in excess of the greater of (i) seventy five percent (75%) of the then fair market value of the Improvements (or the as-completed value if the subject loan is being used to finance the cost of an Alteration) as determined by a third party appraisal approved by Landlord (which may be the Permitted Lender's appraisal if so approved by Landlord), or (ii) the amount required to repay the outstanding principal balance of the existing financing that encumbers the leasehold under a Permitted Encumbrance previously consented to by Landlord;

- (d) the loan secured by the encumbrance shall have a payment term that provides for the full repayment of the loan prior to the Expiration Date of the then current Term of this Lease; and

- (e) Tenant shall have provided to Landlord pursuant to Section 10.1.1: (i) the Financing Transaction term sheet, application or commitment, (ii) a recent appraisal supporting the Financing Transaction, (iii) financial statements of Tenant for not less than the past two (2) years, (iv) the draft and final loan documents and (v) such other documents, information and materials relating to the Financing Transaction as Landlord may request.

### **10.2 Definition of "Permitted Lender" and "Permitted Encumbrance".**

The term "Permitted Lender" as hereinafter used in this Lease means the lender under the Financing Transaction holding a mortgage, deed of trust or other similar security interest

constituting a first lien on Tenant's interest in this Lease which has been consented to in writing by Landlord as provided above ("Permitted Encumbrance").

### **10.3 Rights of Permitted Lender.**

#### **10.3.1 Voluntary Lease Surrender.**

If Tenant owes the Permitted Lender any amounts under the Permitted Encumbrance, Landlord will not accept the voluntary surrender, cancellation, or termination of this Lease by Tenant before the Term expires unless the Permitted Lender provides prior written consent. Nothing in this Section 10.3.1 shall impair Landlord's right to terminate this Lease as a result of Tenant's default or by reason of Landlord's other rights to terminate as set forth in this Lease, subject to the Permitted Lender's notice and cure rights pursuant to Section 10.3.2 below, if applicable.

#### **10.3.2 Right to Cure/New Lease.**

(a) *Notice of Default.* So long as the loan secured by the Permitted Encumbrance remains unsatisfied, Landlord hereby agrees to give the Permitted Lender a copy of any written notice of any default which Landlord has given to Tenant, whereupon the Permitted Lender shall have the right, but not the obligation, to prevent any termination of this Lease by Landlord as a result of such default by curing such default within (i) thirty (30) days after the expiration of the period in which Tenant may cure any default in the payment of Rent, or (ii) subject to the terms of this Section 10.3.2, within one hundred twenty (120) days after the expiration of the period in which Tenant may cure any other default under this Lease.

(b) *Possession Required.* If such default as specified in part (ii) of Section 10.3.2(a) cannot be cured until the Permitted Lender has obtained possession of the Premises through foreclosure or otherwise, and if the Permitted Lender has delivered to Landlord within the forty-five (45) day cure period specified above Permitted Lender's written commitment (in form acceptable to Landlord in its sole discretion) to use commercially reasonable efforts to cure such default with due diligence upon obtaining possession of the Premises through foreclosure or otherwise, then the Permitted Lender shall have such additional time (but in no event to exceed 180 days from the date of obtaining possession of the Premises) as is reasonably necessary to cure such default; provided, however, that the Permitted Lender: (a) unless judicially stayed, commences the judicial or other foreclosure of the Permitted Encumbrance within forty-five (45) days from receipt of written notice of the occurrence of any event which constitutes, or which would constitute, upon the expiration of an applicable cure period, a default under this Lease; (b) prosecutes said foreclosure with due diligence; and (c) cures, during said period, all monetary events of default and, during the period of said stay and/or foreclosure, continues to pay and perform during said period of stay and/or foreclosure all other monetary obligations of Tenant in a timely manner, including, without limitation, payment of all Rent, taxes, assessments, utility charges, insurance premiums and all other amounts required to be paid by Tenant under this Lease. Notwithstanding anything herein to the contrary, nothing herein shall require a Permitted Lender who has taken possession of the Premises to cure any non-monetary default that, by its nature, is not capable of being cured by the Permitted Lender, such as a Bankruptcy Event (an "**Incurable Default**"), and such Incurable Default shall be deemed to be waived following the Permitted Lender's taking possession of the Premises and provided that Permitted Lender has timely cured all monetary defaults and, following taking possession all other non-monetary defaults that are of a continuing nature. In no event shall Tenant's waste or failure to maintain be an Incurable Default.

(c) *No Termination by Landlord.* Landlord will not terminate this Lease by reason of a default by Tenant provided that the Permitted Lender (i) has cured and continues to cure all defaults under the Lease in the payment of Rent in a timely manner as provided in Section 10.3.2(a)(i) above, and (ii) has cured all other defaults in a timely manner as provided in Sections 10.3.2(a)(ii) and 10.3.2(b) above, other than any Incurable Default.

(d) *New Lease.* In the event of a termination of this Lease by reason of a surrender, cancellation, or termination by Tenant (subject to and in accordance with Section 10.3.1), or as a result of the rejection or disaffirmance of this Lease pursuant to bankruptcy law or other Law affecting creditors rights, or as a result of a termination of this Lease by Landlord in violation of Section 10.3.2(c) above, then Landlord shall deliver notice to Permitted Lender that the Lease has been terminated. The notice shall include a statement of all amounts that would be due under this Lease but for the termination, and all other defaults then known to Landlord. The Permitted Lender shall then have the option, to be exercised within thirty (30) days following receipt of such notice of termination to enter into a new lease ("**New Lease**") with Landlord, on the following terms and conditions:

(i) The New Lease shall commence as of the date of the termination of this Lease and shall be for the remainder of the Term, and at the Rent, terms, covenants and conditions as this Lease (but excluding any right to extend the Term).

(ii) Upon execution of the New Lease, the Permitted Lender as tenant shall pay any and all sums that would at the time of execution thereof be due under this Lease, but for termination, and shall pay all expenses, costs, attorneys' fees, court costs, and disbursements incurred by Landlord in connection with any default and termination, recovery of possession of the Premises, and the execution, preparation and delivery of the New Lease.

(iii) Upon execution of the New Lease, the Permitted Lender as tenant shall cure all other defaults under this Lease, which have not yet been cured (other than any Incurable Default), with due diligence in a timely manner in accordance with the cure periods under the Lease assuming such cure periods commence with the execution of the New Lease and without additional notice.

(iv) Nothing herein shall be construed to require Landlord to deliver possession of the Premises to Permitted Lender. Upon execution and delivery of the New Lease, Permitted Lender may take any and all appropriate action as may be necessary to remove parties in possession from the Premises.

Should the Permitted Lender fail to accept said offer for such New Lease in writing within said thirty (30) day period, or, having so accepted said offer, should it fail promptly to execute the New Lease or satisfy the requirements of (ii) and (iii) above in a timely manner, then the termination of this Lease shall be effective as to the Permitted Lender and the Permitted Lender shall have no further rights hereunder.

### **10.3.3 Loan Default.**

If a Permitted Encumbrance is in default at any time, and the Permitted Lender is complying with the cure requirements described in Section 10.3.2 above, the Permitted Lender shall, as provided by law, have the right, without Landlord's prior consent, to:

(a) Accept an Assignment of this Lease in lieu of foreclosure; or

(b) Cause a foreclosure sale to be held pursuant to either judicial proceedings or power of sale as provided in its Permitted Encumbrance. Provided, however, no Assignment to the successful bidder (a "**Foreclosure Purchaser**") other than the Permitted Lender or a designee of the Permitted Lender who is Controlled by or is under common Control



with the Permitted Lender shall be effective without Landlord's prior written consent in accordance with Section 10.4 below.

#### **10.3.4 Assume Lease Obligations.**

Before the Permitted Lender, or any Foreclosure Purchaser, acquires the leasehold interest, it shall, as an express condition precedent, agree in writing to be bound by all provisions of, and assume each and every obligation of Tenant, under this Lease. A Permitted Lender that has: (i) acquired the leasehold interest and assumed the Tenant's obligations, or (ii) entered into a New Lease pursuant to Section 10.3.2(d) above, shall be released from all obligations under this Lease first arising after it assigns the leasehold interest to an assignee consented to by Landlord, in accordance with Section 10.4.

### **10.4 Landlord's Consent to Assignment or Transfer.**

#### **10.4.1 Landlord's Consent to Assignment.**

Landlord's prior written consent pursuant to Article 11 shall be required for the following: (i) an Assignment of this Lease to a Foreclosure Purchaser other than the Permitted Lender or a designee of the Permitted Lender who is Controlled by or is under common Control with the Permitted Lender, or (ii) an Assignment of this Lease or Sublease of all or substantially all of the Premises by the Permitted Lender or a designee of the Permitted Lender who is Controlled by or is under common Control with the Permitted Lender should the Permitted Lender or such designee become the tenant by reason of: (a) being the successful bidder upon said foreclosure, or (b) an Assignment in lieu of foreclosure, or (c) a New Lease entered into pursuant to Section 10.3.2(d) above.

#### **10.4.2 Notice of Foreclosure Sale.**

Permitted Lender shall include a statement in any notice of foreclosure sale covering the requirements under Section 10.4.1 for Landlord's consent to an Assignment upon said foreclosure.

#### **10.4.3 Assignment of Security Interest.**

(a) *Consent.* Neither Permitted Lender nor assignees or any subsequent holder of Permitted Lender's security interest in the Premises shall assign or transfer its security interest in the Premises in whole or in part without Landlord's prior written consent, in each instance. Such consent shall not be unreasonably withheld. Although such holder shall be required to obtain Landlord's express written consent, Landlord shall not withhold such consent (and such assignee or holder will for all purposes of this Lease be deemed to be a Permitted Lender) if the Assignment is to one of the following entities and a copy of the Assignment, in a form acceptable to Landlord, is furnished to Landlord:

(i) A Financial Institution in good legal standing under the laws of the its jurisdiction of incorporation having a tangible net worth exceeding One Billion Dollars (\$1,000,000,000) (which sum shall be adjusted to Constant Dollars at the beginning of each Rental Period); or

(ii) The United States of America or any state thereof, or any agency thereof; or

(iii) An assignee by operation of law; e.g., a state insurance department engaged in supervising the liquidation or rehabilitation of an insurance company lender.

### **10.5 Landlord's Participation in Refinance Proceeds.**

Upon each Financing Transaction other than the construction financing of the initial development of the Improvements, Tenant shall pay to Landlord 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 Landlord's consent to any Financing Transaction, Tenant shall deliver to Landlord a written statement showing the calculation of the Financing Participation Fee owed to Landlord from Tenant 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 Landlord to verify the calculation of the Financing Participation Fee. The Financing Participation Fee due Landlord shall be payable in full to Landlord concurrent with the completion of the Financing Transaction. When owed, the Financing Participation Fee shall constitute Additional Rent.

For the purposes of this Section 10.5, 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, proceeds (if any) that reimburse the tenant for documented equity investment, or any portion of the debt under the Financing Transaction to be expended on improving the Premises or any District-owned land or water, less any reasonable costs or fees of the Financing Transaction payable by Tenant to Permitted Lender.

## **11. ASSIGNMENT/SUBLEASE**

### **11.1 Consent Required.**

Subject to the terms of Section 11.8, no Assignment, Sublease or Change in Entity (collectively, "Transfer") shall be made or permitted without in each instance the prior written consent of Landlord, which consent shall not be unreasonably withheld. It is mutually agreed that Landlord is a government agency holding title to the Premises in trust for the citizens of California and acting as a prudent steward of the Premises and that the personal qualifications of the parties Controlling Tenant are a part of the consideration for granting this Lease. As such, a Change in Entity is as relevant to Landlord as an Assignment of this Lease. For purposes of this Article 11, the term Sublease shall not include the rental of boat slips and dock lockers to tenants not operating a business on or from the Premises. Notwithstanding anything herein to the contrary, no Transfer is allowed prior to the date that the Project Improvements are Completed and open for business.

### **11.2 Request for Consent.**

If a Transfer is proposed, Tenant shall notify Landlord in writing, which notice (the "Transfer Notice") shall include (i) the proposed effective date of the Transfer, which shall not be less than ninety (90) days nor more than one hundred eighty (180) days after the date of delivery of the Transfer Notice, (ii) with respect to a Sublease, a completed Sublease Questionnaire form [Form 317 or 320 depending on the term of the Sublease] including, among other information, a description of the portion of the Premises which is proposed to be Subleased, (iii) all of the terms of the proposed Transfer, the name and address of the proposed transferee with respect to an Assignment or Sublease ("Transferee"), if the Transfer is a result of a Change in Entity, a complete description of the direct and indirect ownership and Control of Tenant just before and just after the Transfer and a copy of all existing and/or proposed documentation pertaining to the proposed Transfer, including all existing operative documents to be executed to evidence such Transfer and the agreements incidental or related to such Transfer, (iv) a statement of any current litigation or litigation which was resolved within the prior five (5) years affecting the

proposed Transferee or persons or entities acquiring an interest resulting in a Change in Entity of Tenant or a Tenant Parent, (v) current financial statements of the proposed Transferee certified by a reputable, certified public accountant (which shall be audited if that is the customary practice of the Transferee), and (vi) such other information as Landlord may require. Any Transfer made without Landlord's prior written consent shall, at Landlord's option, be null, void and of no effect, and shall, at Landlord's option, constitute a default by Tenant under this Lease upon written notice thereof to Tenant. Whether or not Landlord shall grant consent, Tenant shall pay Landlord's legal and other fees incurred by Landlord pursuant to the Reimbursement Procedure, regardless of whether such transaction is consummated. Any Transfer shall be subject to the terms and provisions of this Lease. Notwithstanding anything to the contrary in this Lease, if Tenant claims that Landlord has unreasonably withheld or delayed its consent under this Article 11 or otherwise has breached or acted unreasonably under this Article 11, Tenant's sole remedies shall be a declaratory judgment and an injunction for the relief sought without any monetary damages, and Tenant hereby waives the provisions of Section 1995.310 of the California Civil Code, or any successor statute, and all other remedies. The burden of producing evidence and the burden of proof showing Landlord that a prospective Transferee meets each and all of the aforesaid qualifications and standards shall be on the Tenant.

### **11.3 Consent Factors.**

If Landlord consents to any Transfer, Tenant may within one hundred eighty (180) days after the date of delivery of the Transfer Notice, enter into such Transfer of Tenant's interest in the Premises or portion thereof, upon the same terms and conditions as are set forth in the Transfer Notice furnished by Tenant to Landlord, provided that if there are any material changes to the financial condition of the Transferee or any other material changes to any proposed Transfer terms specified in the Transfer Notice, Tenant shall again submit the Transfer to Landlord for its approval and other action under this Article 11

Without limitation of Landlord's right to withhold its consent for other reasonable reasons, the parties hereby agree that it shall be reasonable under this Lease and under any applicable Law for Landlord to withhold consent to any proposed Transfer where Landlord determines in its reasonable discretion that one or more of the following apply (it being understood that for the purposes of this Section 11.3 and 11.5.1 in the case of a Change in Entity, references to "Transferee" shall mean Tenant following the Change in Entity):

#### **11.3.1 Insufficient Experience.**

The Transferee is not experienced in the ownership or management of similar projects or the proposed Transferee lacks sufficient business reputation and experience to operate a successful business of the type and quality contemplated under this Lease;

#### **11.3.2 Inconsistent Use.**

The Transferee's proposed use of the Premises following the proposed Transfer will not be for the Permitted Use or the quality of the use is not of the quality contemplated under this Lease;

#### **11.3.3 Project Improvements Incomplete.**

The Transfer is to occur prior to the date the Project Improvements are completed;

#### **11.3.4 Reputation.**

The Transferee (i) is not reputable (a reputation for dishonesty, criminal conduct or association with criminal elements), (ii) is of a character or reputation or engaged in a business which is not consistent with the quality or reputation of the Project, or may reflect adversely on the quality or reputation of the business conducted from the Premises or (iii) has a history of, or a reputation for, either discriminatory employment practices which violate any Laws or non-compliance with Environmental Laws;

#### **11.3.5 Financial Stability.**

The Transferee is not a party of sufficient financial worth and financial stability in light of the Tenant obligations under this Lease;

#### **11.3.6 Default.**

At the time of request or Transfer, Tenant is in default under this Lease or any other lease between Landlord and Tenant or an entity that is Controlled by or under common Control with Tenant or which Controls Tenant is in default (after applicable notice and cure periods) of its lease with Landlord.

#### **11.3.7 Other Grounds.**

Any other reasonable grounds considering the unique nature and interests of the Landlord including the fact that Landlord holds the Premises in trust for the people of the State of California and Landlord's duty of care in administering a valuable public resource.

Tenant acknowledges and agrees that each of the grounds set forth in Section 11.3 above in the event of proposed Transfer is a reasonable restriction on Transfer for purposes of California Civil Code Section 1951.4. The burden of producing evidence and the burden of proof showing Landlord that a prospective Transferee meets each and all of the aforesaid qualifications and standards shall be on the Tenant.

#### **11.4 Effect of Transfer.**

If Landlord consents to a Transfer, (i) the terms and conditions of this Lease shall in no way be deemed to have been waived or modified, (ii) such consent shall not be deemed consent to any further Transfer by either Tenant or a Transferee, (iii) Tenant shall deliver to Landlord, within ten (10) days after execution, an original executed copy of all documentation pertaining to the Transfer, and any document evidencing a Transfer shall be in form acceptable to Landlord, and (iv) no Transfer relating to this Lease or agreement entered into with respect thereto, whether with or without Landlord's consent, shall relieve Tenant or any guarantor of the Lease from liability under Articles 21, 22 and Article 19 as it applies to Articles 21 and 22 of this Lease.

## **11.5 Conditions.**

### **11.5.1 Transfer.**

In the event Landlord consents to any Transfer (other than for a Sublease for less than twenty-five percent (25%) of the floor area of the Improvements computed in the aggregate for one or a series of transactions), then at Landlord's election said consent shall be conditioned upon the following: (i) the Transferee (other than a Subtenant under a Sublease of less than all or substantially all of the Premises) shall agree to be bound by all provisions, and assume each and every obligation, under this Lease (including those obligations arising or pertaining to periods prior to the effective date of the Transfer), or in the case of a Subtenant under a Sublease of less than all or substantially all of the Premises, such Subtenant shall execute a document acceptable to Landlord acknowledging that all rights of the Subtenant are subject to all terms and conditions of this Lease as the same relate to the space subject to the Sublease; (ii) if requested by Landlord, a Lease amendment of the type described in Section 10.1.2(b) shall be executed; (iii) Transferee shall comply with other conditions and qualifications determined by the BPC; and (iv) in the case of a Sublease, the Subtenant shall execute an attornment agreement as provided in Section 11.6 below. Without limiting the generality of clause (i) above, the Transferee shall be obligated for the payment to Landlord of any underpayment of Rent determined to be due under Section 5.5.3(e) above, together with the cost of the audit if applicable, notwithstanding that such underpayment of Rent, and related audit, pertains to a period of time prior to the effective date of the Transfer.

### **11.6 Subtenant Attornment.**

Every Sublease hereunder is subject to the express condition, and by accepting a Sublease hereunder each Subtenant shall be conclusively deemed to have agreed, that if this Lease terminates or if Landlord succeeds to Tenant's estate in the Premises, the Subtenant shall, at the option of Landlord, attorn to and recognize Landlord as the Subtenant's landlord under the Sublease, provided that Landlord shall not (i) be liable for any act or omission or negligence of Tenant, (ii) be subject to any counterclaim, offset or defense which theretofore accrued to such Subtenant against Tenant, (iii) be bound by any payment of Rent or other sums of money for more than one (1) month in advance or any security deposit (unless actually received by Landlord), (iv) be obligated to perform any work in the sublet space, (v) in the event of a casualty, be obligated to repair or restore Improvements, (vi) in the event of a partial Taking, be obligated to repair or restore Improvements, (vii) be obligated to make any payment to such Subtenant, or (viii) be bound by any obligations that Landlord lacks the capacity to perform. Any Subtenant shall promptly execute and deliver any instrument Landlord may reasonably request to evidence such attornment. Upon early termination of this Lease, Tenant shall pay over to Landlord all sums held by Tenant for the benefit of Subtenants or as security under the provisions of the existing Subleases.

### **11.7 Sublease Rent Requirements.**

Subject to the terms of any Permitted Encumbrance, each Sublease shall require the Subtenant thereunder to make all payments of Rent and other sums of money to Landlord during the existence of a default hereunder and following written notice of the same from Landlord, and Landlord shall apply said payments made to all Rent that is due and payable to Landlord pursuant to this Lease, and any remaining amounts will be held and applied to future Rent payable under this Lease.

### **11.8 Reporting of Sublease Information.**

If Tenant has entered into any Subleases, then within thirty (30) days of request from Landlord and within sixty (60) days after the end of each calendar year, Tenant shall submit to Landlord a rent roll in the form of Exhibit H attached hereto containing the information described therein for each Sublease then in effect, along with a site plan showing locations of any Subleases.

### **11.9 Permitted Lender and Foreclosure Purchasers.**

The foregoing provisions of this Article 11 shall not apply to the following Transfers, which are governed by Sections 10.3 and 10.4: (i) a Transfer to a Permitted Lender or a designee of the Permitted Lender who is Controlled by or is who is under common Control with the Permitted Lender pursuant to the foreclosure of the Permitted Encumbrance or an Assignment in lieu of foreclosure or (ii) a Transfer to a Foreclosure Purchaser.

### **11.10 Landlord Participation Fee.**

Upon each (i) Assignment of this Lease pursuant to this Article 11 to a Third Party (as defined below), and (ii) a change in the composition of the direct or indirect ownership of Tenant by which a Third Party (as defined below) acquires any direct or indirect interest in Tenant other than pursuant to a transfer of ownership interests traded on a recognized public exchange, (iii) Sublease of all or substantially all of the Premises to a Third Party, Tenant shall pay to Landlord 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 Landlord's consent to any transaction subject to an Assignment Participation Fee, Tenant shall deliver to Landlord a written statement showing the calculation of the Assignment Participation Fee owed to Landlord from Tenant 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 Landlord to verify the calculation of the Assignment Participation Fee. The Assignment Participation Fee due Landlord shall be payable in full to Landlord 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.

For the purposes of this Section 11.10, the term "**Third Party**" shall mean any Person other than (i) Bartell Hotels (the "**Approved Parent**") or an entity who is directly or indirectly Controlled by, [one or more of] the Approved Parent[s], (ii) a Permitted Lender, (iii) an assignee of a Permitted Lender (whether the Permitted Lender acquires the leasehold interest under this Lease by foreclosure or deed-in-lieu of foreclosure or pursuant to a new lease), or (iv) an assignee acquiring less than 10%; provided, however, that if the Gross Proceeds paid by the assignee exceed the Aggregate Debt Amount (as defined below), then such assignee of the Permitted Lender shall be a Third Party and the Assignment Participation Fee shall be payable solely with respect to the portion of the Gross Proceeds that exceed the Aggregate Debt Amount. 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 Permitted Lender of the leasehold interest in the Premises.

For the purposes of this Section 11.10, 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 Tenant, 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 Tenant

and/or holders of direct or indirect interests in Tenant in connection with the subject transaction less the sum of (x) any prorations, brokerage fees, closing costs or other customary deductions to the purchase price for which the seller is responsible and (y) if the Third Party is the assignee of a Permitted Lender, the Aggregate Debt Amount.

Upon the request of Landlord from time to time (which request shall be no more frequent than once per year), Tenant shall provide Landlord with a schedule listing the names and mailing address of all holders of direct or indirect (at all levels) interests in Tenant 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, Tenant 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.

## **12. DEFAULTS AND REMEDIES**

### **12.1 Defaults.**

In addition to any terms hereof expressly providing for a default hereunder, the occurrence of any one (1) or more of the following events shall constitute a default by Tenant hereunder:

#### **12.1.1 Abandonment of the Premises.**

“Abandonment” is herein defined to include, but is not limited to, any absence by Tenant from the Premises for ten (10) consecutive days or longer.

#### **12.1.2 Failure to Pay**

Failure by Tenant to pay, when due, any Rent, other payment, and/or charge herein, is where such failure continues for a period of five (5) days after the date due. Provided, however, any such notice provided in this Section 12.1.2 or in subsequent Section 12.1.3 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.

#### **12.1.3 Failure to Perform.**

Failure by Tenant to perform any express or implied covenants or conditions in this Lease (other than as provided in the other subsections in this Section 12.1), should such failure continue for thirty (30) days after written notice thereof is given to Tenant; provided that if the nature of such failure is such that the same cannot reasonably be cured within such thirty (30) day period, Tenant shall not be deemed to be in default if it diligently commences such cure within such period and thereafter diligently proceeds to rectify and cure such failure, but in no event exceeding a period of time in excess of ninety (90) days after written notice thereof from Landlord to Tenant.

#### **12.1.4 Bankruptcy Event.**

The occurrence of a Bankruptcy Event.

#### **12.1.5 Specified Defaults.**

The occurrence of any event expressly stated to constitute a default under the Lease.

#### **12.1.6 Health Rating.**

If the use of the Premises involves the sale and/or preparation of food, Tenant's failure to maintain a health department rating of "A" (or such other highest health department or similar rating as is available), which failure continues for more than thirty (30) days after the change in rating from the health department.

#### **12.1.7 Other Agreements.**

Tenant or an entity that is Controlled by or under common Control with Tenant or which Controls Tenant is in default (after applicable notice and cure periods) under any other agreement between Landlord and Tenant or such entity.

### **12.2 Remedies.**

Upon any default, Landlord may, in addition to all other rights and remedies afforded Landlord hereunder or by law or equity, take any one or more of the following actions:

#### **12.2.1 Termination of Lease.**

Terminate this Lease by giving Tenant written notice thereof, in which event Tenant shall immediately surrender the Premises to Landlord. In the event that Landlord shall elect to so terminate this Lease, then Landlord may recover from Tenant:

(a) The worth at the time of award of any unpaid Rent which had been earned at the time of such termination; plus

(b) 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 Rent loss Tenant proves reasonably could have been avoided; plus

(c) The worth at the time of award of the amount by which the unpaid Rent for the balance of the Term after the time of award exceeds the amount of such Rent loss that Tenant proves reasonably could be avoided; plus

(d) Any other amount necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including, without limitation, the cost of recovering possession of the Premises, expenses of reletting (including necessary repair, renovation and alteration of the Premises), reasonable attorneys' fees, and any other reasonable costs; plus

(e) At Landlord's election, such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by applicable California law.

Failure by Landlord to enforce one or more of the remedies herein provided upon a default shall not be deemed or construed to constitute a waiver of such default. Tenant hereby waives for Tenant and for all those claiming under Tenant all rights now or hereafter existing to redeem by order or judgment of any court or by any legal process or writ, Tenant's right of occupancy of the Premises after any termination of this Lease.



### **12.2.2 Continue Lease in Effect.**

Landlord shall have the remedy described in California Civil Code Section 1951.4 (Landlord may continue this Lease in effect after Tenant's breach and abandonment and recover Rent as it becomes due if Tenant has the right to sublet or assign this Lease, subject only to reasonable limitations).

### **12.2.3 Perform Acts on Behalf of Tenant.**

Perform any act Tenant is obligated to perform under the terms of this Lease (and enter upon the Premises in connection therewith if necessary) in Tenant's name and on Tenant's behalf, without being liable for any claim for damages therefor, and Tenant shall reimburse Landlord on demand for any expenses which Landlord may incur in thus effecting compliance with Tenant's obligations under this Lease (including, but not limited to, collection costs and legal expenses), plus interest thereon at the Default Rate.

### **12.2.4 Increased Security Deposit.**

Require Tenant to increase the Security Deposit with an additional amount equal to three (3) months of the Minimum Annual Rent (which remedy may be exercised on more than one occasion with further increases in the Security Deposit on any subsequent default or any failure of Tenant to cure the default at issue within the time period set forth in Section 12.1.3).

### **12.2.5 Payment by Tenant.**

Upon any default, Tenant shall pay to Landlord all costs incurred by Landlord (including court costs and reasonable attorneys' fees and expenses and staff time) in: (1) obtaining possession of the Premises; (2) removing and storing Tenant's or any other occupant's property; (3) repairing, restoring, altering, remodeling, or otherwise putting the Premises into condition acceptable to a new tenant; (4) performing Tenant's obligations which Tenant failed to perform; and (5) enforcing, or advising Landlord of, its rights, remedies, and recourses arising out of the default.

### **12.2.6 Assignment of Plans and Other Matters.**

If this Lease is terminated or Landlord otherwise takes possession of the Premises by reason of Tenant's default, Tenant hereby agrees that, if Landlord so requests, (i) Tenant, at Tenant's sole cost and expense, shall assign and transfer to Landlord all of Tenant's right, title and interest in and to all plans, drawings, specifications, permits, approvals, warranties, entitlements, and other similar property and instruments relating to the Premises, free and clear of liens and claims by third parties, in connection with and (ii) Tenant shall execute and deliver to Landlord, within five (5) business days of Landlord's request, in a form provided by and acceptable to Landlord, an instrument confirming the Assignment and transfer of such property and interests to Landlord and shall, within such five (5) business day period, deliver the originals of such plans, drawings, specifications, permits, approvals, warranties, entitlements, and other similar property and instruments relating to the Premises to Landlord. Tenant agrees to reasonably cooperate with Landlord at no cost or expense to Landlord in seeking any consent from the preparer of any plans, drawings, specifications, permits, approvals, warranties, entitlements, and other similar property and instruments relating to the Premises, to the extent assignable, to this Assignment which may be required for Landlord to rely on such plans, drawings, specifications, permits, approvals, warranties, entitlements, and other similar property and instruments relating to the Premises.

### **13. BANKRUPTCY**

#### **13.1 Bankruptcy Event.**

Upon occurrence of a Bankruptcy Event, Landlord shall have all rights and remedies available pursuant to Article 12. After the commencement of a Bankruptcy case: (i) the Tenant shall perform all post-petition obligations of Tenant under this Lease; and (ii) if Landlord is entitled to damages (including unpaid Rent) from and after any order for relief pursuant to the terms of this Lease, then all such damages shall be entitled to administrative expense priority pursuant to the Bankruptcy Code. Tenant acknowledges that this Lease is a lease of nonresidential real property and therefore Tenant, as the debtor in possession, or the trustee shall not seek or request any extension of time to assume or reject this Lease or to perform any obligations of this Lease which arise from or after the order of relief.

#### **13.2 Assignment/Assumption.**

Any Person to which this Lease is assigned pursuant to the Bankruptcy Code shall be deemed without further act or deed to have assumed all of the obligations arising under this Lease on and after the date of Assignment, and any such assignee shall upon request by Landlord execute and deliver to Landlord an instrument confirming such assumption in a form acceptable to Landlord. If the Tenant desires to assume and assign this Lease under the Bankruptcy Code to any Person who shall have made a bona fide offer, then the Tenant shall give Landlord written notice of such proposed Assignment (which notice shall set forth the name and address of such Person, all of the terms and conditions of such offer, and the adequate assurance to be provided Landlord to assure such Person's future performance under this Lease) prior to the date Tenant shall make application to the appropriate court for authority and approval to enter into such Assignment and assumption. Landlord shall thereupon have the prior right and option, to be exercised by notice to the Tenant given at any time prior to the effective date of such proposed Assignment, to accept an Assignment of this Lease upon the same terms and conditions and for the same consideration, if any, as the bona fide offer made by such Person, less any brokerage commissions which may be payable out of the consideration to be paid by such Person for the Assignment of this Lease. If the Tenant fails to assume or assume and assign this Lease in accordance with the requirements of the Bankruptcy Code within the period provided by the Bankruptcy Code or allowed by the Bankruptcy Court, then the Lease shall be deemed rejected and the Landlord shall have all rights and remedies available to it pursuant to Section 12.2. At any time during the Term, upon not less than five (5) days' prior written notice, Tenant shall provide Landlord with audited financial statements for Tenant for not less than the past two (2) years. Such statements are to be certified by an authorized representative of Tenant to be true, correct and complete, prepared in accordance with generally accepted accounting principles and audited by any independent certified public accountant.

#### **13.3 Adequate Assurances.**

In the event Tenant or proposed assignee under Section 13.2 proposes under the Bankruptcy Code to cure any default under this Lease or to assume or assign this Lease and is obliged to provide adequate assurance to Landlord that (a) a default shall be cured, (b) Landlord shall be compensated for its damages arising from any breach of this Lease and (c) future performance of Tenant's obligations under this Lease shall occur, then such adequate assurances shall include all of the following, as designated by Landlord in its sole and absolute discretion:

(a) Those acts specified in the Bankruptcy Code or other applicable laws as included within the meaning of "adequate assurance";

(b) A prompt cash payment to compensate Landlord for any monetary defaults or actual damages arising directly from a breach of this Lease;

(c) A cash deposit in an amount at least equal to the then-current amount of the Security Deposit; and

(d) The assumption or Assignment of all of Tenant's interest and obligations under this Lease.

## **14. EMINENT DOMAIN**

### **14.1 Eminent Domain.**

If all or any portion of the Premises shall be condemned pursuant to exercise of the power of eminent domain, or acquired under an actual threat of the exercise of such power (collectively, "Condemnation") the rights and obligations of Landlord and Tenant with respect thereto shall be as set forth in this Article 14. Nothing in this Article 14 shall be interpreted to prevent Landlord from exercising its power of eminent domain as to Tenant's leasehold interest and/or Premises.

### **14.2 Notice of Condemnation.**

If either party hereto receives notice of any Condemnation or intended Condemnation (including, without limitation, service of process), within five (5) business days of receipt, the party in receipt thereof shall deliver to the other party and to the Permitted Lender (if any) an exact copy of such notice of or relating to any intended Condemnation and the date such notice was received.

### **14.3 Representation of Interest.**

Landlord, Tenant and the Permitted Lender (if any) shall each have the right to represent its respective interests in such proceeding or negotiation with respect to a Condemnation or intended Condemnation and to make full proof of its claims. Landlord and Tenant each agrees to execute and deliver to the other and to the Permitted Lender (if any) any instrument which may be required to effectuate or facilitate the provisions of this Article 14.

### **14.4 Early Termination.**

In the event of a Condemnation of all of the Premises or such portion of the Premises so that Tenant cannot reasonably and economically use the remainder of the Premises for the purposes permitted under this Lease (as reasonably determined by Tenant and approved by each of Landlord and the Permitted Lender (if any)), this Lease shall terminate as of the date of such Condemnation. A termination of this Lease pursuant to this section shall act to relieve Tenant from any further liability under this Lease except as to obligations accruing or arising on or prior to termination or which are otherwise required to be performed in connection with such termination or surrender of the Premises or which otherwise expressly survive termination. Tenant shall deliver the Premises to Landlord in the condition required for the surrender of the Premises under this Lease.

### **14.5 Partial Condemnation.**

If only a portion of the Premises is subject to Condemnation and this Lease is not terminated pursuant to Section 14.4 above, then this Lease shall continue in full force and effect upon the same terms and conditions as set forth herein, and the Minimum Annual Rent shall be reduced in proportion to the reduction in the value of the Premises after the Condemnation as compared

to the value of the Premises immediately prior to the Condemnation (as reasonably determined by Landlord and approved by Tenant in its reasonable discretion).

#### **14.6 Temporary Condemnation.**

If any portion of the Premises, including the entirety thereof, is subject to a temporary Condemnation, then this Lease shall continue in full force and effect and there shall be no adjustment or abatement in Rent during the term of such temporary Condemnation. Any portion of an award, settlement or other compensation or damages which may be given for such temporary Condemnation attributable to the Term shall be the property of Tenant and any portion attributable to any period following the expiration of the Term shall be the property of Landlord. As used herein, a "temporary Condemnation" shall mean any taking which is not intended by the condemning authority to be permanent at the time such Condemnation initially occurs.

#### **14.7 Award.**

##### **14.7.1 Leasehold Award.**

In the event of any Condemnation of all or any portion of the Premises (other than a temporary Condemnation), Landlord shall be entitled to any and all awards and/or settlements or other compensation or damages which may be given for (a) any "bonus value" respecting this Lease (i.e., the excess value of the leasehold arising from the fact that the scheduled rent is less than the market rent for the Premises), and (b) the land (and water, if applicable) comprising the Premises and any Existing Improvements. Any and all other awards and/or settlements or other compensation or damages (collectively, "**Leasehold Award**") for Improvements constructed by Tenant and the leasehold estate created by this Lease (excluding any bonus value thereof) shall be paid as follows:

(a) Provided this Lease is not terminated pursuant to Section 14.4 above, the Leasehold Award shall be payable in trust to any Permitted Lender that is a Financial Institution, if any, and shall be disbursed for the payment of the costs of repairing and restoring the remaining portion of the Premises to substantially its value, condition and character prior to such Condemnation to the extent the same may be feasible. If there is no Permitted Lender that is a Financial Institution or if there is but the Permitted Lender declines to act as a trustee for the disbursement of funds as provided above, then such Leasehold Award shall be payable in trust 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, and shall be disbursed by such trustee as provided above. If the Permitted Lender is the trustee, the Permitted Lender may disburse the progress payments in accordance with its normal loan disbursement procedures (e.g. upon receipt of appropriate mechanics lien releases, invoices, etc.) so long as such disbursement procedures are reasonably acceptable to Landlord and ensure that the Leasehold Award is applied to the costs of repairing and restoring the Premises.

(b) If this Lease is terminated pursuant to Section 14.4, or if there are excess proceeds available after completion of the repair and restoration of the Premises as provided above, then any portion of the Leasehold Award not used for the repair and restoration of the remaining portion of the Premises pursuant to subparagraph (a) above, or used to place the Premises in the condition required for the surrender of same to Landlord, shall be divided between Landlord and Tenant, with Landlord to receive a sum computed by multiplying such excess funds awarded with respect to such Improvement by a fraction, the numerator of which shall be the number of years (or portion thereof) of the Term that have, at the time of such Condemnation, expired, and the denominator of which shall be the total number of years in the

full Term. The remaining amount shall be paid to Tenant, subject to the Permitted Lender's rights under subparagraph (c) below.

(c) Any portion of the Leasehold Award relating to Improvements and not used as described in subparagraph (a) and (b) and which is payable to Tenant pursuant to subparagraph (b) shall be paid to the Permitted Lender to be applied against its Permitted Encumbrance to the extent such payment is required to be made by Tenant pursuant to the terms of the Permitted Encumbrance held by the Permitted Lender.

(d) Any remaining portion of the Leasehold Award after payment as described above shall be paid to Tenant. Notwithstanding the foregoing sentence, with respect to any Leasehold Award received in connection with any Condemnation for street widening or the installation of utilities, public sidewalks or walkways which occurs at any time following the Commencement Date, and provided such Condemnation does not result in material physical damage to then existing buildings or driveways, parkway access or access ways serving the Improvements on the Premises located on the Premises, Landlord instead of Tenant, shall be entitled to receive, in addition to any award otherwise payable to Landlord pursuant to this Article, all of that portion of the Leasehold Award distributed to Tenant pursuant to this subparagraph (d).

(e) In addition to any other amounts to which Lessee is entitled as set forth above, Lessee shall be entitled to pursue any rights and remedies it may have against such condemning authority for: (i) any of Lessee's personal property; (ii) compensation pursuant to the provisions of California Government Code Section 7262 et seq.; (iii) compensation for loss of good will pursuant to California Code of Civil Procedure Section 1263.510 et seq.; and (iv) any other personal rights and remedies to which the occupant and user of the condemned portion of the Leased Premises may be entitled under law. Said amounts shall not be deemed a part of an "award" as provided above.

#### **14.7.2 Default.**

Anything in this Article to the contrary notwithstanding, Tenant shall not be entitled to any funds, awards, rights, benefits or entitlement of any kind arising from or out of a Condemnation, except so far as is designated for damage to Tenant's personal property, if the same occurs during the period Tenant is in default under this Lease or after Landlord has exercised any remedy referred to in Section 12.2 above by reason of Tenant's default. Tenant shall be entitled to any award allocated by a court of competent jurisdiction to Tenant's personal property.

### **15. MAINTENANCE AND REPAIR**

#### **15.1 Maintenance and Repair.**

The Premises and all Improvements, both inside and outside, shall be put and kept free of deferred maintenance and in good operating condition by Tenant at Tenant's sole cost and expense. Tenant, at its sole cost and expense, shall be fully responsible for all care, maintenance and repair of the Premises and all Improvements as necessary to keep the Improvements free of deferred maintenance and in good operating condition except for reasonable wear and tear. Tenant acknowledges that over the Term of this Lease, that in order to adhere to these maintenance and repair standards, certain repairs and replacements will be required and that regular reinvestment should therefore be anticipated. Without limitation of the foregoing, Tenant shall perform all maintenance and make all repairs and replacements, ordinary as well as extraordinary, structural or otherwise, which may be necessary or required so that all times the Premises and the Improvements (together with all equipment, trade fixtures,

mechanical and utility systems, paving, landscaping, installations and appurtenances) shall be free of deferred maintenance and in good operating condition, satisfactory to Landlord in its sole discretion except for reasonable wear and tear which does not adversely affect the appearance and condition of the Premises or Improvements. Further, Tenant shall provide containers for the collection of trash and garbage outside the Improvements, which may require Landlord's approval, and keep the Premises in a clean, safe, healthy and sanitary condition, free and clear of rubbish, litter, and any fire hazards. Tenant's maintenance shall include, without limitation, all preventive maintenance, painting and replacements necessary to maintain and preserve the Premises and Improvements, and compliance with the Best Management Practices ("BMPs") set forth in the Jurisdictional Runoff Management Program incorporated by reference in Article 10 of the San Diego Unified Port District Code.

Prior to Tenant performing any non-routine repairs or replacements (i.e., those not occurring with an expected or known frequency in the normal course of business) to the exterior, the structure or building systems or which will substantially interfere with the typical operation of the Improvements, or affect the portions of the Improvements generally accessible to the public such as the lobby area of a hotel, plans and specifications must first be submitted to Landlord and receive Landlord's written approval, pursuant to the procedures provided in Article 6 herein as if such repairs or replacements were Alterations.

Tenant waives all rights to make repairs at the expense of Landlord, as provided in Section 1942 of the California Civil Code, and all rights provided by Section 1941 of the California Civil Code.

## **15.2 Condition in Compliance with Laws.**

Tenant, at its sole cost and expense, shall keep the Premises and Improvements (together with all equipment, trade fixtures, mechanical and utility systems, paving, installations and appurtenances) in full compliance with all applicable Laws and the requirements of any insurer providing insurance for the Premises or any part thereof.

### **15.2.1 Records and Audit.**

Should Tenant perform any construction in-house (i.e., its own personnel), Tenant 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. The records shall be maintained and made available either at the Premises or another location in San Diego County, California. Further, Landlord shall have the right at any time to examine and audit said records without restriction for the purpose of determining the accuracy thereof. In the event Tenant does not make available the original records at the Premises or within the limits of San Diego County, Tenant agrees to pay all expenses incurred by Landlord in conducting an audit at the location where said records are maintained.

## **15.3 Performance by Landlord.**

### **15.3.1 Inspection and Correction.**

Landlord always shall have the right but not the duty or obligation to enter, view, inspect, determine the condition of, and protect its interests in the Premises and Improvements. If Landlord determines that the Premises or Improvements are not in the condition required pursuant to the terms of this Lease, Landlord shall deliver written notice to Tenant detailing the items to be corrected and Tenant shall commence the necessary maintenance, alteration, repair and replacement work necessary to remedy the issues set forth in Landlord's notice within ten

(10) days after written notice from Landlord and diligently pursue such work to completion. Further, if at any time Landlord determines the Premises or Improvements are not in the condition required pursuant to the terms of this Lease, upon ten (10) days prior written notice thereof Landlord may require Tenant to file and pay for a performance bond. The amount of said bond shall be adequate, in Landlord's opinion, to correct all unsatisfactory conditions.

### **15.3.2 Landlord Repair Rights.**

At Landlord's option, if Tenant fails to commence to perform the necessary maintenance, alteration, repair and replacement work within ten (10) days of Landlord's written demand therefor and thereafter diligently prosecute such work to completion (except in the event of an emergency in which case no such notice shall be required), Landlord may, but need not, perform such maintenance, alteration, repair or replacement work, and Tenant shall pay Landlord the actual cost thereof, together with interest thereon at the Default Rate from the date incurred until paid and an administrative fee in the amount of twenty percent (20%) of the cost of such work, pursuant to the Reimbursement Procedure. Such payments shall constitute Additional Rent under this Lease and shall be paid monthly as billed by Landlord or in a lump sum payment, as directed by Landlord. If requested by Landlord, Tenant shall pay to Landlord the entire estimated cost of such work in advance, but such payment shall not relieve Tenant from the obligation to pay any excess costs that may be actually incurred by Landlord. For all maintenance, alteration, repair and replacement work undertaken by Landlord, Tenant hereby indemnifies and shall defend, at Tenant's sole expense and with counsel reasonably acceptable to Landlord, and hold the Landlord Parties harmless from any and all liability, Related Costs, demands, damages, expenses (including, without limitation, attorneys', consultants' and experts' fees, court costs and amounts paid in settlement of any claims or actions), arising directly or indirectly out of such work or the performance thereof, unless the same is the result of the gross negligence or willful misconduct of Landlord. Landlord shall have no obligation to repair or maintain any portion of the Premises. The rights of Landlord under this Section shall not create any obligations or increase any obligations of Landlord elsewhere in this Lease, nor shall the exercise of such rights, or the failure to exercise same, limit any other rights or remedies of Landlord. Tenant shall provide Landlord Parties access to the Premises for the purposes set forth in this Section 15.3.

### **15.4 Records.**

Tenant shall, at all time during the Term, keep or cause to be kept, accurate and complete records of maintenance conducted at the Premises. The records must be supported by source documents of original entry such as invoices, receipts, work orders, construction contracts, service contracts or other pertinent supporting documents. All of Tenant's maintenance records relating to the Premises shall be kept either at the Premises or at such other locations in San Diego County, California as are acceptable to Landlord. Landlord shall have the right at any time to examine such maintenance records without restriction and, at Landlord's request, Tenant shall provide Landlord with copies thereof at Tenant's expense for the purpose of determining the accuracy thereof.

## **16. TAXES AND PROPERTY EXPENSES**

### **16.1 Taxes.**

This Lease may result in a taxable possessory interest and be subject to the payment of property and other taxes. Tenant shall pay, prior to delinquency, all Tax Expenses attributable to any time period during the Term now or hereafter assessed against, or relating in any way to the Tenant, this Lease, the Premises, the Improvements, or the use or occupancy thereof by

Tenant and Tenant Parties. Tenant shall promptly following written request therefor from Landlord, provide Landlord with evidence of the payment of Tax Expenses. "Tax Expenses" shall include, without limitation, all federal, state, county, or local governmental or municipal taxes, fees, assessments, charges or other impositions of every kind and nature, whether general, special, ordinary or extraordinary, (including, without limitation, real estate taxes, possessory interest taxes, use taxes, general and special assessments, leasehold taxes or taxes based upon Tenant's receipt of rent, including gross receipts or sales taxes applicable to Tenant's receipt of rent, personal property taxes imposed upon the fixtures, machinery, equipment, apparatus, systems and equipment, appurtenances, furniture and other personal property used by Tenant in connection with the Premises) and any taxes and assessments relating to the business or other activities of Tenant upon or in connection with the Premises. Tax Expenses also shall include, without limitation:

(a) Any tax on Landlord's receipt of Rent, right to Rent or other income from the Premises;

(b) Any assessment, tax, fee, levy or charge in addition to, or in substitution, partially or totally, of any assessment, tax, fee, levy or charge previously included within the definition of real property tax, possessory interest tax or use tax or other Tax Expenses, and any assessments, taxes, fees, levies and charges that may be imposed by government agencies for services such as fire protection, street, sidewalk and road maintenance, refuse removal and for other governmental services formerly provided without charge to property owners or occupants. It is the intention of Tenant and Landlord that all such new and increased assessments, taxes, fees, levies, and charges and all similar assessments, taxes, fees, levies and charges be included within the definition of Tax Expenses for purposes of this Lease; and

(c) Any assessment, tax, fee, levy, or charge, which is levied or assessed based upon the area of the Premises or the Improvements or the Rent payable hereunder, including, without limitation, any gross income tax upon or with respect to the possession, leasing, operating, management, maintenance, alteration, repair, use or occupancy by Tenant of the Premises, or any portion thereof.

Tenant agrees to cooperate with Landlord in connection with, and to not object to, the formation of a special maintenance district or infrastructure repair district that includes the Premises and other neighboring properties, the purpose of which is to fund the costs of the maintenance, repair and replacement of public property and/or improvements that benefit the Premises, or are related to the use and enjoyment of the Premises by Tenant, its Subtenants and/or their customers or invitees. All assessments levied by any such maintenance district shall constitute Tax Expenses.

## **16.2 Property Expenses.**

Without limitation of Tenant's other obligations under this Lease, Tenant agrees to pay all Property Expenses. As used herein, "Property Expenses" include, without limitation, all costs and expenses of any nature incurred or payable, or arising in connection with, the ownership, management, maintenance, construction, repair, replacement, restoration or operation of the Premises and/or the Improvements, including, without limitation, any amounts paid for: (i) the cost of supplying any utilities, the cost of operating, maintaining, repairing, renovating and managing any utility systems, mechanical systems, communications systems, sanitary and storm drainage systems, and the cost of supplies and equipment and maintenance and service contracts in connection therewith; (ii) the cost of licenses, certificates, permits and inspections; (iii) the cost of any insurance carried or required to be carried by Tenant with respect to the Premises and/or the Improvements including without limitation any premiums and deductibles;



(iv) the cost of landscaping, supplies, tools, equipment and materials, and all fees, charges and other costs incurred in connection with the management, operation, repair and maintenance of the Premises and/or the Improvements; (v) payments under any easement, license, permit, operating agreement, declaration, or covenant or instrument pertaining to the Premises; and (vi) the cost of any Improvements, capital repairs, capital alterations, or capital equipment, required by any government agency or otherwise required under this Lease.

## **17. EQUAL EMPLOYMENT OPPORTUNITY/NONDISCRIMINATION AND OFAC**

### **17.1 Nondiscrimination.**

Tenant 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 ADA; and any other applicable Laws 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 ADA, Tenant shall be solely responsible for such compliance and required programs, and there shall be no allocation of any such responsibility between Landlord and Tenant. Each Subtenant shall comply with the requirements of this Article 17.

### **17.2 Compliance with Employment and Labor Requirements.**

Tenant 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 Laws now existing or hereinafter enacted, regarding employment and labor practices. Tenant shall also comply with the National Labor Relations Act, including the provisions with respect to the rights of employees to organize.

### **17.3 OFAC Compliance.**

Tenant represents and warrants that (i) Tenant and each Person owning an interest in Tenant is not now, and shall not during the term of this Lease become, a Person with whom Landlord 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 (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 Tenant 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 Tenant (whether directly or indirectly), (iv) none of the funds of Tenant have been derived from any unlawful activity with the result that the investment in Tenant is prohibited by law or that the Lease is in violation of law, and (v) Tenant has implemented procedures, and will consistently apply those procedures, to ensure the foregoing representations and warranties remain true and correct at all times.

## 18. INSURANCE

### 18.1 Insurance.

Tenant shall maintain insurance acceptable to Landlord in full force and effect throughout the Term.

### 18.2 Forms of Coverage.

The policies for said insurance shall, as a minimum, provide the following:

#### 18.2.1 Commercial General Liability.

"**Occurrence**" form Commercial General Liability covering the Premises, operations, and contractual liability assumed by Tenant in this Lease in the amount of not less than as set forth in Section 1.8. Tenant's indemnification obligations under this Lease shall in no event be limited by the terms or qualifications to the contractual liability coverage under such insurance.

#### 18.2.2 Liquor Liability.

If alcoholic beverages are served or sold on the Premises, Liquor Liability coverage in the amount of not less than as set forth in Section 1.8 shall be obtained. If no alcoholic beverages are served or sold on the Premises, the proof of insurance shall so state.

#### 18.2.3 All Risk and Builder's Risk Property Coverage.

All Risk Property Coverage, including flood and debris cleanup provisions, in an amount not less than the full 100% replacement value of all Improvements, together with business interruption and extra expense coverage, including a provision for the continuation of Rent payments for 24 months, a vandalism and malicious mischief endorsement, earthquake sprinkler leakage coverage, boiler and machinery coverage and, if so required by Landlord, earthquake coverage. The coverage policies shall be endorsed with a Loss Payee endorsement in favor of each of Landlord and the Permitted Lender (if any). 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 Landlord and Tenant to ensure that said proceeds will be reinvested in rebuilding and/or repairing the damaged Improvements and applied to Tenant's Rent obligations hereunder, as applicable. However, if there is a Permitted Lender that is a Financial Institution, then all proceeds from such policies of insurance (other than from the business interruption and extra expense coverage) shall be payable in trust, with safeguards reasonably acceptable to Landlord, to such Permitted Lender to be disbursed for the repair and restoration of the Improvements (or, if there is no Permitted Lender that is a Financial Institution, or if there is, but the Permitted 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 such 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 Landlord so as to ensure the application of such proceeds in compliance with this Lease.

During the construction of the Project Improvements or any subsequent Alterations or restoration work, builder's risk completed value form insurance covering the perils insured under

the ISO special causes of loss form, including collapse, water damage, transit and flood and earthquake coverage, covering the total value of work performed and equipment, supplies and materials furnished (with an appropriate limit for soft costs in the case of construction) and covering the full insurable value (exclusive of the cost of noninsurable items) of all equipment, supplies and materials at any off-site storage location used with respect to the Project or in transit. The coverage shall be endorsed with a Loss Payee endorsement in favor of Landlord. The insurance proceeds shall be paid and disbursed in the same manner as set forth in this Section 18.2.3 above.

#### **18.2.4 Worker's Compensation.**

Workers' compensation insurance covering all persons employed by Tenant at the Premises and with respect to whom death or bodily injury claims could be asserted against Tenant, Landlord or the Premises, with statutorily required limits, and employer's liability insurance with minimum limits of not less than One Million Dollars (\$1,000,000) for each accident/employee/disease. Workers' compensation insurance shall include a waiver of subrogation in favor of Landlord Parties.

#### **18.2.5 Automobile Liability.**

Business automobile liability insurance covering liability arising out of vehicles used on or about the Premises by Tenant or its employees (including owned, non-owned, leased, rented and/or hired vehicles) insuring against liability for bodily injury, death and property damage in an amount not less than One Million Dollars (\$1,000,000) each accident limit.

#### **18.2.6 UST Insurance Obligations.**

In the event underground storage tanks are located on the Premises, Tenant is required to comply with all Laws applicable to underground storage tanks, including, without limitation, United States Code, Title 42, Chapter 82, Subchapter IX, 40 CFR Part 280, 40 CFR Part 281 and 40 CFR Parts 282.50 – 282.105, and Title 23, Division 3, Chapter 18 of California Code of Regulations, collectively, herein "UST Law." At the time Tenant is required to comply with any provisions of UST Law requiring financial assurance mechanisms, Tenant shall provide Landlord with a certified copy of its Certification of Financial Responsibility. If Tenant's program for financial responsibility requires insurance, then Tenant's policy(ies) shall name the Landlord Parties as additional insureds, and all other terms of Section 18.3 below, shall apply. Should Tenant change its financial assurance mechanisms, Tenant shall immediately provide Landlord with a certified copy of its revised Certification of Financial Responsibility.

#### **18.2.7 Marine and Marina Related Coverage.**

Marina Operator's Liability Insurance in an amount of not less than as set forth in Section 1.10. Evidence of coverage in accordance with United States Longshore & Harbor Workers' Compensation Act, if applicable, either as part of Marina Operator's Liability Insurance required herein, or an extension of a worker's compensation policy.

Protection and indemnity insurance (including coverage for collision, towers' liability, and bodily injury and property damage.)

#### **18.2.8 Contractor's Pollution Liability Coverage.**

If the Landlord determines, in its sole and absolute discretion, that Tenant performs or contracts for any work which involves a Hazardous Materials Activity or which has the potential to disturb or result in the release of any Hazardous Material, for which there is potential

exposure to pollution or Hazardous Materials to Persons or the environment, Tenant shall obtain or cause its contractor to obtain Contractor's Pollution Liability, Pollution Legal Liability and/or Asbestos Pollution Liability and/or Errors & Omissions applicable to the work being performed or the potential release of any Hazardous Material, with limits of \$5,000,000 per claim or occurrence and \$10,000,000 aggregate per policy period of one year or the limits maintained by or available to the contractor, whichever is higher. The Landlord Parties shall also be named as an additional insured on any such policy. Immediately upon learning of or reasonably suspecting that a release of Hazardous Materials has occurred on, in, under or about the Premises, Tenant shall provide notice of the same to Landlord.

### **18.3 General Requirements.**

#### **18.3.1 Certificates and Other Requirements.**

All required insurance shall be in force the first day of the Term, and shall be maintained continuously in force throughout the Term. In addition, the cost of all required insurance shall be borne by Tenant. During the entire Term, Tenant shall provide Landlord with insurance certificates, in a form acceptable to Landlord, issued by the insurer evidencing the existence of the necessary insurance policies and original endorsements effecting coverage required by this Article ("**Certificates**"). 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, Landlord reserves the right to require complete, certified copies of all required policies at any time.

#### **18.3.2 Additional Insureds and Other Requirements.**

All liability insurance policies shall name, or be endorsed to name the Landlord Parties as additional insureds and protect the Landlord Parties 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 or voided, except after Landlord has been furnished with thirty (30) days' prior written notice. To the extent the policy is blanket endorsed or is specifically endorsed to provide the same, all insurance policies shall also provide that the subject policy shall not be cancelled without thirty (30) days' prior written notice to Landlord. All insurance policies shall be endorsed to state that Tenant's insurance is primary and not excess or contributory to any insurance issued in the name of Landlord. Further, all insurance companies must be satisfactory to Landlord.

#### **18.3.3 Deductibles.**

Any deductibles or self-insured retentions must be declared and acceptable to Landlord. If the deductibles or self-insured retentions are unacceptable to Landlord, then Tenant shall have the option to either: (i) reduce or eliminate such deductibles or self-insured retentions as respects the Landlord Parties; or, (ii) procure a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

#### **18.3.4 Updates.**

Landlord shall retain the right at any time to review the coverage, form, amount and type of insurance required herein. If, in the opinion of Landlord, the insurance provisions in this Lease do not provide adequate protection for the Landlord Parties and/or members of the public using the Premises or using services connected with Tenant's use or occupancy of the Premises, Landlord may require Tenant to obtain insurance sufficient in coverage, form, amount and type to provide adequate protection. Landlord's requirements 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.

#### **18.3.5 New Certificates.**

If Landlord changes the insurance requirements as provided in Section 18.3.4 above, Landlord shall notify Tenant in writing of such changes. With respect to changes in insurance requirements that are available from Tenant's then-existing insurance carrier, Tenant shall deposit new Certificates with Landlord issued by the insurer evidencing acceptable insurance policies incorporating such changes within thirty (30) days of receipt of such notice. With respect to changes in insurance requirements that are not available from Tenant's then-existing insurance carrier, Tenant shall deposit new Certificates evidencing acceptable insurance policies with Landlord, incorporating such changes, within ninety (90) days of receipt of such notice. In the event Tenant fails to deposit insurance Certificates as required herein, and such failure is not cured within ten (10) days following written notice thereof to Tenant, this Lease shall be in default without further notice to or cure right by Tenant, and Landlord shall be entitled to exercise all legal remedies. Without limitation of the foregoing, Tenant agrees that if Tenant does not take out and maintain such insurance or furnish Landlord with renewals or binders in a timely manner, Landlord may (but shall not be required to), procure said insurance on Tenant's behalf and charge Tenant the cost thereof, which amount shall be payable by Tenant to Landlord pursuant to the Reimbursement Procedure.

#### **18.3.6 Default.**

If Tenant fails or refuses to maintain insurance as required in this Lease, or fails to provide proof of insurance, and such failure is not cured within ten (10) days following written notice thereof to Tenant, Landlord has the right to declare this Lease in default without further notice to Tenant, and Landlord shall be entitled to exercise all legal remedies.

#### **18.3.7 No Limit on Liability.**

The procuring of such required policies of insurance shall not be construed to limit Tenant's liability hereunder, nor to fulfill the indemnification provisions and requirements of this Lease.

#### **18.3.8 Compliance with Insurance Requirements.**

Tenant agrees not to use the Premises in any manner that will result in the cancellation of any insurance Landlord may have on the Premises or on adjacent premises, or that will cause cancellation of any other insurance coverage for the Premises or adjacent premises, notwithstanding that such use may be included within the Permitted Use. Tenant further agrees not to keep on the Premises or permit to be kept, used, or sold thereon, anything prohibited by any fire or other insurance policy covering the Premises. Tenant shall, at its sole expense, comply with all reasonable requirements for maintaining fire and other insurance coverage on the Premises and represents to Landlord that Tenant will confirm that it is in compliance with such requirements at all times.

#### **18.4 Waiver of Subrogation.**

Tenant hereby releases the Landlord Parties from any and all liability or responsibility to Tenant or anyone claiming through or under Tenant by way of subrogation or otherwise for any loss or damage to the Premises, any Improvements, or any of Tenant's personal property or business caused by or arising from a fire or any other event that is covered by the insurance required to be carried pursuant to this Lease or is actually carried, even if such fire or other event shall have been caused by the fault or negligence of any of the Landlord Parties. Each Subtenant similarly releases the Landlord Parties. Tenant, and any Subtenant, shall also obtain an endorsement waiving the insurance company's subrogation rights against the Landlord Parties for any insurance policies required by the terms of this Lease. Tenant and Subtenant shall also defend and indemnify the Landlord Parties in the manner specified in Section 19.1 in the event any Person asserts such a claim.

#### **18.5 Subtenants to Maintain Insurance.**

All Subtenants shall maintain insurance in the amounts required under Section 18.2, which shall comply with the requirements of Section 18.3. In addition, all Subleases shall provide that the Subtenant releases the Landlord Parties pursuant to the requirements of Section 18.4.

### **19. INDEMNITY**

#### **19.1 Indemnity.**

Tenant hereby indemnifies and shall defend the Landlord Parties, at Tenant's sole cost and expense and with counsel selected by Landlord, and hold the Landlord Parties harmless from any and all claims (including claims under negligence and strict liability), demands, liability, losses, causes of actions and suits of any kind, administrative or judicial proceedings, orders, judgments, and all Related Costs arising directly or indirectly out of (i) the performance by Tenant of its obligations under this Lease, (ii) the construction of any Improvements or Alterations, (iii) any breach by Tenant of its obligations under this Lease, (iv) any accident, injury or damage whatsoever caused to any Person or the property of any Person on or about the Premises, (v) the use, occupancy, possession or operation of the Premises by any Tenant Party, or any acts or omissions of any Tenant Party, except only claims or litigation arising through the sole gross negligence or sole willful misconduct of Landlord (but subject to Section 18.4). Landlord, at its election, may conduct its own defense with its own counsel independent from Tenant's counsel (and in that event Tenant will select its own counsel) and the costs incurred by Landlord in such defense shall be covered by the foregoing indemnification, hold harmless and defense obligations and be subject to immediate payment once incurred. The terms of this Article 19 shall survive the expiration or earlier termination of this Lease. The foregoing indemnity obligations of Tenant are in addition to, and not in limitation of, any other indemnity obligations of Tenant contained in this Lease or otherwise.

### **20. DAMAGE OR DESTRUCTION**

#### **20.1 Casualty.**

In the event of any damage to or destruction of any Improvements, whether or not from a risk coverable by the insurance described in Article 18. Tenant shall promptly repair and restore such Improvements, in a manner approved in writing by Landlord, so that after such restoration and repair, the Improvements are at least as valuable and usable as immediately prior to such damage or destruction. Tenant shall be entitled to have any insurance policy proceeds held in trust with the Permitted Lender or other trustee selected pursuant to Section 18.2.3 disbursed

as progress payments as the work of repair, restoration or replacement progresses, to be used solely for paying for such work; and upon completion of such work free and clear of liens, if required by the terms of the Permitted Encumbrance any remaining balance of any insurance proceeds shall be paid first to the Permitted Lender to the Permitted Encumbrance, and thereafter, if the Permitted Lender permits or requires by the terms of the Permitted Encumbrance, to Tenant. If the Permitted Lender is the trustee, the Permitted Lender may disburse the progress payments in accordance with its normal disbursement procedures (e.g. upon receipt of appropriate mechanic's lien releases, invoices, etc.) so long as such disbursement procedures are reasonably satisfactory to Landlord and ensure that the proceeds of insurance are applied to the costs of repairing or replacing the Improvements. To the extent that the insurance proceeds are insufficient to pay for the costs of repairing the damaged Improvements, Tenant shall pay such deficiency to the trustee for application to the restoration costs on or before the earlier to occur of (i) sixty (60) days from the date of such damage or destruction, or (ii) the date the insurer first makes available such insurance proceeds for repair, restoration or replacement. In the event Tenant or the Permitted Lender fails to commence to repair, restore or replace the damaged Improvements (including without limitation, engaging architects and engineers to prepare plans and specifications for the restoration), or pursue any permits necessary to repair, restore or replace the damaged Improvements, within ninety (90) days of such damage or destruction or to diligently prosecute such work to completion, Tenant shall be deemed to be in default hereunder upon written notice thereof from Landlord to Tenant and, in addition to any other remedies, Landlord shall be entitled to receive and retain such insurance proceeds to apply them to the repair, restoration and replacement of the Improvements. The provisions of Articles 6 and 7 shall apply to all work performed pursuant to this Article. Notwithstanding the foregoing, if Tenant and the Permitted Lender are not able to obtain sufficient insurance proceeds (in the case of an insured casualty) or construction funds (in the case of an uninsured casualty) to commence repair, restoration or replacement of the damaged improvements within ninety (90) days of such damage or destruction, and in the case of an insured casualty, Tenant and the Permitted Lender have used their best efforts to so obtain such insurance proceeds, or in the case of an uninsured casualty, Tenant and the Permitted Lender have used their best efforts to obtain sufficient construction funds, then Tenant and the Permitted Lender shall have such additional time as is necessary to obtain such insurance proceeds or construction funds (but in no event to exceed one hundred eighty (180) days from the date of such damage or destruction) in which to commence to repair, restore or replace the damaged Improvements.

## **20.2 Casualty During the Last Part of Term.**

Notwithstanding Section 20.1 to the contrary, if there is damage or destruction to the Improvements during the last five (5) years of the Term (including all exercised options) and the cost of repairing said damage or destruction exceeds the cost of demolishing and removing the remaining Improvements as determined by the Demolition and Remediation Report, then Tenant shall have the option to terminate this Lease, subject to Tenant's satisfaction of all of the following requirements: (a) Tenant shall have obtained the written consent of the Permitted Lender (if any), (b) Tenant shall, within ninety (90) days after the date of the casualty, give Landlord written notice of its election to terminate ("Notice of Election to Terminate"); and (c) Tenant shall, at the election of Landlord (which election shall be communicated in writing to Tenant ("Demolition Notice") within thirty (30) days of Landlord's receipt of the Notice of Election to Terminate), raze and remove the damaged or destroyed Improvements and any other Improvements that Landlord may designate in the Demolition Notice and, if applicable, remediate the Premises, and shall complete said demolition, removal and remediation and shall vacate the Premises within ninety (90) days of Landlord's delivery of the Demolition Notice

(which vacation date shall fix the termination date of this Lease). Any and all property damage insurance proceeds (exclusive of any proceeds applicable to Tenant's personal property that would be retained by Tenant at the end of the Term) paid as a result of the damage or destruction giving rise to the termination, shall be distributed in accordance with the following order of priority: first, to the payment of the costs to raze and remove the Improvements as required above, second, to repayment of any outstanding Permitted Encumbrance, if required by the terms thereof; and third, to Landlord all remaining insurance proceeds.

### **20.3 No Rental Abatement.**

Tenant shall not be entitled to any abatement or reduction in the Rent during any period of time that any Improvements located on the Premises are in need of repair, restoration or replacement or are under construction for such repairs, restoration or replacements or any other period of time during the Term of this Lease.

### **20.4 Waiver of Statutory Provisions.**

The provisions of this Lease, including this Article 20, constitute an express agreement between Landlord and Tenant with respect to any and all damage to, or destruction of, all or any part of the Premises or Improvements, or any other portion thereof, and any California statute or regulation, now or hereafter in effect, regarding the rights or obligations of a tenant concerning damage or destruction following a casualty event are waived and shall have no application to this Lease or any damage or destruction to all or any part of the Premises or Improvements as a result of a casualty event.

## **21. HAZARDOUS MATERIALS**

### **21.1 Hazardous Materials.**

#### **21.1.1 Tenant Use of Hazardous Materials.**

Tenant 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 Premises or Improvements (collectively and individually, a "**Hazardous Materials Activity**") by Tenant or its agents, whether by a Tenant Party or any other Person unless expressly approved, at Landlord's sole discretion, in writing by Landlord after submittal by Tenant of Material Safety Data Sheets ("**MSDS**") or other information requested by Landlord regarding the Hazardous Material. Approval by Landlord of any Hazardous Materials Activity shall not create or impose any liability or obligation on Landlord with respect to such Hazardous Material or Hazardous Materials Activity and Tenant assumes all liability and obligations related thereto. All Hazardous Materials Activity shall be in strict compliance with all applicable Laws and other requirements in effect during the Term, including, without limitation, Laws and requirements that regulate Hazardous Materials or otherwise relate to public health and safety or the protection of the environment ("**Environmental Laws**") and shall comply at all times with all Environmental Laws.

#### **21.1.2 Notice of Release or Investigation.**

If Tenant becomes aware of (i) any actual or threatened release of any Hazardous Material on, in, under, from, or about the Premises or (ii) any notice, inquiry, investigation, proceeding, or claim by any government agency or other Person regarding the presence of any Hazardous Material on, in, under, from or about the Premises (collectively "**Inquiry**"), Tenant shall give Landlord written notice of the release or Inquiry within twenty-four (24) hours after



Tenant learns or first has reason to believe there has been a release or Inquiry and shall simultaneously furnish to Landlord copies of any notices of inquiry or investigation, claims, notices of violation, reports, warning or other writings received by Tenant that concern the release or Inquiry. Tenant shall provide Landlord with advance written notice of meetings scheduled with any federal, state or local government agency (such as, but not limited to, the United States Environmental Protection Agency, the Regional Water Quality Control Board, Department of Toxic Substances Control or Air Resources Board) ("**government agency**") that may be relevant to or potentially impact the Premises at least ten (10) full business days prior to such meeting or as soon as reasonably possible if the government agency schedules the meeting for less than ten (10) business days from the date the meeting is proposed. Landlord shall be entitled to have its representatives attend and participate in any and all such meetings. If the government agency brings up the Premises in any other scheduled meeting, Tenant shall suggest that a separate meeting should be scheduled so that Landlord can participate.

### **21.1.3 Landlord Right to Inspect and Data.**

If Hazardous Materials Activity has occurred during the Term or is ongoing, Landlord or its designated representatives, at Landlord's sole discretion, may, but is no way obligated to, enter upon the Premises and make any inspections, tests or measurements Landlord deems necessary or desirable to determine if a release or discharge of Hazardous Materials has occurred. Landlord shall furnish Tenant a minimum of twenty-four (24) hours' notice prior to conducting any inspections or tests, unless, in Landlord's sole judgment, circumstances require otherwise. If Landlord suspects a possible release of Hazardous Materials or a use of Hazardous Materials in violation of Environmental Law, then Landlord, at Landlord's sole discretion, may require Tenant, at Tenant's sole expense, to have additional investigation for such Hazardous Materials conducted on, under or about the Premises by an environmental consultant or engineering firm designated by Landlord. Such tests may include, without limitation, any area outside the Premises that may have been contaminated, including but not limited to surface and groundwater. Tenant shall provide Landlord, as soon as reasonable after they become available to Tenant, access to all information reports and data obtained, generated or learned as a result of sampling or testing activities on the Premises, including raw and verified lab data and consultant reports. Tenant shall be permitted to have representatives present during any sampling or testing on or at the Premises, and may obtain split samples, if requested, copies of the results of on-site testing and visual inspections, and complete access to all samples and tests taken or conducted as a result of any investigations of the Premises. Access to any consultant reports issued by or on behalf of Tenant concerning the Premises shall be furnished to Landlord as soon as reasonable after the reports are finalized. Any environmental reports issued by or on behalf of Tenant regarding the Premises or Hazardous Material Activities related thereto shall first be generated in draft form and furnished to Landlord for review and comment. No such report will be made final until Landlord has had reasonable opportunity to review the draft and to identify any factual inaccuracies therein. Landlord's failure to inspect, test or take other actions pursuant to this Section 21.1.3 regarding the Premises, shall in no way relieve Tenant of any responsibility for a release of a Hazardous Material.

### **21.1.4 Clean-up Obligations.**

If Hazardous Materials Activity or Pre-Existing Hazardous Material has resulted or does result in contamination of the Premises and/or the Improvements, any adjacent or nearby property, the San Diego Bay or any surface or groundwater, Tenant shall promptly take all necessary actions, at Tenant's sole expense, to investigate, remove or remediate such Hazardous Materials in compliance with all Environmental Laws and in a manner and with results satisfactory to Landlord in Landlord's good faith discretion ("**Environmental Cleanup**").

Tenant shall provide notice to Landlord prior to performing any removal or remedial action. In the event that an Environmental Cleanup conducted or required of Tenant interferes with the current or future use of the Premises or other property of Landlord, Tenant shall promptly alter or amend the Environmental Cleanup (whether such is completed or not and regardless of the time period elapsed between the clean-up activities and Landlord's request to alter the Environmental Cleanup because of the interference), upon notice from Landlord, as necessary to prevent and/or eliminate such interference. Tenant shall not propose, and Landlord is under no obligation to agree to, any covenant of use restriction or other institutional controls as part of any removal or remediation required as a result of this Section 21.1.4. Unless otherwise agreed in writing by Landlord, an Environmental Cleanup required under this Section shall avoid and not include the use of restrictive covenants or other institutional controls. To the extent Landlord incurs any costs or expenses in performing Tenant's obligation to conduct an Environmental Cleanup which is Tenant's obligation under this Lease or under Environmental Law, Tenant shall reimburse Landlord for all such costs and expenses in accordance with the Reimbursement Procedure. This provision does not limit the indemnification obligation set forth in Section 21.2.

#### **21.1.5 Clean-up Extending Beyond Lease Term.**

Should any Environmental Cleanup of Hazardous Materials for which Tenant is responsible not be completed prior to the expiration or sooner termination of this Lease, then: (i) Tenant shall deposit with Landlord an amount of money equal to the balance of the estimated costs of the Environmental Cleanup, and (ii) if the nature of the contamination or Environmental Cleanup required of Tenant is of such a nature as to make any portion of the Premises untenable or unleaseable, then Tenant shall be liable to Landlord as a holdover Tenant until the Environmental Cleanup has been sufficiently completed to render the Premises in full compliance with all Environmental Laws and to make the Premises suitable, in Landlord's good faith determination, for lease to third parties. The estimated cost of the Environmental Cleanup shall require approval of the Landlord. Landlord shall release funds from such deposit from time to time to pay for such Environmental Cleanup costs incurred with Landlord's approval. To the extent Landlord estimates, at any time, that the funds remaining on deposit may not be sufficient to cover all remaining anticipated Environmental Cleanup costs, then Tenant shall deposit, within thirty (30) days of Landlord's written demand therefor, such additional funds with Landlord as Landlord may estimate at such time may be required to complete the Environmental Cleanup.

#### **21.1.6 Financial Security.**

If Landlord determines, in its reasonable discretion, that Tenant does not have insurance or other financial resources sufficient to enable Tenant to fulfill its obligations under this Article 21 whether or not accrued, liquidated, conditional, or contingent, then Tenant shall, at the request of Landlord, 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 Landlord as is appropriate to assure that Tenant will be able to perform its duties and obligations hereunder.

### **21.2 Hazardous Materials Indemnification.**

Tenant hereby assumes for itself and shall indemnify and defend Landlord Parties, at Tenant's sole cost and expense and with counsel selected by Landlord, and hold the Landlord Parties harmless from any and all claims, demands, liability, losses, causes of actions and suits of any kind, administrative or judicial proceedings, orders, (judicial or administrative), judgments, and

all Related Costs (whether or not based upon personal injury, negligence, strict liability, property damage, or contamination of, or adverse effects upon, the environment, waters or natural resources, including any loss of or damage to Landlord's real or personal property), which occur or arise during or after the Term relating to, or resulting from, any Hazardous Materials Activity, Tenant Hazardous Material or any Pre-Existing Hazardous Material or any breach by Tenant under this Article 21, Tenant's obligations under Article 21 (including the indemnification of Landlord by Tenant under this section) include, without limitation, any Environmental Cleanup required by this Lease, costs incurred in connection with any investigation of site conditions or any cleanup, treatment, remedial, removal, or restoration work required by this Lease or any federal, state or local governmental agency because of Hazardous Materials present in the air, soil or ground water above, on, or under the Premises. The obligations apply 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. Landlord shall have a direct right of action against Tenant even if no third party has asserted a claim. Furthermore, Landlord shall have the right to assign said indemnity and Environmental Cleanup requirements under Article 21. This indemnification and Environmental Cleanup requirements under Article 21 includes, but is not necessarily limited to:

- (a) Losses attributable to diminution in the value of the Premises;
- (b) Losses of rental or other income from the Premises;
- (c) Loss of or damage to natural resources;
- (d) Loss or restriction of use of rentable space(s) in the Premises;
- (e) Adverse effect on the marketing of any space(s) in the Premises;
- (f) 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); and
- (g) All Related Costs (including, without limitation, reasonable attorneys' fees, consulting fees and subcontracted costs) incurred by Landlord in undertaking any assessment or remediation of the Premises that is not fully resolved by Tenant by the time this Lease terminates or expires.

### **21.3 Termination of Lease.**

Upon the expiration or earlier termination of the Term, Tenant shall: (i) cause all Tenant Hazardous Materials and Pre-Existing Hazardous Material to be removed from the Premises and disposed of in accordance with all applicable provisions of Environmental Law; (ii) remove any underground or aboveground storage tanks or other containers installed or used by Tenant, or its predecessors, to store any Hazardous Material on the Premises, and repair any damage to the Premises caused by such removal; (iii) cause any soil or other portion of the Premises which has become contaminated by any Hazardous Material 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 Premises to Landlord free of any Tenant Hazardous Materials and Pre-Existing Hazardous Material.

### **21.4 Storage Tanks.**

#### **21.4.1 Storage Tanks.**

No underground storage tanks ("**USTs**") or aboveground storage tanks ("**ASTs**") shall be permitted to be installed on or under the Premises without the prior written consent of Landlord in its sole and absolute discretion. In the event Tenant obtains such approval to install a UST or a AST on or under the Premises, Tenant shall be responsible for complying with all Laws pertaining to such UST or AST, including tank monitoring of such UST or AST as required by the County of San Diego Hazardous Material Management Division (HMMD) or any other responsible agency. Tenant further agrees to take sole responsibility for reporting unauthorized releases from UST to HMMD and Landlord within twenty-four (24) hours of such unauthorized release. Tenant will be responsible for all fees and costs related to the unauthorized release of any Hazardous Material or any required Environmental Cleanup, including, but not limited to: investigative, surface and groundwater clean-up, and expert and agency fees. Tenant 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 or an AST. Tenant further agrees to be responsible for maintenance and repair of the USTs and ASTs; obtaining tank permits; filing a business plan with HMMD or other responsible agency; and for paying for all regulatory agency fees relating to USTs and ASTs.

#### **21.4.2 Records.**

Tenant agrees to keep complete and accurate records regarding USTs and ASTs on the Premises for at least the prior three (3) years period including, but not limited to, records relating to permit applications, monitoring, testing, equipment installation, repairing and closure of the USTs and ASTs, and any unauthorized releases of Hazardous Materials. Tenant also agrees to make such records available for Landlord or responsible agency inspection. Tenant further agrees to include a copy of Health and Safety Code, Chapter 6.7, Section 25299, as part of any agreement between Tenant and any operator of USTs or ASTs.

#### **21.4.3 Aboveground Storage Tanks.**

In the event Tenant obtains such approval to install an AST, Tenant shall be responsible for complying with all Laws pertaining to such AST. Tenant shall, in accordance with this Lease and applicable Laws, 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. In addition, Tenant shall maintain and repair said tanks to conform and comply with all other applicable Laws 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"), Landlord, and/or responsible agency, to conduct periodic inspections. Tenant also shall comply with valid orders of the SDRWQCB, filing the required storage tank statement and payment of the fee therefor, 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.

### **21.5 Environmental Covenants.**

#### **21.5.1 Regulated Waste Removal.**

Tenant hereby acknowledges that excavation of soils from the Premises could result in exportation of a regulated waste requiring appropriate characterization, handling, transport and disposal (together "**Regulated Waste Removal**"). Landlord takes no responsibility and assumes no liability whatsoever for Regulated Waste Removal. Accordingly, Tenant 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 the Landlord Parties from and against any and all claims (including under negligence or strict liability), liabilities, losses, damages, costs, and expenses arising from, out of, or in any way related to Regulated Waste Removal, except only claims or litigation arising through the sole gross negligence or sole willful misconduct of Landlord.

### **21.5.2 Residual Hazardous Materials.**

Landlord shall have no liability or responsibility for ensuring that Tenant's workers, including without limitation those conducting testing, construction and maintenance activities on the Premises, are protected from residual contaminants in 29 Code of Federal Regulations ("CFR"). Tenant 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. Tenant hereby waives any claim, or potential claim, it may have to recover any damages, losses, Related Costs related to worker exposure or alleged exposure to any residual onsite contamination and to indemnify, defend and hold harmless the Landlord Parties from and against any and all such Related Costs, claims (including under negligence or strict liability), liabilities, losses and damages, except only claims or litigation arising through the sole gross negligence or sole willful misconduct of Landlord.

### **21.5.3 Covenant Not To Sue and Release of Landlord.**

Tenant hereby RELEASES the Landlord Parties from, COVENANTS NOT TO SUE the Landlord Parties for and ASSUMES FOR ITSELF all obligations, requirements and liabilities of Tenant under Article 21, including for claims for contribution, equitable indemnity or otherwise seeking to transfer or limit the obligations, requirements and liabilities of Tenant under Article 21, With respect to all releases made by Tenant under or pursuant to this Article 21, Tenant hereby waives the application and benefits of California Civil Code § 1542 and hereby verifies that it has read and understands the provision of California Civil Code § 1542 set forth in Article 22 below.

### **21.6 Survival.**

The terms of this Article 21 shall survive the expiration or earlier termination of this Lease.

## **22. "AS-IS" LEASE AND WAIVERS**

### **22.1 Tenant's Acknowledgment.**

Tenant acknowledges that prior to entering into this Lease, Landlord has given Tenant sufficient opportunity to consider, inspect and review, to Tenant's complete satisfaction: (1) any and all rights, appurtenances, entitlements, obligations, and liabilities concerning the Premises; (2) the physical condition of the Premises, including, without limitation, the condition and value of any Improvements and the soils, subsoil media, and ground waters at or under the Premises; (3) the risk of climate change and the possible adverse consequences thereof, including, without limitation, rises in sea level and possible damage to and destruction of the Premises; (4) the development potential of the Premises including without limitation on the preceding clause (3), the effect of all Laws, including, without limitation, those concerning land use, environmental quality and maintenance, endangered species, and traffic regulation; (5) the financial prospects of the Premises and local market conditions; (6) Tenant's determination of the feasibility of Tenant's intended use and enjoyment of the Premises; (7) the presence of any Pre-Existing Hazardous Material and any other contamination of the Premises, including any Improvements,

soils, groundwater and adjacent to San Diego Bay water and sediment; and (8) all other facts, circumstances, and conditions affecting, concerning or relating to the Premises. The land use; the environmental, biological, physical and legal condition of the Premises; the risks associated with possible climate change; the feasibility of Tenant's intended use and enjoyment of the Premises; and such other facts, circumstances and conditions being collectively referred to herein as the "Condition of the Premises"; and, without limitation on any other provision of this Lease, Tenant expressly assumes the risk that adverse conditions affecting the Premises have not been revealed by Tenant's investigations.

## **22.2 Only Landlord's Express Written Agreements Binding.**

Tenant acknowledges and agrees that no Person acting on behalf of Landlord is authorized to make, and that except as expressly set forth in this Lease, neither Landlord nor anyone acting for or on behalf of Landlord has made, any representation, warranty, statement, guaranty or promise to Tenant, or to anyone acting for or on behalf of Tenant, concerning the Condition of the Premises or any other aspect of the Premises. Tenant further acknowledges and agrees that no representation, warranty, agreement, statement, guaranty or promise, if any, made by any Person for or acting on behalf of Landlord which is not expressly set forth in this Lease will be valid or binding on Landlord.

## **22.3 As-Is Lease.**

Tenant further acknowledges and agrees that Tenant's execution of this Lease shall constitute Tenant's representation, warranty and agreement that the Condition of the Premises has been independently verified by Tenant to its full satisfaction, and that, except to the extent of the express covenants of Landlord set forth in this Lease, Tenant will be leasing the Premises based solely upon and in reliance on its own inspections, evaluations, analyses and conclusions, or those of Tenant's representatives; and that **TENANT IS LEASING THE 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 TENANT'S EXECUTION OF THIS LEASE.** Without limiting the scope or generality of the foregoing, Tenant expressly assumes the risk that the Premises do not or will not comply with any Laws now or hereafter in effect.

## **22.4 Waivers, Disclaimers and Indemnity.**

### **22.4.1 Waiver and Disclaimer.**

Tenant hereby fully and forever waives, and Landlord hereby fully and forever disclaims, all warranties of whatever type or kind with respect to the Premises, whether expressed, implied or otherwise including, without limitation, those of fitness for a particular purpose, tenantability, habitability or use.

### **22.4.2 Landlord's Materials.**

Tenant 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 Tenant has received or may hereafter receive from Landlord Parties or its agents or consultants (collectively the "Landlord's Materials") have been furnished without warranty of any kind and on the express condition that Tenant will make its own independent verification of the accuracy, reliability and completeness of such Landlord's Materials and that Tenant will not rely thereon. Accordingly, subject to terms of Section 22.4.3

below, Tenant 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, Landlord Parties or any of the persons or entities who prepared or furnished any of the Landlord's Materials as a result of the inaccuracy, unreliability or incompleteness of, or any defect or mistake in, any such Landlord's Materials and Tenant hereby fully and forever releases, acquits and discharges Landlord Parties and each Person furnishing such Landlord's Materials of and from, any such claims, actions, causes of action, proceedings or liability, whether known or unknown.

#### **22.4.3 Release and Waiver.**

(a) *Release.* Except to the extent of Claims (as defined below) against Landlord arising from any breach by Landlord of its covenants and obligations expressly provided in this Lease, Tenant, on behalf of Tenant, its successors and assigns, hereby fully and forever releases, acquits and discharges Landlord of and from, and hereby fully, and forever waives and agrees not to assert any and all claims, actions, causes of action, suits, proceedings, demands, rights, damages, Related Costs, losses, judgments, provisional relief, fines, penalties, and fees, including, without limitation, any and all claims for compensation, reimbursement, or contribution whatsoever (individually and collectively, "**Claims**"), whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent, that any Tenant Party or any of Tenant'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: (i) any act or omission of Landlord (or any Person acting for or on behalf of Landlord or for whose conduct Landlord may be liable), whether or not such act be the active, passive or sole negligence of Landlord, in connection with prior ownership, maintenance, operation or use of the Premises; (ii) any condition of environmental contamination or pollution at the Premises (including, without limitation, any Pre-Existing Hazardous Material or other contamination or pollution of any soils, subsoil media, surface waters or ground waters at the Premises and any clean-up or abatement order effecting the Premises); (iii) to the extent not already included in clause (ii) above, the prior, present or future existence, release or discharge, or threatened release, of any Hazardous Materials at the Premises, (including, without limitation, the release or discharge, or threatened release, of any Hazardous Materials into the air at the Premises or into any soils, subsoils, surface waters or ground waters at the Premises); (iv) the violation of, or noncompliance with, any Environmental Law or other applicable Law now or hereafter in effect, however and whenever occurring; (v) the condition of the soil at the Premises; (vi) the Condition of the Premises, including, without limitation, the condition of any improvements located on the Premises including, without limitation, the structural integrity and seismic compliance of such improvements; (vii) any matters which would be shown on an accurate ALTA land survey of the Premises (including, without limitation, all existing easements and encroachments, if any); (viii) all applicable Laws now or hereafter in effect; (ix) matters which would be apparent from a visual inspection of the Premises; or (x) to the extent not already covered by any of the foregoing clauses (i) through (ix) above, the use, maintenance, development, construction, ownership or operation of the Premises by Landlord or any predecessor(s)-in-interest in the Premises of Landlord.

(b) *Waiver of Civil Code Section 1542.* With respect to all releases made by Tenant under or pursuant to **Article 21 and this Article 22**, Tenant 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 or her settlement with the debtor."

**TENANT:** \_\_\_\_\_

#### **22.4.4 Survival.**

The terms of this Article 22 shall survive the expiration or earlier termination of this Lease.

### **23. QUITCLAIM OF TENANT'S INTEREST UPON TERMINATION**

Subject to the terms of this Article 23 and Article 7, upon the expiration or earlier termination of the Lease, all Improvements, excluding trade fixtures, installed or constructed on the Premises, shall become the property of Landlord and a part of the realty and shall be surrendered to Landlord. In order to confirm such transfer of ownership, at Landlord's request following the expiration or earlier termination of the Lease, Tenant shall deliver to Landlord a Tenant-executed quitclaim deed in recordable form conveying the Improvements to Landlord free and clear of any mechanic's or materialmen's liens and other encumbrances. Without limitation of the foregoing, Tenant hereby appoints Landlord as Tenant's attorney-in-fact to execute such deed in the name and on behalf of Tenant and to record same in the official records of San Diego County, California. This power of attorney is irrevocable and coupled with an interest.

### **24. PEACEABLE SURRENDER**

Upon expiration of this Lease or earlier termination thereof, Tenant shall peaceably surrender the Premises to Landlord in a broom clean condition with all refuse removed and in as good condition and repair as the Premises were at the Completion of the Project Improvements except for reasonable wear and tear and except for as the Premises may have been rebuilt, restored, altered, or added to as permitted or required by the provisions of this Lease. Notwithstanding the foregoing, Tenant shall leave or remove such Improvements as directed by Landlord pursuant to Section 7.2, and surrender the Premises in the condition required under Section 7.2. If Tenant fails to surrender the Premises at the expiration of this Lease or the earlier termination or cancellation thereof in the condition required under this Lease, in addition to Landlord's other remedies, Tenant shall defend and indemnify Landlord from all liability and expense resulting from the delay or failure to surrender, including without limitation any succeeding tenant claims based on Tenant's failure to surrender or Landlord's failure to deliver the Premises.

### **25. WAIVER**

No waiver of any provision of this Lease shall be implied by any failure of a party to enforce any remedy on account of the violation of such provision, even if such violation shall continue or be repeated subsequently. Any waiver by a party of any provision of this Lease may only be in writing, and no express waiver shall affect any provision other than the one specified in such waiver and that one only for the time and in the manner specifically stated. No receipt of monies by Landlord from Tenant after the termination of this Lease shall in any way alter the length of the Term or of Tenant's right of possession hereunder or after the giving of any notice shall reinstate, continue or extend the Term or affect any notice given Tenant prior to the receipt of such monies, it being agreed that after the service of notice or the commencement of a suit or after final judgment for possession of the Premises, Landlord may receive and collect any Rent due, and the payment of said Rent shall not waive or affect said notice, suit or judgment. The



Landlord shall have the power and authority to waive any requirement of Tenant under this Lease except as such authority may be limited by the Port Act or BPC from time to time; provided, however, Landlord may elect to obtain approval of the BPC as a condition to exercising this authority.

## **26. HOLDOVER**

This Lease shall terminate without further notice at expiration of the Term. Any holding over by Tenant after either expiration or termination without Landlord's written consent shall be a tenancy-at-sufferance upon all of the provisions of this Lease, except those pertaining to the Term, and except that Minimum Annual Rent shall be 200% of the Minimum Annual Rent in effect prior to the expiration or termination. If Tenant, with Landlord's consent, remains in possession of the 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. All provisions of this Lease, except those pertaining to the Term, shall apply to the month-to-month tenancy, and Tenant shall continue to pay all Rent required by this Lease. Notwithstanding anything herein to the contrary, in no event may the Term of this Lease, together with any holdover period, exceed sixty-six (66) years.

## **27. NOTICES**

All notices provided for by this Lease or by Law to be given or served upon Landlord or Tenant shall be addressed as provided in Section 1.9 (as such address may have been changed by subsequent notice given to the other party) and shall be in writing and: (i) personally served upon Landlord or Tenant, or any Person hereafter authorized by either party in writing to receive such notice, (ii) delivered via reputable over-night courier service, or (iii) delivered by U.S. postal service certified letter.

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.

## **28. GENERAL PROVISIONS**

### **28.1 Terms; Captions.**

The necessary grammatical changes required to make the provisions hereof apply either to corporations, limited liability companies or partnerships or individuals, men or women, as the case may require, shall in all cases be assumed as though in each case fully expressed. The captions of Articles and Sections are for convenience only and shall not be deemed to limit, construe, affect or alter the meaning of such Articles and Sections.

### **28.2 Binding Effect.**

Each of the provisions of this Lease shall extend to and shall, as the case may require, bind or inure to the benefit not only of Landlord and of Tenant, but also of their respective heirs, successors or assigns, provided this clause shall not permit any Assignment by Tenant contrary to the provisions of Article 11 of this Lease.

### **28.3 No Merger.**

If both Landlord's and Tenant's estates in the Premises become vested in the same owner (other than by termination of this Lease following a default hereunder, subject to the rights of a

Permitted Lender pursuant to Section 10.3 above), this Lease shall not be terminated by application of the doctrine of merger except at the express election of Landlord and with the consent of any Permitted Lender.

#### **28.4 Recording.**

Unless the parties agree otherwise in writing in advance, on or before the date of this Lease, Landlord and Tenant shall execute a Memorandum of Lease in the form of Exhibit F attached hereto (the "Memorandum of Lease"). At Tenant's option, Tenant shall cause the Memorandum of Lease to be recorded at Tenant's sole cost and Tenant shall be solely responsible for any transfer taxes or fees required to be paid in connection with the recording of the Memorandum of Lease.

#### **28.5 Transfer of Landlord's Interest.**

Tenant acknowledges that, subject to the Port Act and the oversight of the California State Lands Commission, Landlord has the right to transfer all or any portion of its interest in the Premises and in this Lease, and Tenant agrees that in the event of any such transfer, Landlord shall automatically be released from all liability under this Lease and Tenant agrees to look solely to such transferee for the performance of Landlord's obligations hereunder after the date of transfer. Each landlord hereunder shall be liable only for those obligations arising during its period of ownership and shall be released from further obligations upon any transfer. The liability of Landlord and any transferee of Landlord shall be limited to their respective interests in the Premises, as the case may be, and Landlord and such transferee shall be without personal liability under this Lease, and Tenant hereby expressly waives and releases such personal liability on behalf of itself and all persons claiming by, through or under Tenant.

#### **28.6 Time of Essence.**

Time is of the essence with respect to this Lease and each of its provisions.

#### **28.7 Partial Invalidity.**

If any term, provision or condition contained in this Lease shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term, provision or condition to persons or circumstances other than those with respect to which it is invalid or unenforceable, shall not be affected thereby, and each and every other term, provision and condition of this Lease shall be valid and enforceable to the fullest extent possible permitted by Law.

#### **28.8 Entire Agreement.**

It is understood and acknowledged that there are no oral agreements between the parties hereto affecting this Lease and this Lease supersedes and cancels any and all previous negotiations, arrangements, agreements and understandings, if any, between the parties hereto with respect to the subject matter hereof. This Lease contains all of the terms, covenants, conditions, warranties and agreements of the parties relating in any manner to the rental, use and occupancy of the Premises, shall be considered to be the only agreement between the parties hereto and their representatives and agents, and none of the terms, covenants, conditions or provisions of this Lease can be modified, deleted or added except in writing signed by the parties hereto. Prior to any modification, deletion or addition, Tenant shall have obtained the written consent of the Permitted Lender (if any). All negotiations and oral agreements acceptable to both parties have been merged into and are included herein. There are no other representations or warranties between the parties, and all reliance with respect to

representations is based totally upon the representations and agreements contained in this Lease. However, Tenant acknowledges and agrees that other documents may restrict Tenant's use of the Premises or impose other obligations not specifically referenced in this Lease including, but not limited to, conditions of approval of a CDP or mitigation measures under CEQA.

#### **28.9 Joint and Several.**

If there is more than one Person constituting Tenant (i) the obligations imposed upon such persons or entities under this Lease shall be joint and several and (ii) the act or signature of, or notice from or to, any one or more of them with respect to this Lease shall be binding upon each and all of such persons and entities with the same force and effect as if each and all of them had so acted or signed, or given or received such notice.

#### **28.10 Tenant's Authority.**

If Tenant is a corporation, partnership or limited liability company, each individual executing this Lease on behalf of Tenant hereby represents and warrants that Tenant is a duly formed and existing entity qualified to do business in the state in which the Premises is located and that Tenant has full right and authority to execute and deliver this Lease and that each Person signing on behalf of Tenant is authorized to do so.

#### **28.11 Financial and Other Information Supplied by Tenant.**

Tenant represents and warrants that any financial or other information supplied by Tenant to Landlord regarding Tenant or any Guarantor prior to entering into the Lease or during the Term or regarding any Transfer, or to Tenant's actual knowledge, regarding any Transferee, is true and accurate and not misleading in any material respect. The breach of this warranty shall be a default of this Lease by Tenant.

#### **28.12 Attorneys' Fees.**

Should any suit or action 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 Landlord 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 attorneys' fees and costs of suit, including, without limitation, any and all costs incurred in enforcing, perfecting and executing such judgment.

#### **28.13 Transaction Costs.**

To the extent Tenant requests any approval, consent or other action by Landlord (including, without limitation, in connection with any proposed Alterations, Financing Transaction or Transfer), Tenant shall pay or reimburse Landlord, upon written demand therefor, all of Landlord's attorneys' fees and other third party costs incurred by Landlord relating to Landlord's review, together with Landlord's then current processing or cost recovery fee for similar transactions consistent with any schedule of such fees then utilized by Landlord. Landlord will provide Tenant with a copy of any such fee schedule following written request therefor from Tenant. Such costs and fees shall be payable to Landlord whether or not Landlord grants such approval or consent, or undertakes the action requested by Tenant.

#### **28.14 Governing Law.**

Venue for any legal proceeding shall be in San Diego County, California. This Lease shall be construed and enforced in accordance with the Laws of the State of California.

#### **28.15 Brokers.**

Landlord and Tenant each hereby warrant to each other that neither has retained or employed any real estate broker or agent in connection with the negotiation of this Lease. Tenant shall be solely responsible for the payment of any fee or commission due to any broker and agrees to indemnify and defend and hold Landlord harmless from any and all claims, demands, losses, liabilities, lawsuits and costs and expenses (including without limitation reasonable attorneys' fees) with respect to any leasing commission or equivalent compensation alleged to be owing by Landlord.

#### **28.16 Counterparts.**

This Lease may be executed in any number of counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same agreement.

#### **28.17 Drafting Presumption; Review Standard.**

The parties acknowledge that this Lease has been agreed to by both the parties, that both Landlord and Tenant have consulted with attorneys with respect to the terms of this Lease and that no presumption shall be created against the drafting party. Any deletion of language from this Lease prior to its execution by Landlord and Tenant shall not be construed to raise any presumption, canon of construction or implication, including, without limitation, any implication that the parties intended thereby to state the converse of the deleted language. Unless otherwise specified in this Lease, any approval or consent to be given by Landlord may be given or withheld in Landlord's sole discretion.

#### **28.18 Estoppel Statement.**

At any time and from time to time upon not less than fifteen (15) business days' notice by Landlord, Tenant shall execute, acknowledge and deliver to Landlord or any other party specified by Landlord an estoppel statement certifying that this Lease is unmodified and in full force and effect (or if there have been modifications, that the same, as modified, is in full force and effect and stating the modifications) and the date to which each obligation constituting Rent has been paid, and stating whether or not Landlord is in default in performance of any covenant, agreement or condition contained in this Lease, and, if so, specifying such default of which Tenant may have knowledge, and any other information regarding the Lease or Tenant's performance requested by Landlord. At any time and from time to time upon not less than fifteen (15) business days' notice by Tenant or a Permitted Lender, Landlord shall execute, acknowledge and deliver to such Permitted Lender an estoppel statement in the Form of Landlord's Estoppel Statement attached hereto as Exhibit I.

#### **28.19 Certified Access Specialist.**

For purposes of Section 1938 of the California Civil Code, Landlord hereby discloses to Tenant, and Tenant hereby acknowledges, that the Premises have not undergone inspection by a Certified Access Specialist ("CASp").

**IN WITNESS WHEREOF, LANDLORD AND TENANT HAVE EXECUTED THIS LEASE AS OF  
THE DATE FIRST SET FORTH ABOVE.**

APPROVED AS TO FORM AND LEGALITY  
GENERAL COUNSEL

By: \_\_\_\_\_  
Assistant/Deputy

**SAN DIEGO UNIFIED PORT DISTRICT**

By: \_\_\_\_\_  
Tony Gordon  
Director, Real Estate

**BARTELL HOTELS,  
a California Limited Partnership**

By: \_\_\_\_\_]  
Signature

NAME: \_\_\_\_\_

Its: \_\_\_\_\_  
Signature

SDUPD Docs No. \_\_\_\_\_

## DEFINITIONS ADDENDUM

This Definitions Addendum constitutes a part of that certain Amended, Restated, and Combined Lease (the "Lease") entered into as of \_\_\_\_\_, 20\_\_\_\_ by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation ("Landlord") and BARTELL HOTELS, a California Limited Partnership ("Tenant") and by reference to the same in the Lease, the following definitions are incorporated into and constitute a part of the Lease.

DEFINITIONS ADDENDUM	
<b>ADA:</b>	the Americans with Disabilities Act, 42 U.S.C. §12101 (et seq.) and the regulations promulgated thereunder, as the same may be amended from time to time.
<b>ADDITIONAL RENT:</b>	all sums of money other than Minimum Annual Rent, Percentage Rent, Improvement Rent (if applicable) or Construction Period Rent (if applicable) required to be paid by Tenant to Landlord under this Lease.
<b>AFFILIATE:</b>	any managing member or general partner of the subject Person (as the case may be), or any Person that Controls, is directly or indirectly Controlled by, or is under common ownership or Control with the subject Person.
<b>AGGREGATE DEBT AMOUNT:</b>	defined in Section 11.10.
<b>ALTERATIONS:</b>	any alterations, additions, installations, removals, demolitions, improvements or other physical changes to the Premises or any Improvements thereon following the completion of the Project Improvements, including the alteration, addition, installation or removal of machines, equipment, appliances or fixtures.
<b>ALTERATION PLANS:</b>	defined in Section 6.1.
<b>APPROVED PARENT:</b>	defined in Section 11.10.
<b>ASSIGNMENT:</b>	any disposition, assignment, sale, conveyance, exchange or other transfer (other than a Permitted Encumbrance) of all or any portion of Tenant's interest in this Lease (including without limitation any easements), the leasehold estate created hereby, or the Premises, whether by operation of law or otherwise.
<b>ASSIGNMENT PARTICIPATION FEE:</b>	defined in Section 11.10.
<b>ASTS:</b>	defined in Section 21.4.1.
<b>BANKRUPTCY CODE:</b>	Title 11 of the United States Code, as amended.
<b>BANKRUPTCY EVENT:</b>	the occurrence with respect to Tenant, any Guarantor or any other Person liable for Tenant's obligations hereunder (including without limitation any general partner of Tenant) of any of the following: (a) such Person becoming insolvent, as that term is defined in the Bankruptcy Code; (b) appointment of a receiver or custodian for any property of such Person, or the institution of a

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**DEFINITIONS ADDENDUM**


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foreclosure or attachment action upon any property of such Person; (c) filing by such Person of a voluntary petition under the provisions of the Bankruptcy Code or any insolvency laws; (d) filing of an involuntary petition against such Person as the subject debtor under the Bankruptcy Code or any insolvency laws, which either (1) is not dismissed within sixty (60) days after filing, or (2) results in the issuance of an order for relief against the debtor; (e) such Person making or consenting to an assignment for the benefit of creditors or a composition of creditors; or (f) an admission by Tenant or Guarantor of its inability to pay debts as they become due.

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**BMPS:** defined in Section 15.1.

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**BPC:** Board of Port Commissioners of the San Diego Unified Port District.

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**BUILDABLE CONDITION:** defined in Section 7.2

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**CASP:** defined in Section 28.19.

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**CCC:** defined in Section 4.3

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**CDP:** defined in Section 4.2.

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**CEQA:** defined in Section 4.2.

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**CERTIFICATES:** defined in Section 18.3.1.

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**CFR:** defined in Section 21.5.2.

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**CHANGE IN ENTITY:** includes, whether through one transaction or a series of transactions:

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(i) with respect to a corporation whose stock is not publicly traded through a nationally recognized exchange, partnership, association, limited liability company, or other entity (other than a corporation whose stock is traded through a nationally recognized exchange) any one or more of the following resulting in a change in Control of the subject entity: (A) the withdrawal, admittance or change, voluntary, involuntary or by operation of law or otherwise, of one or more of the partners, members or other principals or participants unless due to death or disability of the shareholders, partners and/or members, or (B) the assignment, hypothecation, pledge, encumbrance, transfer or sale, whether voluntary or involuntary or by operation of law or otherwise, of any stock, partnership, membership or equity interests (other than (i) to immediate family members by reason of gift or death, or (ii) to a family trust for the benefit of immediate family members), or (C) the dissolution, merger, consolidation or other reorganization of such corporation, partnership, association, limited liability company or other entity; or

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(ii) with respect to a corporation whose stock is publicly held and

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**DEFINITIONS ADDENDUM**


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traded through a nationally recognized exchange, the transfer or sale, voluntary or involuntary, of the all or substantially all of the assets or stock of the corporation to a third party.

Any event or transaction that would constitute a Change in Entity of a Tenant Parent, also shall constitute a Change in Entity of Tenant.

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**CLAIMS:** defined in Section 22.4.3(a).

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**COMMENCEMENT DATE:** defined in Section 1.1.1

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**COMPLETION AND COMPLETE:** shall mean that Tenant has obtained and delivered to Landlord (i) a final certificate of occupancy, if such certificate of occupancy can be issued, for substantially all of the Project Improvements or Alterations, as applicable, from the appropriate governing authority, (ii) a certificate from Tenant's architect and general contractor in favor of Landlord stating that, to the best knowledge of such certifying party, the Project Improvements or Alterations, as applicable, have been completed in accordance, in all material respects, with the Plans, and (iii) a copy of final lien releases in statutory form from all of Tenant's contractors and all subcontractors.

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**CONDEMNATION:** defined in Section 14.2.

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**CONDITION OF THE PREMISES:** defined in Section 22.1.

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**CONSTANT DOLLARS:** shall mean that the referenced dollar amount shall be adjusted on each anniversary of the Rent Commencement Date by an amount equal to the percentage increase in the CPI from the Rent Commencement Date to the most recent anniversary of the Rent Commencement Date preceeding the date the Constant Dollar equivalent is to be calculated.

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**CONSTRUCTION REQUIREMENTS:** those requirements, conditions and procedures regulating the installation, construction, modification and repair of Improvements and Alterations as described in Exhibit D attached to this Lease.

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**CONTROL, CONTROL, CONTROLLED AND CONTROLLING:** 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.

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**CPI:** 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, as the same may be substituted pursuant to Section 5.4.1(a).

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**DEFINITIONS ADDENDUM**


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<b>DEFAULT RATE:</b>	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 Landlord and Tenant 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.
<b>DEMOLITION AND REMEDIATION CONTRACTOR:</b>	defined in Section 7.4.1.
<b>DEMOLITION AND REMEDIATION REPORT:</b>	defined in Section 7.4.1.
<b>DEMOLITION AND REMEDIATION REPORT UPDATE:</b>	defined in Section 7.4.2(a).
<b>DEMOLITION AND REMEDIATION SECURITY AMOUNT:</b>	defined in Section 7.4.2.
<b>DEMOLITION AND REMEDIATION SECURITY FUNDING PERIOD:</b>	defined in Section 7.4.2.
<b>DEMOLITION NOTICE:</b>	defined in Section 20.2.
<b>DISCRETIONARY ACTION:</b>	defined in Section 8.3.
<b>DISCRETIONARY PROJECT:</b>	defined in Section 8.1.
<b>ENVIRONMENTAL CLEANUP:</b>	defined in Section 21.1.4.
<b>ENVIRONMENTAL LAWS:</b>	defined in Section 21.1.1.
<b>ESTIMATED DEMOLITION AND REMEDIATION COST:</b>	defined in Section 7.4.2.
<b>EXISTING IMPROVEMENTS:</b>	shall mean any improvements (including utilities, storm drains and park ways) located upon the land (and water, if applicable) described in Section 1.2 that are in existence and located on, in, over or under the Premises as of the date of this Lease, whether constructed by Landlord, a prior tenant or another third party. Landlord and Tenant acknowledge that the Existing Improvements (if any) are identified in the Basic Lease Provisions.

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**DEFINITIONS ADDENDUM**


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<b>EXPIRATION DATE:</b>	defined in Section 1.1 but if this Lease has been validly extended pursuant to an Option to Extend, the Expiration Date shall be the last day of the applicable Option Term.
<b>FINANCIAL INSTITUTION:</b>	shall mean (i) an insurance company qualified to do business in the state of California; or (ii) a U.S. 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 real estate investment trust; or (v) any lender or investment fund whose regular on-going business includes real property secured financing for commercial or industrial properties, or (vi) a combination of two or more of the preceding entities.
<b>FINANCING PARTICIPATION FEE:</b>	defined in Section 10.5.
<b>FINANCING TRANSACTION:</b>	defined in Section 10.1.1.
<b>FORCE MAJEURE EVENT:</b>	defined in Section 6.3.
<b>FORECLOSURE PURCHASER:</b>	defined in Section 10.3.3.
<b>GOVERNMENT AGENCY:</b>	defined in Section 21.1.2.
<b>GREATER OF RENT:</b>	defined in Section 5.3.
<b>GROSS INCOME:</b>	defined in Section 5.5.2(a).
<b>GROSS PROCEEDS:</b>	defined in Section 11.10.
<b>HAZARDOUS MATERIAL:</b>	shall mean any pollutant, contaminant, or hazardous, dangerous, or toxic chemical, material, or substance, including, without limitation, asbestos and oil and petroleum products, which is a "Hazardous Material" or "Hazardous Substance" within the meaning of any applicable Law (including, but not limited to, hazardous substances as defined by Cal. Health & Safety Code § 25316 and anything that may result in contamination or pollution as defined by Cal. Water Code § 13050), and at any concentration that is subject to regulation under any Law relating to such Hazardous Material or Hazardous Substance. Notwithstanding any exclusion from the definition of hazardous substance or hazardous material in any applicable Law, Hazardous Material as defined herein includes any hydrocarbons, petroleum, petroleum products or waste and any other chemical, substance or waste, that is regulated by, or may form the basis of liability under, any Environmental Laws.

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**DEFINITIONS ADDENDUM**


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<b>HAZARDOUS MATERIALS ACTIVITY:</b>	defined in Section 21.1.1.
<b>IMPROVEMENT RENT:</b>	defined in Section 1.7
<b>IMPROVEMENTS:</b>	those buildings, structures and other improvements (including vaults, utilities and other underground improvements) now (including any Existing Improvements, if applicable) or hereafter (including Alterations) located on, in, over or under the Premises.
<b>INCURABLE DEFAULT:</b>	defined in Section 10.3.2 (b).
<b>INITIAL TERM:</b>	means the Term if there are no Options to Extend and, if there are Options to Extend, the "Initial Term" of this Lease is the Term prior to the exercise of any Option to Extend.
<b>INQUIRY:</b>	defined in Section 21.1.2.
<b>LANDLORD:</b>	The San Diego Unified Port District, and where applicable the Landlord acting through the BPC.
<b>LANDLORD END OF TERM ELECTION:</b>	defined in Section 7.2
<b>LANDLORD PARTIES:</b>	Landlord, its officers, directors, members of the BPC, employees, partners, affiliates, agents, contractors, successors and assigns.
<b>LATE CHARGES:</b>	defined in Section 5.6.
<b>LAWS:</b>	All present and future California state, federal and local laws, rules, orders, ordinances, regulations, statutes, requirements, codes and executive orders, including, without limitation, the ADA, and any law of like import, and all rules, regulations and government orders with respect thereto, including without limitation any of the foregoing relating to Hazardous Materials, environmental matters (including, but not limited to, Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA"), the Clean Air Act, the Clean Water Act, Oil Pollution Act, the Toxic Substances Control Act and comparable and supplemental California laws), public health and safety matters and landmarks protection, as any of the same now exist or may hereafter be adopted or amended. Said Laws shall include, but are not limited to the Laws enacted by the San Diego Unified Port District Act, such as Article 10 of the San Diego Unified Port District Code; any applicable ordinances of the city in which the Premises are located, including the building code thereof, and any governmental permits and approvals, including, without limitation, any California Coastal Development Permit, applicable to the Premises or the use or development thereof.

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**DEFINITIONS ADDENDUM**


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<b>LEASE YEAR:</b>	a period of twelve (12) consecutive months commencing on the Rent Commencement Date, and each successive twelve (12) month period thereafter during the Term; provided, however, that if the Rent Commencement Date is not the first day of a month, then the first Lease Year shall be from the Rent Commencement Date until the last day of the month in which the first anniversary of the Lease Commencement Date occurs and the second Lease Year shall commence on the first day of the month immediately following the first anniversary of the Rent Commencement Date.
<b>LEASEHOLD AWARD:</b>	defined in Section 14.7.1.
<b>MAJOR ALTERATIONS:</b>	defined in Section 6.1.1.
<b>MEMORANDUM OF LEASE:</b>	defined in Exhibit D.
<b>MINIMUM ANNUAL RENT:</b>	defined in Section 1.5 above, as adjusted pursuant to Section 5.4.
<b>MINIMUM RENT CPI ADJUSTMENT DATE:</b>	defined in Section 1.5.1.
<b>MINIMUM RENT LOOK BACK ADJUSTMENT DATES:</b>	defined in Section 1.5.2
<b>MINOR ALTERATIONS:</b>	defined in Section 6.1.2.
<b>MSDS:</b>	defined in Section 21.1.1.
<b>NET PROCEEDS:</b>	defined in Section 10.5.
<b>NEW LEASE:</b>	defined in Section 10.3.2(d)
<b>NOTICE OF ELECTION TO TERMINATE:</b>	defined in Section 20.2.
<b>OFAC:</b>	defined in Section 17.3.
<b>OPTION TERM:</b>	each extension of the Term pursuant to a properly exercised Option to Extend.
<b>OUTSIDE AGREEMENT DATE:</b>	defined in Section 5.4.3(b).
<b>PERCENTAGE RENT:</b>	defined in Section 5.5.
<b>PERCENTAGE RENT RATE:</b>	defined in Section 5.5.
<b>PERMITTED ENCUMBRANCE:</b>	defined in Section 10.2.
<b>PERMITTED LENDER:</b>	defined in Section 10.2.
<b>PERMITTED USE:</b>	defined in Section 1.3.

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**DEFINITIONS ADDENDUM**


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<b>PERSON:</b>	any individual, partnership, firm, joint venture, association, corporation, limited liability company, government agency or any other form of business entity.
<b>PMP:</b>	defined in Section 1.3.
<b>PMPA:</b>	defined in Section 8.1.
<b>PRE-EXISTING HAZARDOUS MATERIAL:</b>	any Hazardous Material located on or under the Premises as of the Commencement Date, whether known or unknown.
<b>PREMISES:</b>	defined in Section 1.2.
<b>PRIMARY USE:</b>	defined in Section 1.3.
<b>PROHIBITED PERSON:</b>	defined in Section 17.3.
<b>PROHIBITED PERSONS:</b>	defined in Section 17.3.
<b>PROJECT:</b>	shall mean Tenant's development of the Project Improvements.
<b>PROJECT IMPROVEMENTS:</b>	shall mean the Improvements initially developed by Tenant and described by the Project Improvement Plans referred to in Exhibit C to this Lease (as opposed to both Existing Improvements existing as of the date of this Lease and subsequent Alterations to the Project Improvements).
<b>PROPERTY EXPENSES:</b>	defined in Section 16.2.
<b>PWL:</b>	defined in Section 6.8.1 (a)
<b>RECREATIONAL DOCKAGE REQUIREMENT:</b>	defined in Section 4.2
<b>REGULATED WASTE REMOVAL:</b>	defined in Section 21.5.1.
<b>REIMBURSEMENT PROCEDURE:</b>	defined in Section 5.8.
<b>RELATED COSTS:</b>	any costs, damages (of all kinds including punitive damage, diminution in value and loss of use), claims, liabilities, expenses (including reasonable attorneys', consultants' and experts' fees), losses, fines, penalties and court costs related to the subject matter of the Related Costs and amounts paid in settlement of any claims or actions related to the subject matter of the Related Costs.
<b>REMOVAL EXTENSION:</b>	defined in Section 7.5.
<b>REMOVAL PERIOD:</b>	defined in Section 7.4.1.
<b>RENT:</b>	defined in Article 5.
<b>RENT COMMENCEMENT DATE:</b>	defined in Section 1.4.

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## DEFINITIONS ADDENDUM

<b>RENTAL PERIODS:</b>	defined in Section 1.4.
<b>REVENUE:</b>	shall mean all income, receipts, proceeds, amounts, money, cash, assets, property or other things of value, whether collected, uncollected, received, payable or accrued.
<b>SUBLEASE:</b>	any sublease (or sub-sublease or other level of sublease), and any occupancy, franchise, license, operating agreement, concession agreement or management agreement or other right to use applicable to this Lease or the Premises or any part thereof.
<b>SUBTENANT:</b>	any subtenant (or sub-subtenant or other level of subtenant), occupant, franchisee, licensee, operator, concessionaire or manager under any Sublease.
<b>TAX EXPENSES:</b>	shall have the meaning as defined in Section 16.1.
<b>TENANT:</b>	defined in the Preamble of this Lease.
<b>TENANT HAZARDOUS MATERIAL:</b>	any Hazardous Material either (i) brought onto the Premises during the Term of this Lease by any Person, or (ii) brought onto the Premises or any other property by Tenant or Tenant Party or generated by any of the same.
<b>TENANT PARENT:</b>	a Person which Controls, directly or indirectly, Tenant.
<b>TENANT PARTY:</b>	Tenant, its agents, employees, representatives, contractors, subcontractors, suppliers, materialmen, workmen, licensees, concessionaires, Affiliates and successors and assigns and its Subtenants, and the agents, employees, representatives, contractors, subcontractors, suppliers, materialmen, workmen, concessionaires, licensees, Affiliates and successors and assigns of those Subtenants.
<b>TENANT PERCENT FOR ART:</b>	defined in Section 6.5
<b>TENANT RECORDS:</b>	defined in Section 5.5.3(c).
<b>TENANT RELATED PARTY:</b>	(i) a corporation or other business entity into or with which Tenant shall be merged or consolidated (such as a "successor corporation"), or to which substantially all of the assets of Tenant may be transferred or sold; or (ii) a corporation or other business entity (a "related corporation") which shall Control, be Controlled by or be under common Control with Tenant.
<b>TERM:</b>	defined in Section 1.1.
<b>THIRD PARTY:</b>	defined in Section 11.10.
<b>TRANSFER:</b>	defined in Section 11.1.
<b>TRANSFER NOTICE:</b>	defined in Section 11.2.
<b>TRANSFeree:</b>	defined in Section 11.2 and 11.3.

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**DEFINITIONS ADDENDUM**

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<b>USA Patriot Act:</b>	defined in Section 17.3.
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<b>USTs:</b>	defined in Section 21.4.1.
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**EXHIBIT A**

**LEGAL DESCRIPTION OF PREMISES**



**EXHIBIT B**

**DEPICTION OF PREMISES**

**EXHIBIT C**  
**CONSTRUCTION REQUIREMENTS**

1. **GENERALLY.** TENANT SHALL COMPLY WITH THE PROVISIONS OF THIS EXHIBIT D, THE CONDITIONS OF PROJECT APPROVAL SET FORTH IN EXHIBIT D-1, SUCH OTHER GENERAL CONSTRUCTION RELATED RULES AND REQUIREMENTS AS LANDLORD MAY ADOPT OR REQUIRE FROM TIME TO TIME FOR CONSTRUCTION BY TENANTS, AND THE PROVISIONS OF THE LEASE IN CONNECTION WITH ALL CONSTRUCTION OR DEMOLITION WORK AT THE PREMISES ("CONSTRUCTION WORK").

2. **Contractors.** Landlord shall have the right to approve the general contractor for Construction Work (other than Minor Alterations). All contractors and subcontractors performing any Construction Work must be licensed in the State of California.

3. **Architects and Engineers.** All architects and engineers must have an active license to practice in the State of California.

4. **Contractors, Architects and Engineers Agreements.** Landlord shall have the right to approve the architectural, engineering and construction contracts for all the Improvements (other than Minor Alterations). All such contracts shall provide, in form and content reasonably satisfactory to Landlord, (i) for the assignment thereof to Landlord as security to Landlord for Tenant's performance hereunder (ii) that if this Lease is terminated Landlord may, at its election, use any plans and specifications created by such architect, engineer or contractor for the contemplated Improvements at the Premises.

5. **Construction Barricades.** Tenant shall install a construction barricade around the area of Construction Work (other than Minor Alterations), and erect such other protective measures as may be reasonably required by Landlord.

6. **Dust and Trash Control.** Tenant shall take commercially reasonable steps to minimize dust resulting from any Construction Work, and shall promptly dispose of all trash generated from the Construction Work.

7. **Performance and Payment Bonds.** Tenant shall furnish Landlord with the following separate corporate surety bonds not less than ten (10) days prior to the commencement of any Construction Work with a hard cost reasonably estimated by Tenant to be greater than \_\_\_\_\_ Dollars (\$\_\_\_\_\_) (as such amount is increased on each anniversary of the Rent Commencement Date by the percentage increase in the CPI from the Rent Commencement Date):

7.1 A corporate surety performance bond ("Performance Bond") issued by a surety company licensed to transact business as such in the State of California, in an amount not less than one hundred percent (100%) of the projected cost of such Construction Work. The Performance Bond and its issuer shall be in all material respects satisfactory to Landlord. The Performance Bond shall name Tenant as principal and Landlord as obligee, assuring full completion by Tenant of such Construction Work.

7.2 A corporate surety Payment Bond, issued by a surety company licensed to transact business as such in the State of California, with Tenant as principal and Landlord as obligee, in a sum equal to one hundred percent (100%) of the total construction cost anticipated to be incurred in connection with such Construction Work, guaranteeing payment for all materials, provisions, supplies and equipment used in, upon, for or about the performance of the

Construction Work or for labor done thereon and protecting Landlord from any and all liability, loss or damages arising out of or in connection with any failure to make any such payments ("Payment Bond").

7.3 The Payment Bond and Performance Bond shall be in form and content satisfactory to Landlord.

8. Financial Assurances. At least ten (10) days prior to commencing any Construction Work (other than Minor Alterations), Tenant shall deliver to Landlord evidence reasonably demonstrating to Landlord that Tenant has obtained or retains financial resources and capabilities in an amount sufficient to complete the Construction Work.

9. Construction Schedule. Tenant shall, at least ten (10) days prior to date on which Tenant intends to commence construction of any Construction Work (other than Minor Alterations), deliver to Landlord a construction schedule. Tenant shall use commercially reasonable efforts, subject to Force Majeure Events, to perform the Construction Work in accordance with the construction schedule.

10. Contractor Insurance. All contractors and subcontractors performing Construction Work shall obtain and thereafter maintain so long as such Construction Work is occurring, at least the minimum insurance coverages set forth below, which insurance coverages may be modified by Landlord from time to time in its sole and absolute discretion:

- (i) Workers' compensation and employer's liability insurance:
  - (a) Workers' compensation insurance as required by any applicable law or regulation.
  - (b) Employer's liability insurance in the amount of \$1,000,000 each accident/employee/disease.
- (ii) General liability insurance: Commercial General Liability insurance covering all operations by or on behalf of the contractor, which shall include the following minimum limits of liability and coverages:
  - (a) Required coverages:
    - (1) Premises and Operation;
    - (2) Products and Completed Operations;
    - (3) Contractual Liability;
    - (4) Broad Form Property Damage (including Completed Operations);
    - (5) Explosion, Collapse and Underground Hazards; and
    - (6) Personal Injury Liability.
  - (b) Minimum limits of liability:
    - (1) \$2,000,000 each occurrence (for bodily injury and property damage);
    - (2) \$2,000,000 for Personal Injury Liability;
    - (3) \$5,000,000 aggregate for Products and Completed Operations (which shall be maintained for a three (3) year period following final completion of the Work); and
    - (4) \$5,000,000 general aggregate applying separately to this Project.

(iii) **Automobile Liability Insurance:** Automobile liability insurance including coverage for owned, leased, rented, hired, and/or non-owned automobiles. The limits of liability shall not be less than \$1,000,000 for each accident limit for bodily injury, death and property damage.

(iv) **Umbrella/Excess Liability Insurance:** The general contractor shall also carry umbrella/excess liability insurance in the amount of \$5,000,000. If there is no per project aggregate under the Commercial General Liability policy, the limit shall be \$10,000,000.

(v) **Contractor's Pollution Liability Coverage:** If Landlord determines, in its sole and absolute discretion, that Tenant performs or contracts for any work which involves a Hazardous Materials Activity or which has the potential to disturb or result in the release of any Hazardous Material, for which there is potential exposure to pollution or Hazardous Materials to Persons or the environment, Tenant shall obtain or cause its contractor to obtain Contractor's Pollution Liability, Pollution Legal Liability and/or Asbestos Pollution Liability and/or Errors & Omissions applicable to the work being performed or the potential release of any Hazardous Material, with limits of \$5,000,000 per claim or occurrence and \$10,000,000 aggregate per policy period of one year or the limits maintained by or available to the contractor, whichever is higher.

Landlord Parties shall be named as an additional insured on the forgoing insurance, and such insurance shall provide that the same shall not be canceled, or reduced in amount or coverage below the requirements of this Lease, nor shall it be allowed to expire, without at least thirty (30) days prior written notice to Landlord. The foregoing insurance shall include a waiver of subrogation in favor of Landlord Parties.

11. **Notice of Completion.** Within ten (10) days after Completion of any Construction Work (other than Minor Alterations), Tenant shall record a Notice of Completion in the office of the San Diego County Recorder and furnish a copy thereof to Landlord upon such recordation.

12. **Lien Releases.** Within sixty (60) days after Completion, Tenant shall deliver to Landlord unconditional final lien waivers from all contractors and materialmen.

13. **Copy of Record Set of Plans and Certificate of Completion.** At the conclusion of any Construction Work (other than Minor Alterations), deliver to Landlord (i) a set of "as-built drawings", (ii) a certificate from Tenant's architect and general contractor in favor of Landlord stating that, to the best knowledge of such certifying party, the Construction Work has been Completed in accordance, in all material respects, with the approved plans therefor, and (iii) a copy of the certificate of completion issued by the applicable government agency.

14. **Conflict.** In the event of conflict between the terms of these Construction Requirements and terms of the Lease, the terms of the Lease shall control.

**EXHIBIT C-1**

**Conditions of Project Approval**

**To be attached prior to execution of Lease.**

**(PLACEHOLDER PAGE)**

**EXHIBIT D****MEMORANDUM OF LEASE****RECORDING REQUESTED BY:**


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(Above Space for Recorder's Use Only)

**MEMORANDUM OF LEASE**

This Memorandum of the Amended, Restated, and Combined Lease, hereinafter "Memorandum," is dated \_\_\_\_\_, 20\_\_, between SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, Landlord, and BARTELL HOTELS, a California Limited Partnership, Tenant, concerning that certain real property described in Exhibit "A" and depicted in Exhibit "B", attached hereto and by this reference made a part hereof (the "Leased Premises").

For good and adequate consideration, Landlord leases the Leased Premises to Tenant, and Tenant hires them from Landlord, for the term and on the provisions contained in that certain Lease of even date herewith by and between Landlord and Tenant (the "Lease"), including without limitation provisions prohibiting assignment, subleasing, and encumbering said leasehold without the express written consent of Landlord in each instance, all as more specifically set forth in said Lease, **and** subject to the terms of the Article 23 of the Lease, Landlord conveys to Tenant and Tenant accepts from Landlord, all of Landlord's right, title and interest in and to the Existing Improvements, which said Lease is incorporated in this Memorandum by this reference.

The term of the Lease is Forty (40) years, beginning May 1, 2018, and ending April 30, 2058. 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 the terms of this Memorandum and terms of the Lease, the terms of the Lease shall control.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Memorandum of Lease as of the date first set forth above.

APPROVED AS TO FORM AND LEGALITY  
GENERAL COUNSEL

By: \_\_\_\_\_

Assistant/Deputy

**SAN DIEGO UNIFIED PORT DISTRICT**

By: \_\_\_\_\_

Tony Gordon

Director, Real Estate

**BARTELL HOTELS,  
a California Limited Partnership**

By: \_\_\_\_\_]

Signature

NAME: \_\_\_\_\_

Its: \_\_\_\_\_

**EXHIBIT A TO MEMORANDUM OF LEASE**

**LEGAL DESCRIPTION OF PREMISES**



**EXHIBIT B TO MEMORANDUM OF LEASE**

**DEPICTION OF PREMISES**

**(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: \_\_\_\_\_

\_\_\_\_\_  
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 \_\_\_\_\_

RIGHT THUMBPRINT  
OF SIGNER

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(FOR USE BY \_\_\_\_\_)

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: \_\_\_\_\_

\_\_\_\_\_  
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RIGHT THUMBPRINT  
OF SIGNER

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Signer's Name \_\_\_\_\_

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

Signer is Representing: \_\_\_\_\_

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OF SIGNER

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**EXHIBIT E**

**SIGN PLANS**

**\*\* TENANT MUST MAINTAIN SIGNAGE IN CONFORMANCE WITH SECTION 8.30 OF THE SAN DIEGO UNIFIED PORT DISTRICT CODE, AS SUCH MAY BE AMENDED FROM TIME TO TIME, AND ANY OTHER POLICIES AND ORDINANCES ADOPTED BY LANDLORD RELATED TO SIGNAGE.**

**\*\*IF APPLICABLE, INSERT PROVISION IN THE EVENT THAT LANDLORD HAS TO RESTRICT ADVERTISING ON CERTAIN PORTIONS OF TENANT'S PROPERTY DUE TO OVERLAY DISTRICTS OR OTHER CONSIDERATIONS.**



**EXHIBIT G****FORM OF LANDLORD'S ESTOPPEL STATEMENT**

\*Name  
Address

Ladies and Gentlemen:

This Landlord Estoppel Statement ("Statement") is issued by the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation (hereinafter referred to as "Landlord"), as landlord under that certain lease dated \_\_\_\_\_, covering a portion of those lands conveyed to Landlord 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, between Landlord and \_\_\_\_\_ (hereinafter referred to as "Tenant"), as tenant, a copy of which lease is on file in the Office of the Clerk of Landlord bearing Document No. \_\_\_\_\_ (the "Lease").

To the actual knowledge of Landlord (without any duty of investigation or inquiry), Landlord hereby acknowledges and confirms to Recipient (as defined below) the following:

1. The Lease is currently in full force and effect and has not been modified in whole or in part [\*], except as provided by that \*(those) certain amendment(s)\* described and dated as follows: \* copies of which amendment(s)\* is/are\* on file in the Office of the Clerk of Landlord bearing Document No.(s)]\*.
2. The Lease is for a term of \* (\*) years, commencing \* and ending \*.
3. As of the date of this Statement, Tenant is not, to the actual knowledge of Landlord (without any duty of investigation or inquiry), in default or in breach under the provisions of the Lease.
4. Landlord has no actual knowledge (without any duty of investigation or inquiry) of any other assignment or hypothecation of said leasehold estate, or any pledge or assignment of rents with respect to said premises \*[except any security interest therein created in favor of \* for a loan in the amount of \* Dollars (\$\*) as consented to by Landlord in an Administrative Approval or Resolution No. \*, a copy of which is attached hereto and by reference incorporated herein]\*. *[NOTE TO DRAFTER: Modify language if encumbrance has not yet been approved.]*
5. All rent, and any other charges payable by Tenant pursuant to the lease (referred to collectively hereinafter as "Rent") has been paid through and including \*; provided, however, there may be Rent still due and owing which will be discovered at the time of audit by Landlord and, to that extent, Landlord cannot represent that all Rent has been paid.

6. This Statement is given by Landlord with the understanding that the statements herein made may be relied upon only by \* (the "Recipient") and only for the purpose of estopping Landlord from asserting contrary facts against Tenant which Tenant also has no knowledge of.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

APPROVED AS TO FORM AND LEGALITY  
GENERAL COUNSEL

**SAN DIEGO UNIFIED PORT DISTRICT**

By: \_\_\_\_\_  
Assistant/Deputy

By: \_\_\_\_\_  
\_\_\_\_\_, Real Estate

SDUPD Docs No. \_\_\_\_\_