

RESOLUTION NUMBER R- 292702ADOPTED ON JAN 31 2000

WHEREAS, on November 3, 1998, the electorate of the City of San Diego [City] approved Ordinance No. O-18613 [Ordinance] which authorized the City to enter into a Memorandum of Understanding [MOU] with the San Diego Padres [Padres], the Redevelopment Agency of the City of San Diego [Agency], and the Centre City Development Corporation [CCDC] Concerning a Ballpark District, Construction of a Baseball Park, and a Redevelopment Project within the Centre City East (East Village) Redevelopment District of the Expansion Sub Area of the Centre City Redevelopment Project; and

WHEREAS, the Ordinance provided that it was the intent of the electorate that the Ordinance and the MOU constitute the legislative acts establishing policy for the City on those matters, and provided for the ways and means for the implementation of that policy by such administrative and non-legislative acts as may be necessary and appropriate to carry out the purpose and intent of the Ordinance; and

WHEREAS, the MOU has been executed by all parties thereto; and

WHEREAS, the MOU reflects the basic business deal between the parties, and contains certain general terms for the planning, construction and financing of the proposed ballpark and redevelopment project [Project]; and

WHEREAS, the City and San Diego Unified Port District [Port] have worked cooperatively together to cause the development, construction and successful operation of the San Diego Convention Center [Convention Center]; and

WHEREAS, the City and Port have worked cooperatively together to cause the expansion of the Convention Center [Expansion] to enhance the capabilities of the Convention Center and to meet the increased demand for convention facilities in the San Diego region; and

WHEREAS, the Convention Center and the Expansion provide benefits to the tidelands of the State of California [Tidelands], held in trust by the Port, by making beneficial public use of the Tidelands in a manner consistent with the Tidelands trust, and by increasing revenue to the Port through the increased use by visitors to the San Diego region of hotels, restaurants, and other facilities and amenities located on the Tidelands; and,

WHEREAS, the development of another "headquarters" type hotel on the Tidelands near the Expansion is required to serve the needs of the expanded Convention Center and its increased use; and

WHEREAS, a headquarters type hotel, consisting of at least 1000 guest rooms and other amenities, has long been planned to be located on the site of the Campbell Shipyard [Hotel], which site is on the Tidelands adjacent to the Expansion; and

WHEREAS, on November 30, 1999, the Port entered into an Option Agreement with Manchester Resorts, L.P. for development of such Hotel; and

WHEREAS, studies have shown that a demand exists for the construction of a significant number of new hotel rooms in the City to serve the needs of visitors to the San Diego region; and

WHEREAS, the Tidelands will benefit from the development of additional hotel rooms beyond those provided by the Hotel because enhancing the ability of the San Diego region to meet the needs of increased tourism will result in the increased use of the Convention Center, the

Expansion, airport and car rental facilities, restaurants and other facilities and amenities located on the Tidelands; and

WHEREAS, the development of additional public parking is needed to serve the needs of the Convention Center and the Expansion; and

WHEREAS, the City, Agency and CCDC are planning and attempting to finance the Project, which is also adjacent to the Convention Center and Expansion; and

WHEREAS, the Project will include the development of approximately 850 new hotel rooms, a ballpark suitable and available for convention related events, a significant number of new public and private parking spaces, restaurants, retail stores, and other facilities and amenities suitable to serve the needs of tourists and convention goers in the region; and

WHEREAS, the construction of the Project will provide for the recreational needs of tourists and visitors to the Tidelands, in which there is a general statewide purpose, and is incidental, necessary, or convenient for the promotion and accommodation of commerce, navigation, fisheries and recreation on the Tidelands; and

WHEREAS, new and additional revenue will accrue to the Port from the development of the Project as a result of the increased use of hotels, restaurants, airport and car rental facilities, and other facilities and amenities located on the Tidelands by persons visiting the Project and experiencing a new and revitalized downtown area of the City; and

WHEREAS, in order for the Project to proceed as authorized by the City's electorate, it is desirable that the Hotel be developed concurrently with the Project because the revenue accruing to the City from the Hotel, in the form of Transient Occupancy Taxes, can be an important component of the City's plan of finance for the Project in that such revenue will

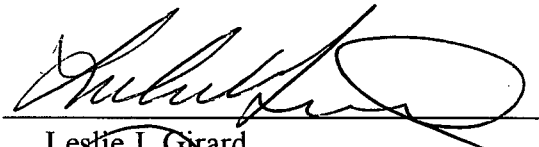
accrue to the City's General Fund from which any finance payments by the City will be made;  
and

WHEREAS, the Port, City, Agency and CCDC desire to facilitate the concurrent development of the Hotel and the Project for the mutual benefit of the parties, the Tidelands, and the citizens of the San Diego region; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, that the City Manager be and he is hereby authorized and directed to execute for and on behalf of the City of San Diego an Agreement Concerning The Development Of A Convention Center Expansion Related Hotel, And The Financing Of The Proposed Ballpark And Redevelopment Project, in form and substance consistent with Exhibit 1 to this resolution. When the Agreement is fully executed it will be kept on file in the Office of the City Clerk as Document No. RR- 292702

BE IT FURTHER RESOLVED, that the City Manager be and he is hereby authorized to take such other and further actions as may be necessary or appropriate to implement the intent and purposes of this resolution, consistent with the rights and obligations of the City pursuant to the Ordinance and MOU.

APPROVED: CASEY GWINN, City Attorney

By   
Leslie J. Girard  
Assistant City Attorney

LJG:ljk:js  
1/18/00  
Or.Dept:Mgr.  
R-2000-830  
Form=r-t.frm

**AGREEMENT CONCERNING THE DEVELOPMENT  
OF A CONVENTION CENTER EXPANSION RELATED  
HOTEL AND THE FINANCING OF THE PROPOSED  
BALLPARK AND REDEVELOPMENT PROJECT**

by and among

**CITY OF SAN DIEGO,**  
a Municipal corporation,

and

**SAN DIEGO UNIFIED PORT DISTRICT,**  
a public corporation,

and

**THE REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO,**

and

**CENTRE CITY DEVELOPMENT CORPORATION.**

Dated as of

\_\_\_\_\_, 2000

*Exhibit 1*

*R-* 292702

**AGREEMENT CONCERNING THE DEVELOPMENT  
OF A CONVENTION CENTER EXPANSION RELATED  
HOTEL AND THE FINANCING OF THE PROPOSED  
BALLPARK AND REDEVELOPMENT PROJECT**

This Agreement Concerning The Development of a Convention Center Expansion Related Hotel And The Financing of The Proposed Ballpark and Redevelopment Project ("Agreement") is entered into as of \_\_\_\_\_, 2000, by and between the City of San Diego, a municipal corporation, the San Diego Unified Port District, a public corporation, the Redevelopment Agency of the City of San Diego, and the Centre City Development Corporation.

**RECITALS**

- A. WHEREAS, the City of San Diego ("**City**") and San Diego Unified Port District ("**Port**") have worked cooperatively together to cause the development, construction and successful operation of the San Diego Convention Center ("**Convention Center**"); and
- B. WHEREAS, the City and Port have worked cooperatively together to cause the expansion of the Convention Center ("**Expansion**") to enhance the capabilities of the Convention Center and to meet the increased demand for convention facilities in the San Diego region; and
- C. WHEREAS, the Convention Center and the Expansion provide benefits to the tidelands of the State of California ("**Tidelands**"), held in trust by the Port, by making beneficial public use of the Tidelands in a manner consistent with the Tidelands trust, and by increasing revenue to the Port through the increased use by visitors to the San Diego region of hotels, restaurants, and other facilities and amenities located on the Tidelands; and
- D. WHEREAS, the development of another "headquarters" type hotel on the Tidelands near the Expansion is required to serve the needs of the expanded Convention Center and its increased use; and
- E. WHEREAS, a headquarters type hotel, consisting of at least 1000 guest rooms and other amenities, has long been planned by the Port to be located on the site of the Campbell Shipyard ("**Hotel**"), which site is on the Tidelands adjacent to the Expansion; and
- F. WHEREAS, on November 30, 1999, the Port entered into an Option Agreement ("**Option Agreement**") with Manchester Resorts, L.P. ("**Developer**") for development of such Hotel. A copy of the Option Agreement is attached hereto as Exhibit A and, as may be relevant to this Agreement, is incorporated by this reference; and
- G. WHEREAS, studies have shown that a demand exists for the construction of a significant number of new hotel rooms in the City to serve the needs of visitors to the San Diego region; and

H. WHEREAS, the Tidelands will benefit from the development of additional hotel rooms beyond those provided by the Hotel because enhancing the ability of the San Diego region to meet the needs of increased tourism will result in the increased use of the Convention Center, the Expansion, airport and car rental facilities, restaurants, and other facilities and amenities located on the Tidelands; and

I. WHEREAS, the development of additional public parking is needed to serve the needs of the Convention Center and the Expansion; and

J. WHEREAS, the City, the Redevelopment Agency of the City of San Diego ("Agency"), and the Centre City Development Corporation ("CCDC") are planning a redevelopment project, including a new ballpark ("Project"), to be located in the East Village area of downtown San Diego, and adjacent to the Convention Center and Expansion, and, pursuant to a vote of the City's electorate, have executed a Memorandum of Understanding ("MOU") concerning the Project; and

K. WHEREAS, the Project will include the development of approximately 850 new hotel rooms, a ballpark suitable and available for convention related events, a significant number of new public and private parking spaces, restaurants, retail stores, and other facilities and amenities suitable to serve the needs of tourists and convention goers in the region; and

L. WHEREAS, the construction of the Project will provide for the recreational needs of tourists and visitors to the Tidelands, in which there is a general statewide purpose, and is incidental, necessary, or convenient for the promotion and accommodation of commerce, navigation, fisheries and recreation on the Tidelands.

M. WHEREAS, new and additional revenue will accrue to the Port from the development of the Project as a result of the increased use of hotels, restaurants, airport and car rental facilities, and other facilities and amenities located on the Tidelands by persons visiting the Project and experiencing a new and revitalized downtown area of the City; and

N. WHEREAS, in order for the Project to proceed as authorized by the City's electorate, it is desirable that the Hotel be developed concurrently with the Project because the revenue accruing to the City from the Hotel, in the form of Transient Occupancy Taxes, can be an important component of the City's plan of finance for the Project in that such revenue will accrue to the City's General Fund from which any finance payments by the City will be made; and

O. WHEREAS, the Port, City, Agency and CCDC desire to facilitate the concurrent development of the Hotel and the Project for the mutual benefit of the parties, the Tidelands, and the citizens of the San Diego region.

NOW THEREFORE, in consideration of the mutual and direct economic and social benefits to be obtained by all parties as a result of the development of the Hotel and the Project, and in consideration of the mutual obligations undertaken by the parties as set forth in this Agreement, the City, Port, Agency and CCDC agree as follows:

1. CITY.

a. In reliance upon the commitments of the Port set forth in this Agreement, the City will, subject to its rights and obligations pursuant to the MOU regarding the Project, undertake the financing of its investments in the Project, which will benefit the Tidelands as set forth above.

b. City will use its best efforts to develop Park Avenue so as to prohibit parking on the north side of Park Avenue west of Imperial to allow for configuration of Park Avenue at its intersection with Harbor Drive in a manner which accommodates Port's traffic circulation concerns (the "Park Avenue Improvements"). City acknowledges that, to accomplish development on Port property, including development of the Hotel, Port will require certain improvements to Harbor Drive as are generally depicted on Exhibit "B". City will use its best efforts to accommodate Port's development needs. City shall incur no financial responsibility for such improvements beyond amounts which it has appropriated to such projects in its existing capital budgets as of the date of this Agreement, except with respect to the Park Avenue Improvements. To the extent that the City incurs costs to complete the Park Avenue Improvements which exceed amounts which the City has appropriated for such improvements, the Port agrees to contribute an amount not to exceed Two Hundred Fifty Thousand Dollars (\$250,000.00) for such improvements, which amount shall not be repayable by the City to the Port.

c. City is contemplating a project which would make modifications to and upgrade its storm drain system in the East Village area, some of which crosses Port property in the general vicinity of the Hotel. However, City is not now contemplating modifying that portion of the storm drain in the general vicinity of the Hotel. If a failure to modify that portion of the storm drain results in a delay in the development and construction of the Hotel, then City acknowledges that such delay may be considered a Force Majeure Event as defined in the Option Agreement, except to the extent that such delay is caused as a result of the action or inaction of Port, Developer or any party in privity with them, and Developer may be entitled to a day-for-day extension of time for performance of its obligations as provided for in the Option Agreement.

2. PORT.

a. Development of Hotel. The Port shall use its best efforts to cause the Hotel to be developed so that it will be open and operating no later than January 2, 2004 (unless such date is extended pursuant to the provisions of the Option Agreement which pertain to extensions of time for opening of the Hotel, which provisions shall survive any termination of the Option Agreement, and shall apply to Port's obligation hereunder) ("**Damages Date**"), and shall immediately undertake necessary and appropriate actions in furtherance thereof.

b. Termination of Option Agreement. In the event that the Option Agreement is terminated for any reason, or if the Developer is relieved for any reason from its obligations under the Option Agreement to develop the Hotel, the Port agrees to use its best efforts to cause binding, irrevocable commitments for the financing of the Hotel, on either a taxable or tax-exempt basis, to be obtained within such time that the Hotel will be open and operating no later than the Damages Date.



c. **Liquidated Damages.** If the Port does not cause the Hotel to be fully open and operating by the Damages Date, then the Port, subject to the provisions set forth below, will pay liquidated damages to the City for every day beyond the Damages Date, that the Hotel is not fully open and operating. The Port's obligation is set forth below.

CITY AND PORT AGREE AND ACKNOWLEDGE THAT IF THE HOTEL IS NOT OPEN TO THE PUBLIC FOR BUSINESS ON OR BEFORE JANUARY 2, 2004 (AS SUCH DATE MAY BE EXTENDED PURSUANT TO THE PROVISIONS OF THE OPTION AGREEMENT), THEN CITY WILL SUFFER DAMAGES IN AN AMOUNT WHICH IS SUBSTANTIAL, BUT IS NOT READILY SUSCEPTIBLE OF DETERMINATION. THEREFORE, CITY WILL HAVE THE RIGHT TO RECEIVE FROM PORT LIQUIDATED DAMAGES IF THE HOTEL IS NOT OPEN TO THE PUBLIC FOR BUSINESS ON OR BEFORE JANUARY 2, 2004 (UNLESS SUCH DATE IS EXTENDED PURSUANT TO THE PROVISIONS OF THE OPTION AGREEMENT), FOR ANY REASON WHATSOEVER. THE LIQUIDATED DAMAGES WILL BE IN THE AMOUNT OF \$5 MILLION PER YEAR (PRORATED ON A DAILY BASIS FOR A 365-DAY YEAR) WITH A MAXIMUM DURATION OF TEN YEARS, PROVIDED THAT THE PORT'S OBLIGATION TO PAY LIQUIDATED DAMAGES TO CITY SHALL NOT EXCEED, AND SHALL BE LIMITED TO, ACTUAL AMOUNTS RECEIVED FROM THE DEVELOPER PURSUANT TO ITS OBLIGATION TO PORT PURSUANT TO THE OPTION AGREEMENT, OR THE PROCEEDS OF INSURANCE TO THE EXTENT A POLICY IS PROCURED IN ACCORDANCE WITH THE PROVISIONS OF PARAGRAPH 2 (c) (ii).

PORT'S OBLIGATION TO PAY LIQUIDATED DAMAGES WILL TERMINATE ON THE DATE ON WHICH THE PROJECT IS OPENED TO THE PUBLIC FOR BUSINESS. THE PARTIES ACKNOWLEDGE THAT THE PAYMENT OF THE LIQUIDATED DAMAGES TO CITY WILL BE CITY'S SOLE REMEDY AGAINST PORT FOR ANY DAMAGES SUFFERED BY CITY AS A RESULT OF PORT'S FAILURE TO SATISFY ITS OBLIGATIONS HEREUNDER.

\_\_\_\_\_  
City

\_\_\_\_\_  
Port

i. The Port's obligation to pay liquidated damages to the City shall be limited to the actual amount of money the Port receives from the Developer pursuant to its liquidated damages obligation under the Option Agreement or the proceeds of insurance to the extent a policy is procured in accordance with the provisions of ¶ 2.c.ii. Subject to the foregoing, the payment of liquidated damages to the City shall be at such time and under such conditions as the City may require for the timely remittance by the City of any financing payment concerning the Project.

ii. The Port has identified insurance which may be procured which could insure the Developer's obligation under the Option Agreement to pay liquidated damages. At its option, the City may elect to require the Port to procure a policy upon terms acceptable to the City regarding coverage and time of payments to insure the Developer's obligation to pay liquidated damages as provided in the Option Agreement. Within seven (7) days after the

execution of this Agreement by all parties, the Port will forward to the City a letter from its proposed insurance provider stating (1) its commitment to issue a policy of such insurance; and (2) the duration of its commitment. The Port shall use its best efforts to cause the renewal of this commitment if it expires before the City exercises its option to require the Port to obtain such insurance. If the City elects to require the Port to obtain such insurance, the Port shall not be required to pay premium(s) exceeding \$ 2,500,000.00.

d. **Cooperation.** The Port will assist the City, if requested, in the process of proceeding with redevelopment on and near the Tidelands, including, if requested, attending presentations and providing necessary documents and information, including updates on a timely basis.

3. **AGENCY AND CCDC.**

In the event that the Hotel is open and operating by ten years after the Damages Date, then the Agency and CCDC will, subject to any required hearings and findings, undertake projects within the Project area that will provide a benefit to the Port, such projects to have a value equal to the total amount of the premium for any insurance policy obtained by the Port pursuant to ¶ 2.c.ii, together with interest thereon calculated at a rate equal to the weighted average of the return on the Port's investment portfolio calculated quarterly commencing on the date the monies are paid by the Port and accruing until such projects have been completed. Such projects shall be in the Port's Capital Development Program, and shall be identified by mutual agreement; parties shall work cooperatively and in good faith towards such identification. If the Port identifies projects included as part of the North Embarcadero Visionary Plan as the projects to be undertaken by Agency and CCDC, then no further consultation or agreement of the parties shall be required and such projects shall be those undertaken by Agency and CCDC in satisfaction of and otherwise subject to the provisions of this ¶ 3.

Funds for the projects to be performed will be allocated by the Agency and CCDC from annual tax increment available to the Agency, net of set asides for low and moderate income housing as required by law, generated from projects which commence construction in the Centre City Redevelopment Project area (the boundaries of which are reflected on Exhibit "C") after the date of this Agreement. This obligation on the part of the Agency and CCDC to undertake projects shall not arise until the Hotel is open and operating.

City, Agency, and CCDC each agree to use its best efforts to process expeditiously plans and permits required for the Port's Hotel project, parking garage development, and related developments, and will assist the Port, if requested, in obtaining such permits and entitlements as may be necessary for such projects.

4. **GOVERNING LAW.**

**THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA.**

5. MISCELLANEOUS.

a. Each individual and entity executing this Agreement hereby represents and warrants that he, she or it has the capacity set forth on the signature pages hereof with full power and authority to bind the party on whose behalf he, she or it is executing this Agreement to the terms hereof.

b. This Agreement is the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether oral or written, between the parties with respect to the matters contained in this Agreement. Any waiver, modification, consent or acquiescence with respect to any provision of this Agreement shall be set forth in writing and duly executed by or on behalf of the party to be bound thereby. No waiver by any party of any breach hereunder shall be deemed a waiver of any other or subsequent breach.

c. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon provided such signature page is attached to any other counterpart identical thereto except having additional signature pages executed by other parties to this Agreement attached thereto.

d. Time is of the essence in the performance of and compliance with each of the provisions and conditions of this Agreement.

e. Any communication, notice or demand of any kind whatsoever which either party may be required or may desire to give to or serve upon the other shall be in writing and delivered by personal service (including express or courier service), by electronic communication, whether by telex, telegram or telecopy (if confirmed in writing sent by registered or certified mail, postage prepaid, return receipt requested), or by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

San Diego Unified Port District  
P.O. Box 120488  
San Diego, California 92112-0488  
Attn: Real Estate Operations  
Telephone: (619) 686-6291  
Telecopy: (619) 686-6403

With a copy to: San Diego Unified Port District  
P.O. Box 120488  
San Diego, California 92112-0488  
Attn: Port Attorney  
Telephone: (619) 686-6219  
Telecopy: (619) 686-64444

City of San Diego  
City Manager  
202 C Street  
San Diego, CA 92101  
Telephone: (619) 236-5941  
Telecopy: (619) 236-6067

With a copy to: City Attorney  
1200 3<sup>rd</sup> Avenue, Suite 1620  
San Diego, CA 92101  
Telephone: (619) 236-6220  
Telecopy: (619) 236-7215

Redevelopment Agency of the City of San Diego  
Executive Director  
202 C Street  
San Diego, CA 92101  
Telephone: (619) 236-5941  
Telecopy: (619) 236-6067

With a copy to: General Counsel, Redevelopment Agency of the City of San Diego  
1200 3<sup>rd</sup> Avenue, Suite 1620  
San Diego, CA 92101  
Telephone: (619) 236-6220  
Telecopy: (619) 236-7215

Centre City Development Corporation  
President  
225 Broadway, Suite 1100  
San Diego, CA 92101  
Telephone: (619) 533-7119  
Telecopy: (619) 236-9148

With a copy to: General Counsel, Centre City Development Corporation  
Beatrice L. Kemp, Esq.  
550 West C Street, Suite 1470  
San Diego, CA 92101  
Telephone: (619) 232-2931  
Telecopy: (619) 232-8316

Any party may change its address for notice by written notice given to the other in the manner provided in this Section. Any such communication, notice or demand shall be deemed to have been duly given or served on the date personally served, if by personal service, one (1) day after the date of confirmed dispatch, if by electronic communication on a business day before 5:00 p.m., or three (3) days after being placed in the U.S. Mail, if mailed.

f. The parties agree to execute such other instruments and to do such further acts as may be reasonably necessary to carry out the provisions of this Agreement.

g. The making, execution and delivery of this Agreement by the parties hereto has been induced by no representations, statements, warranties or agreements other than those expressly set forth herein.

h. Wherever possible, each provision of this Agreement shall be interpreted in such a manner as to be valid under applicable law, but, if any provision of this Agreement shall be invalid or prohibited thereunder, such invalidity or prohibition shall be construed as if such invalid or prohibited provision had not been inserted herein and shall not affect the remainder of such provision or the remaining provisions of this Agreement.

i. The language in all parts of this Agreement shall be in all cases construed simply according to its fair meaning and not strictly for or against any of the parties hereto. Paragraph headings of this Agreement are solely for convenience of reference and shall not govern the interpretation of any of the provisions of this Agreement. References to "paragraphs" or "¶" are to paragraphs of this Agreement, unless otherwise specifically provided.

j. Subject to the arbitration provision set forth in ¶ 6 below, if any action is brought by either party against the other party, each party shall bear its own attorneys' fees, costs and expenses incurred in connection with the prosecution or defense of such action or any appeal thereof.

k. This Agreement shall be binding upon and inure to the benefit of each of the parties hereto and to their respective transferees, successors, and assigns. Neither this Agreement nor any of the rights or obligations of the parties hereunder shall be transferred or assigned by any party without the prior written consent of the non-assigning party; which consent shall not be unreasonably withheld or delayed.

l. Notwithstanding anything to the contrary contained herein, this Agreement shall not be deemed or construed to make the parties hereto partners or joint venturers, or to render either party liable for any of the debts or obligations of the other, it being the intention of the parties to merely create the relationship of the parties with respect to the obligations as set forth herein.

m. The parties agree that it is their specific intent that no broker shall be a party to or a third party beneficiary of this Agreement (or any escrow); and further that the consent of a broker shall not be necessary to any agreement, amendment, or document with respect to any of the transactions contemplated by this Agreement.

## 6. ARBITRATION OF DISPUTES.

IF ANY DISPUTE ARISES BETWEEN TWO OR MORE OF THE PARTIES ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREIN, (HEREAFTER, A "DISPUTE"), THEN ANY PARTY MAY ELECT TO RESOLVE THE DISPUTE PURSUANT TO THE TERMS OF THIS

PARAGRAPH 6. WHEN A PARTY DETERMINES THAT A DISPUTE HAS ARISEN, THE PARTIES AFFECTED SHALL MEET WITHIN 10 DAYS THEREAFTER TO NEGOTIATE IN GOOD FAITH IN AN ATTEMPT TO RESOLVE THE DISPUTE. IF THE DISPUTE IS NOT RESOLVED BY MUTUAL AGREEMENT OR COMPROMISE WITHIN SEVEN BUSINESS DAYS AFTER THE PARTIES MEET REGARDING THE DISPUTE, THEN THE PARTIES WILL RESOLVE THE DISPUTE BY BINDING ARBITRATION IN ACCORDANCE WITH THE FOLLOWING PROCEDURES:

WITHIN FIVE BUSINESS DAYS AFTER THE EXPIRATION OF THE SEVEN-DAY DISPUTE RESOLUTION PERIOD DESCRIBED ABOVE, EACH PARTY WILL DESIGNATE A NEUTRAL ARBITRATOR WITH AT LEAST 10 YEARS' EXPERIENCE IN COMMERCIAL REAL ESTATE. IF ANY PARTY FAILS TO INFORM THE OTHER(S) OF THE ARBITRATOR SUCH PARTY HAS SELECTED WITHIN THE FIVE-DAY PERIOD, THEN IF ONLY ONE ARBITRATOR HAS BEEN PROPERLY SELECTED WITHIN SUCH FIVE-DAY PERIOD THAT ARBITRATOR WILL CONDUCT THE ARBITRATION. IF TWO OR MORE PARTIES EACH SELECT AN ARBITRATOR, THEN WITHIN 10 DAYS THEREAFTER, THE ARBITRATORS SO SELECTED MUST DESIGNATE AN ADDITIONAL ARBITRATOR (HEREAFTER, THE "ARBITRATOR") TO CONDUCT THE ARBITRATION. THE ARBITRATOR MAY NOT HAVE PERFORMED SERVICES FOR ANY OF THE AFFECTED PARTIES WITHIN THE PRECEDING TEN YEARS. EXCEPT AS OTHERWISE STATED HEREIN, THE ARBITRATOR WILL RESOLVE THE DISPUTE IN ACCORDANCE WITH THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION ("RULES"). TO THE EXTENT THE RULES ARE SILENT, THE ARBITRATOR WILL APPLY THE PROCEDURES SET FORTH IN CALIFORNIA CODE OF CIVIL PROCEDURE §§ 1280 ET. SEQ. EACH PARTY MAY SUBMIT A WRITTEN BRIEF AND OTHER RELEVANT DOCUMENTS TO THE ARBITRATOR, BUT NO DEPOSITIONS OR DISCOVERY MAY BE CONDUCTED UNLESS ORDERED BY THE ARBITRATOR. THE ARBITRATOR WILL CONDUCT A HEARING IN THE COUNTY OF SAN DIEGO WITHIN 30 DAYS AFTER BEING SELECTED, AND WILL ISSUE A WRITTEN RULING WITH RESPECT TO THE DISPUTE PROMPTLY. IN NO EVENT WILL THE ARBITRATOR'S WRITTEN RULING BE ISSUED MORE THAN 10 DAYS AFTER THE HEARING. THE ARBITRATOR'S WRITTEN DECISION WILL RESOLVE THE DISPUTE, AND SUCH WRITTEN DECISION WILL BE BINDING ON THE PARTIES AND NOT APPEALABLE. NO PARTY MAY PETITION A COURT TO CORRECT OR VACATE THE RULING. EACH PARTY WILL BEAR ITS OWN COSTS IN CONNECTION WITH THE ABOVE-DESCRIBED ARBITRATION PROCESS.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE

COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

\_\_\_\_\_  
Port

\_\_\_\_\_  
City

\_\_\_\_\_  
Agency

\_\_\_\_\_  
CCDC

*[signatures to follow]*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date first above written.

CITY OF SAN DIEGO, a municipal corporation

APPROVED AS TO  
FORM:

By: \_\_\_\_\_  
City Attorney

By: \_\_\_\_\_  
Name:  
Its:

SAN DIEGO UNIFIED PORT DISTRICT,  
a public corporation

APPROVED AS TO  
FORM:

By: \_\_\_\_\_  
Port Attorney

By: \_\_\_\_\_  
Name:  
Its:

REDEVELOPMENT AGENCY OF THE CITY  
OF SAN DIEGO

APPROVED AS TO  
FORM:

By: \_\_\_\_\_  
General Counsel

By: \_\_\_\_\_  
Name:  
Its:

CENTRE CITY DEVELOPMENT  
CORPORATION

APPROVED AS TO  
FORM:

By: \_\_\_\_\_  
General Counsel

By: \_\_\_\_\_  
Name:  
Its:



**EXHIBIT A**

**OPTION AGREEMENT BETWEEN  
SAN DIEGO UNIFIED PORT DISTRICT AND MANCHESTER RESORTS, L.P.**

FILED  
NOV 30 1999  
SAN DIEGO  
UNIFIED PORT DISTRICT Clerk's Office

OPTION AGREEMENT

THIS OPTION AGREEMENT ("Agreement") is made and entered into as of this 30<sup>th</sup> day of November, 1999 ("Effective Date"), by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation ("District"), and MANCHESTER RESORTS, L.P., a California limited partnership ("Optionee").

RECITALS:

- A. District owns that certain real property located southwest of the intersection of Eighth Avenue and Harbor Drive, in the City of San Diego, California, consisting of approximately 473,900 square feet of land and 460,700 square feet of water, which is depicted on Exhibit A attached hereto ("Land"), together with all buildings, structures, improvements, and infrastructure located on the Land ("Improvements"). The Land and Improvements are collectively referred to in this Agreement as the "Premises."
- B. The Premises are currently leased to Campbell Industries ("Campbell"), which is a subsidiary of MARCO Holdings, Inc. District plans to acquire or otherwise terminate Campbell's leasehold interest in the Premises.
- C. District desires to grant Optionee an option to lease the Premises, and Optionee desires to acquire an option to lease the Premises from District for a period not to exceed 66 years, subject to the terms and conditions of that certain Lease Agreement ("Lease") the form of which is attached hereto as Exhibit B.
- D. If Optionee exercises the option and executes the Lease, Optionee will construct a convention center hotel ("Project") on the Premises. The Project will consist of approximately 1,200 rooms, and include between 85,000 and 100,000 square feet of meeting and conference rooms, a minimum of two restaurants and cocktail lounges, a health spa, approximately 230 marina slips, and parking facilities.
- E. In order to provide an incentive to Optionee to complete the Project at the earliest practicable date, the Lease will provide for a rent credit equal to 1/12<sup>th</sup> of \$5 million dollars per month prorated based upon a 365-day year for a maximum of six months if the Project is open to the public for business earlier than January 2, 2004, as that date may be extended pursuant to the provisions of this Agreement.

NOW, THEREFORE, in reliance on the foregoing recitals and in consideration of the mutual covenants and agreements set forth in this Agreement, the receipt and sufficiency of which are hereby acknowledged, District and Optionee hereby agree that the terms and conditions of this Agreement are as follows:

1. Grant of Option.

Subject to the conditions set forth in this Agreement, District hereby grants Optionee an option ("Option") to lease the Premises for the Term (as defined in Paragraph 2 below) and in accordance with the covenants and conditions set forth in the Lease.

2. Option Term.

Unless otherwise extended pursuant to the terms of this Agreement or by written agreement by the parties, the term ("Term") of the Option will commence on the Effective Date and expire (subject to extensions of time pursuant to Paragraph 6.2 of this Agreement) at 4:00 p.m. on January 2, 2002. Notwithstanding any other provision of this Agreement, Optionee's right to exercise the Option and execute the Lease will terminate and be of no further force and effect if the conditions set forth in this Agreement are not satisfied, and the Option exercised, before the expiration of the Term.

3. Deposit.

Optionee has delivered to District a good faith deposit in the amount of \$1,000,000 which is being held in an interest bearing account by District. Upon execution of this Agreement, the deposit, and all interest accrued thereon ("Deposit"), will become non-refundable to Optionee unless otherwise specified in this Agreement. If all conditions set forth in Paragraph 4 below are satisfied, and the parties execute the Lease, then Optionee will receive a credit against the rent payable under the Lease in the amount of the Deposit. If this Agreement terminates for any reason other than a default in performance by Optionee, which Optionee has not cured pursuant to the terms of this Agreement, then District will refund the Deposit to Optionee.

4. Conditions Precedent.

Optionee will have no right to exercise the Option unless and until the conditions set forth in this Paragraph 4 below have been satisfied. Except for Optionee's monetary obligations and other provisions expressly identified, including the Liquidated Damages provision in Paragraph 8 below, these conditions precedent are not covenants of District or of Optionee.

4.1 Approvals and Infrastructure Costs.

4.1.1 PMPA Approval and EIR Certification. District, or a private firm hired by District, will prepare (i) a Port Master Plan Amendment ("PMPA"), which will include development of the Project, for the area that includes the Premises and other improvements and infrastructure described in the Lease; (ii) the South Embarcadero Redevelopment Program II Environmental Impact Report ("EIR") (or other applicable document) which will comply with the California Environmental Quality Act ("CEQA"), and (iii) all other documents required by the California Coastal Commission ("Coastal Commission") to approve the PMPA. Optionee will fully and timely cooperate with District in connection with District's preparation of the PMPA and EIR and District's

efforts to obtain Coastal Commission approval, including Optionee's attendance and presentations at community workshops or other public forums where issues relating to the EIR and PMPA are discussed. District's Board of Commissioners ("Board") may, in its sole and absolute discretion, approve the PMPA and certify the EIR. Before Optionee may exercise the Option, the Board must adopt the PMPA and certify the EIR, and the Coastal Commission must approve the PMPA. Optionee acknowledges and agrees that either the Board or the Coastal Commission may, at its sole and absolute discretion, elect not to approve the PMPA based on the environmental review under CEQA or other discretionary factors, and acknowledges that the PMPA might be approved only upon the performance of certain additional conditions or mitigation measures. Optionee accepts the risk that the Board or the Coastal Commission will not approve the PMPA, and that the PMPA might be approved subject to the performance of certain additional conditions or mitigation measures imposed by District or the Coastal Commission in their sole and absolute discretion. Notwithstanding any provision of this Agreement to the contrary, if the Board or Coastal Commission elects not to approve the PMPA or certify the EIR, or if either fails to do so before August 31, 2001, then either District or Optionee, at their sole and absolute discretion, may elect to terminate this Agreement by providing written notice to the other. If the Agreement is terminated under this Paragraph 4.1, then the Deposit (but, subject to the terms of Paragraph 4.7.1 below, not the costs and fees paid by Optionee under Paragraph 4.2 below) will be refunded to Optionee and Optionee's obligations and conditional obligations under this Agreement (including payment of the liquidated damages under Paragraph 8 of this Agreement) will be extinguished and eliminated. Other than as expressly set forth in this Agreement, Optionee will have no claim, cause of action, or right to compensation or reimbursement from District or any other person if the PMPA is not approved by District or the Coastal Commission for any reason, or if it is approved subject to the performance of certain additional conditions or mitigation measures.

4.1.2 Infrastructure. District agrees to fund up to \$9.5 million ("Infrastructure Commitment") for the purpose of building certain infrastructure items located on the Premises, including a seawall, public utilities, and other public improvements. Optionee will be responsible for the construction and completion of such infrastructure items, and except as provided in Paragraph 4.1.3 below, will be responsible for all costs associated with the on-site infrastructure items to the extent the cost thereof exceeds the Infrastructure Commitment; provided that District will contribute to the cost of the on-site infrastructure items any amount not required to be spent on the Mitigation Measures (as defined in Paragraph 4.1.3 below). Optionee will deliver to District invoices and maintain accurate records, in form reasonably acceptable to District, setting forth the nature and cost of the items paid from the Infrastructure Commitment. Optionee will deliver to District the invoices and cost records upon District's request, but in no event less often than quarterly. Except as set forth in Paragraph 4.1.3 below, Optionee further agrees that District will have no financial liability or obligation to Optionee resulting from any actual or projected financial losses experienced or anticipated by Optionee arising from or relating to the fact that the cost of the on-site infrastructure items exceeds the Infrastructure Commitment or Optionee's estimates of such costs.

4.1.3 Mitigation Measures. District agrees to pay the first \$1.5 million of costs associated with street improvements, other off-site improvements, or any

conditions imposed by the Board or the Coastal Commission in connection with the approval of the Project and related parking garage (collectively, "Mitigation Measures"). If the cost of the Mitigation Measures exceeds \$1.5 million (as such costs are estimated to be at the time the conditions are imposed, such estimates being made by engineers and contractors reasonably acceptable to District), then Optionee must pay the next \$2.5 million of costs associated with the Mitigation Measures, less any remaining portion of the Infrastructure Commitment not otherwise spent in accordance with Paragraph 4.1.2 above. If the cost of the Mitigation Measures exceeds the sum of \$4 million, then Optionee may elect to pay the costs to complete the required Mitigation Measures or elect to terminate this Agreement. Optionee must inform District of its election within 20 days after receiving the cost estimates for completion of the street mitigation measures. In no event will the failure to obtain such cost estimates be deemed to extend the dates by which Optionee must satisfy its obligations under this Agreement. Optionee's failure to make an election within such 20-day period will be deemed to be Optionee's election to pay the costs associated with the remaining Mitigation Measures. If Optionee elects to terminate this Agreement pursuant to the terms of this Paragraph 4.1.3, then District may, at its sole discretion, elect to cause this Agreement to remain in effect and agree, in writing, to pay the remaining costs to complete the Mitigation Measures. District must inform Optionee of this election within 20 days after receiving a termination notice from Optionee. If District elects not to cause this Agreement to remain in effect, then District will refund to Optionee the Deposit. Optionee further agrees that District will have no financial liability or obligation to Optionee resulting from any actual or projected financial losses experienced or anticipated by Optionee arising from or relating to the cost of the Mitigation Measures or the fact that such costs exceed Optionee's estimates.

**4.2 Fees and Costs.** Optionee agrees to reimburse District for 80% of all fees and costs (with Optionee's reimbursement obligation not to exceed \$300,000) incurred by District in connection with preparing the PMPA, certifying the EIR, or obtaining Coastal Commission approval. The parties hereby agree that 80% represents Optionee's pro rata share of the cost of preparing the EIR and PMPA. Optionee will pay such fees and costs within ten days after Optionee receives District's written request for reimbursement. The costs will include, but not be limited to, fees and costs charged by consultants and contractors, expenditures by District before the execution of this Agreement in connection with the preparation of the Notice of Preparation of a draft EIR, the expense of District's public outreach effort (including any public workshops or community informational meetings) and all work by District employees relating to the PMPA, EIR, and Coastal Commission approval.

**4.3 Conceptual Design Drawings.** On or before December 1, 1999, Optionee will submit to District for approval by the Board, six copies of "conceptual design drawings" prepared in conformance with the PMPA indicating conceptually the Project Optionee proposes to develop on the Premises. Optionee's conceptual design drawings, of sufficient size for presentation at public meetings, will consist: (i) of a minimum of ten (10) colored renderings and drawings prepared by a licensed architect showing a scaled site layout with all major dimensions of the entire Premises showing uses, buildings, parking areas, landscaping, outdoor furniture, sign design concept, existing and proposed utilities, lighting concept, and other features; (ii) schematic floor

plans of all structures; (iii) key elevations of buildings sufficient to indicate the proposed architectural theme; (iv) location of all existing and proposed easements on the site; (v) a site grading plan; (vi) a detailed description of improvements and methods of operation; (vii) and a general outline specification indicating materials and methods of construction and an estimate of the total cost of improvements planned. In addition to the renderings, Optionee will submit a narrative outline of the improvements it intends to construct, including the number of floors, the number of hotel guest room equivalents, the number of restaurant and cocktail lounge seats, the square footage of areas for different uses, the total square footage of landscaped areas and walkways, the number and types of recreational facilities and all other substantial ancillary improvements. District staff will review and comment on the conceptual design drawings within 30 days after it receives them from Optionee. Conceptual design drawings will be submitted to the Board for its consideration as soon as possible. Within twenty (20) days after District approves or comments on the conceptual design drawings, Optionee will complete all corrections and modifications to the conceptual design drawings to District's satisfaction.

**4.4 Design Development Drawings.** On or before December 31, 2000, Optionee shall submit to District, for approval by the Board, six copies of "design development drawings" for development of the Premises. The design development drawings will be prepared by a licensed architect and must conform to the conceptual design drawings approved by District. In addition to the items described below, the design development drawings will also include a soils and/or foundation report of a scope commensurate with the improvements planned for the Premises prepared by a licensed soils consultant. Subject to acquisition of the Premises from Campbell, District will grant Optionee a temporary Right of Entry Permit permitting Optionee and its designated agents to enter the Premises for the purpose of conducting soils tests (including an inspection for Contaminants as defined in Section 41 of the Lease) and other tests, examinations and remediation (if applicable) necessary or appropriate to enable Optionee to satisfy the conditions to its right to exercise this Option. Prior to entering upon the Premises, Optionee agrees to obtain any insurance required by District which insurance will (i) be endorsed to read that all policies are primary policies and (ii) name District as an additional insured. The limited license hereby granted will have a term reasonably necessary for Optionee to conduct such tests, but in no event will the term of the license continue beyond the Term of this Agreement, or continue in the event this Agreement terminates. Optionee further agrees, to the fullest extent provided by law, to defend, indemnify and hold District and the Premises free from any and all liability as a result of such work or the exercise of said license, except that arising out of District's sole active negligence or sole willful misconduct.

The design development drawings will include the following:

- (a) A detailed dimensional site plan drawn to scale showing all land and water improvements planned to be constructed on the Premises. This plan will include the location of all existing and proposed easements and how they will be accommodated, location of all existing and proposed utilities, site drainage plan, site grading plan, grade

elevations of all structures, proposed site work, dredging plans (if applicable), shore protection, and site horizontal (coordinate) and vertical control drawings.

- (b) Floor plans, elevations, and sections of all improvements.
- (c) A design plan for signing the entire area, indicating sign type, location, area, letter style, color and materials to be used.
- (d) Landscape development plans with horticulture palette.
- (e) Complete outline specifications to cover all phases of work.
- (f) A detailed cost estimate of all improvements with indirect costs, furniture, fixtures, and equipment separately identified.
- (g) Exterior and interior color scheme.

The design development drawings must conform with the conceptual design drawings approved by District. District will approve or comment on the design development drawings within 30 days following submittal. Within twenty (20) days after District approves or comments on the design development drawings, Optionee will complete all corrections and modifications to the design development drawings to the satisfaction of District.

**4.5 Working Drawings.** On or before May 30, 2001, Optionee will submit to District for approval by the Board, six copies of "working drawings" for development of the Premises. Working drawings will be prepared by an architect or engineer, as appropriate, licensed to do business in the State of California, and will consist of the following:

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

The working drawings must conform with the design development drawings approved by District. District will approve or comment on the working drawings within 30 days. Within 30 days after District approves or comments on the working drawings, Optionee will complete all corrections and modifications to the working drawings to the satisfaction of District. Optionee agrees to proceed diligently with the preparation of the working drawings following District's approval of the design development and agrees to cause its architect to furnish to District by the tenth day of each month (commencing with the month immediately following the month in which the design development drawings are completed to the satisfaction of District and terminating when the working drawings are submitted to District) a written statement of the progress made in the prior calendar month in producing said working drawings.

4.6 Management Contract. On or before October 1, 2001, Optionee shall submit to District, for approval by the Board, a proposed management contract for operation of the Project. The proposed manager will be a first-class operator, which manages hotels equivalent in quality to the Hyatt Regency Hotel ("Hyatt Hotel"), located at One Market Place in the City of San Diego, California, and the San Diego Marriott Hotel ("Marriott Hotel"), located at 333 West Harbor Drive in the City of San Diego. Optionee will have no right to enter into the management contract until the Board has approved the terms thereof and the identity of the proposed operator, and the management contract will not be valid until such written consent is obtained. Notwithstanding anything to the contrary stated herein, the Board will not unreasonably withhold its consent to the terms of the management contract or the identity of the hotel operator if the proposed operator has the necessary hotel management experience and financial ability to operate a first-class hotel equivalent to the Hyatt Hotel and the Marriott Hotel; provided, however, if (i) the proposed operator is affiliated with or a subsidiary of either the operator of the Hyatt Hotel or the operator of the Marriott Hotel on the date that Optionee submits the proposed management contract and (ii) the date on which Optionee submits the proposed management contract to District for approval is less than 15 years after the date of this Agreement, then District may withhold its consent of the proposed hotel operator in its sole and absolute discretion.

#### 4.7 Financing Commitment.

4.7.1 On or before January 2, 2002, Optionee will submit evidence to District that Optionee has obtained an irrevocable commitment, in form and content reasonably acceptable to District, from a financial institution reasonably acceptable to District, to provide debt financing to build the Project in accordance with the approved working drawings. Optionee will use reasonable and diligent efforts to obtain such commitment on or before July 23, 2001, but Optionee will not be deemed to have failed to satisfy the condition in this subparagraph unless Optionee fails to produce evidence of financing by January 2, 2002. The amount of the financing will not exceed 80% of the then-estimated value of the Project (including the improvements described in Paragraph 4.5(e)), such estimate being based on information reasonably approved by District. Optionee agrees that it will not obtain a commitment for financing in connection with any project other than the Project and the expansion of the Hyatt Hotel until such time as Optionee has obtained a binding commitment from financial institutions



reasonably acceptable to District to issue the financing in connection with those two projects. Before Optionee exercises the Option, the lender will be prepared to close the loan subject to delivery of the executed Lease. District agrees to negotiate in good faith with such financial institution to amend the form of the Lease to provide such terms as the lender may reasonably require in order to provide the construction and permanent financing for the construction of the Project; provided that such amended terms will not include economic concessions by District. District will not be liable to Optionee or any third party for any loss, damage or injury of any kind arising from District's refusal to amend the Lease, and Optionee agrees not to bring any action against District in connection therewith other than actions for equitable relief. District will have no obligation to amend the Lease in any way inconsistent with District's fiduciary duty to its tidelands trust or with its customary hotel leasing practices.

District acknowledges that the condition set forth in this Paragraph 4.7.1 requires Optionee to accelerate its development process, and incur substantial architectural, engineering, and other professional and consulting costs at a date earlier than it would otherwise plan to do so. Accordingly, District agrees to reimburse Optionee for all reasonable and verifiable professional fees (excluding Optionee's internal overhead, costs, and fees) in connection with the development of the Project incurred by Optionee after November 15, 1999, if District terminates this Agreement because the Coastal Commission fails to approve the PMPA, or the Board fails to certify the EIR on or before August 31, 2001.

4.7.2 If Optionee fails to provide evidence of financing to build the Project as required by Paragraph 4.7.1, then District may terminate this Agreement unless time for performance is extended in accordance with Paragraph 6.2 of this Agreement.

4.8 Hyatt Hotel Expansion. Optionee will use reasonable and diligent efforts to obtain a construction loan and commence construction of the 810-room expansion of the Hyatt Hotel by March 1, 2000. The financing commitment will be to fund an expansion in accordance with plans approved by District. District acknowledges that this schedule represents a substantial acceleration of Optionee's obligations under the Option Agreement between District and Optionee relating to the Hyatt Hotel.

4.9 Ingress and Egress. District and Optionee will agree on the location of a right of access to the Premises which will provide for ingress and egress to the Tenth Avenue Marine Terminal and access to District's General Services Department. Such access will be incorporated into the conceptual design drawings, as described in Paragraph 4.3, and will be constructed at Optionee's sole cost and expense (as limited in accordance with Paragraph 4.1.3), to the extent not paid by District under Paragraph 4.1.2 or Paragraph 4.1.3.

4.10 Development Permits. By January 2, 2002, Optionee will obtain, at its sole cost and expense, all required construction and development permits in connection with the development of the Project, and deliver to District copies thereof. Said permits will include, but not be limited to, the building permits issued by the City of

San Diego ("City") and the Coastal Development permit. Optionee will submit to District a copy of all documents delivered to the City in connection with obtaining such permits, and District will have the right to consult with the City about the current state of the environmental contamination of the Property.

4.11 Performance Bond. Before the earlier of (i) January 2, 2002, or (ii) the exercise of the Option, Optionee will provide to District a performance bond (in accordance with the requirements of Section 16 of the Lease) guaranteeing that construction will be timely completed in accordance with the requirements of Section 5 of the Lease.

4.12 Construction Contract. On or before January 2, 2002, Optionee shall submit an executed construction contract or contracts with competent and financially responsible contractors for construction in accordance with the working drawings approved by District.

4.13 Acquisition of Campbell's Interest. On or before December 1, 1999, District will use its best efforts to execute an agreement with Campbell, or its parent, pursuant to which District will acquire Campbell's leasehold interest in the Premises and contribute to the remediation of any required environmental contamination on the Premises. District will have no obligation to spend more than \$16 million in connection with the acquisition and preparation of the Premises, including a maximum of \$9 million for acquisition, \$4 million for remediation, and \$3 million for the demolition of existing Improvements. District will have no liability to Optionee if, despite its good faith and reasonable efforts, District is not able to reach an agreement with Campbell to acquire and remediate the Premises. The remediation of the Premises will be to a standard sufficient to allow the development of the Project on the Premises. District agrees to meet and consult with Optionee before District approves the work plan prepared by Campbell relating to the remediation of the site.

4.14 Critical Path Milestones. Without limiting any of the foregoing conditions, and in addition thereto, Optionee must also satisfy the milestone tasks assigned to Optionee and identified on that certain "Manchester Resorts/Convention Center Hotel Critical Path" ("Critical Path") attached hereto as Exhibit C by the date specified therein (subject to extensions of time pursuant to Paragraph 6.2 of this Agreement) as the "Finish" date for such task. Subject to Optionee's cure rights set forth in this Agreement, and unless the dates for accomplishing the tasks in the Critical Path are extended pursuant to Paragraph 6.2 of this Agreement, Optionee's failure to satisfy the tasks set forth in the Critical Path by the date specified will be a default under this Agreement and entitle District, in its sole discretion, to terminate this Agreement.

#### 5. Optionee's Right to Exercise Option.

If, at any time before the expiration of the Term or earlier termination of this Agreement, Optionee has satisfied all of its obligations under this Agreement by the dates specified herein, as such dates may have been extended under the terms hereof (unless District waives such obligation in writing), then Optionee may exercise the Option by delivering to District written notice of election to do so, accompanied by (i) properly

executed and acknowledged copies of the Lease in duplicate and (ii) the Memorandum of Lease attached as Exhibit "D" to the Lease (the "Memorandum"). The commencement date of the term of the Lease will be the date District executes the Lease after receiving an executed original of the Lease from Optionee.

6. Termination.

6.1 Subject to the terms of this Paragraph 6, this Agreement will terminate when one party (the "terminating party") provides written notice of its desire to terminate this Agreement to the other party ("non-terminating party") following the occurrence of any of the following events before the expiration of the Term: (i) the non-terminating party's failure to satisfy an obligation set forth in this Agreement by the date required by this Agreement, as such date may be extended pursuant to Paragraph 6.2 of this Agreement; (ii) excessive costs associated with the Mitigation Measures as set forth in Paragraph 4.1.3 above; (iii) an impermissible transfer of Optionee's rights under this Agreement or of interests in Optionee as set forth in Paragraph 12 below (in which case, District will be the only party with the right to terminate this Agreement for such reason); (iv) an excessive level of environmental contamination as set forth in Paragraph 15 below; or (v) District's failure to acquire or otherwise terminate Campbell's current leasehold interest in the Premises pursuant to Paragraph 4.1.3. If this Agreement is terminated pursuant to this Paragraph 6.1, then Optionee's obligations and conditional obligations under this Agreement, (including the payment of the Liquidated Damages Amount under Paragraph 8.1 of this Agreement) will be extinguished and eliminated. If District terminates this Agreement pursuant to the provisions of (i) or (iii) of this Paragraph 6.1, then Optionee's obligation to pay liquidated damages under Paragraph 8.2 of this Agreement shall remain in full force and effect.

6.2 Notwithstanding the termination provisions set forth in this Paragraph 6, the dates specified in this Agreement will be extended as follows:

(i) one day for each day after December 1, 2000 that the Coastal Commission has not approved the PMPA;

(ii) one day for each day an obligation is not satisfied due to a delay caused by a Force Majeure Event (as defined in Paragraph 10.1 below); provided that under no circumstances will Optionee's failure to obtain financing for the Project be considered a Force Majeure Event, including failure to obtain financing due to economic or other conditions beyond Optionee's control; and

(iii) one day for each day delays in providing its approval or disapproval of items that Optionee submits to District within the time specified for review and approval.

6.3 This Agreement will not terminate until the terminating party has provided written notice to the non-terminating party of the intent to terminate this Agreement, and (if the Agreement is being terminated due to the non-terminating party's

failure to satisfy an obligation of such party by the required date) the non-terminating party has been granted an opportunity to satisfy the obligation giving rise to the termination. The non-terminating party will be entitled to a period of 60 days to satisfy the obligation and cure the defect giving rise to the termination. No provision of this Paragraph 6.3 will be construed to extend the time for performance of any other obligation of either party as set forth in this Agreement.

6.4 The terms of Paragraph 6.3 shall not apply to Optionee's obligation to obtain financing for the Project as provided in Paragraph 4.7.

## 7. Obligations Upon Termination.

7.1 If District terminates this Agreement following Optionee's failure to satisfy an obligation of Optionee under this Agreement, then Optionee will deliver or cause to be delivered to District, and District shall have an unrestricted right to use, at no cost to District, all materials which have been prepared relating to the development of the Project and the condition of the Premises, including without limitation all tests, inspections, studies, surveys and reports (including engineering, soils, geology, environmental, grading, street and storm drain, sewer, water, landscape and feasibility studies or reports), drawings, plans, and specifications, including working drawings (collectively "Development Documents"). If this Agreement terminates for any other reason (except for District's failure to satisfy an obligation of District under this Agreement, in which event Optionee will have no obligation to deliver the Development Documents to District), then District may, at District's election, acquire the Development Documents by paying to Optionee the cost incurred by Optionee in preparing the Development Documents. Optionee will have the burden of verifying its cost in producing or causing to be produced the Development Documents. If Optionee fails to produce evidence reasonably acceptable to District of the total cost of the Development Documents, then District will be entitled to acquire such documents at a cost equal to the amount which Optionee is able to verify with reasonable evidence of its expenditures (excluding Optionee's internal overhead, costs, and fees).

7.2 Prior to entering into any agreements for or relating to the preparation of the Development Documents, as more specifically referenced in Paragraph 7.1, Optionee shall submit such agreements to District for its reasonable approval. Such agreements shall include provisions to District's satisfaction which give District enforceable rights to obtain and use all such materials, whether in draft or final form, including without limitation all calculations, data, analyses and other work product prepared in connection therewith. District's right to receive such materials shall be contingent only upon delivery by District of written notification that this Agreement has terminated for reasons other than District's failure to satisfy an obligation of District under this Agreement.

7.3 At the time Optionee executes this Agreement, Optionee will also execute, acknowledge, and deliver to District a quitclaim deed which, when recorded, will be sufficient to remove any cloud on title of the Premises arising from this Agreement. District will hold such document in its files until this Agreement terminates

for any reason, at which time District will cause the document to be recorded in the real property records for the County of San Diego.

8. Liquidated Damages.

Optionee will be obligated to pay liquidated damages to District in accordance with the terms set forth in this Paragraph 8.

8.1 Ten Year Liquidated Damages Obligation. Optionee will pay liquidated damages in the amount of \$5 million per year (prorated on a daily basis for a 365-day year) for a maximum of ten years and a maximum amount of \$50 million ("Liquidated Damages Amount") only if (i) the Project is not open to the public for business on or before January 2, 2004 (unless such date is extended pursuant to the provisions of Paragraph 6.2 of this Agreement), and (ii) this Agreement is not terminated pursuant to the provisions of Paragraph 6.1. Optionee will pay such liquidated damages monthly on a prorated basis for each day after January 2, 2004 (unless such date has been extended pursuant to the provisions of Paragraph 6.2 of this Agreement), that the Project is not open to the public for business. Under no circumstances will Optionee's failure, for any reason whatsoever, to obtain financing for the Project, including without limitation failure to obtain financing due to economic or other conditions beyond Optionee's reasonable control, be considered or treated as an event which extends the date by which the Project shall be open to the public for business. The liquidated damages owed will be reduced by any portion of the Deposit not applied as a rent credit under the Lease pursuant to Paragraph 3 of this Agreement.

8.2 One Year Liquidated Damages Obligation. In the alternative, and notwithstanding any other provision of this Agreement, Optionee will pay liquidated damages in the amount of \$5 million per year (prorated on a daily basis for a 365-day year) for a maximum of one year and a maximum of \$5 million if (i) the Project is not open to the public for business on or before January 2, 2004 (unless such date is extended pursuant to the provisions of Paragraph 6.2 of this Agreement), and (ii) District terminates this Agreement pursuant to the provisions of Paragraph 6.1 (i) or (iii). Optionee will pay such liquidated damages monthly on a prorated basis for each day after January 2, 2004 (unless such date has been extended pursuant to the provisions of Paragraph 6.2 of this Agreement), that the Project is not open to the public for business. Under no circumstances will Optionee's failure, for any reason whatsoever, to obtain financing for the Project, including without limitation failure to obtain financing due to economic or other conditions beyond Optionee's reasonable control, be considered or treated as an event which extends the date by which the Project shall be open to the public for business. The liquidated damages owed will be reduced by any portion of the Deposit not applied as a rent credit under the Lease pursuant to Paragraph 3 of this Agreement.

OPTIONEE AND DISTRICT AGREE AND ACKNOWLEDGE THAT IF THE PROJECT IS NOT OPEN TO THE PUBLIC FOR BUSINESS ON OR BEFORE JANUARY 2, 2004 (AS SUCH DATE MAY BE EXTENDED PURSUANT TO THE PROVISIONS OF PARAGRAPH 6.2 OF THIS AGREEMENT), THEN DISTRICT WILL SUFFER DAMAGES IN AN AMOUNT WHICH IS SUBSTANTIAL, BUT IS

NOT READILY SUSCEPTIBLE OF DETERMINATION. THEREFORE, DISTRICT WILL HAVE THE RIGHT TO RECEIVE FROM OPTIONEE LIQUIDATED DAMAGES IF THE PROJECT IS NOT OPEN TO THE PUBLIC FOR BUSINESS ON OR BEFORE JANUARY 2, 2004 (UNLESS SUCH DATE IS EXTENDED PURSUANT TO THE PROVISIONS OF PARAGRAPH 6.2 OF THIS AGREEMENT), FOR ANY REASON WHATSOEVER. THE LIQUIDATED DAMAGES WILL BE IN THE AMOUNT OF \$5 MILLION PER YEAR (SUBJECT TO PRORATION AS DESCRIBED ABOVE) WITH A MAXIMUM DURATION OF TEN YEARS IF THIS AGREEMENT IS NOT TERMINATED AND A MAXIMUM DURATION OF ONE YEAR IF THIS AGREEMENT IS TERMINATED AS SUCH AMOUNTS MAY BE REDUCED BY THAT PORTION OF THE DEPOSIT NOT APPLIED AS A RENT CREDIT PURSUANT TO PARAGRAPH 3 OF THIS AGREEMENT. OPTIONEE'S OBLIGATION TO PAY LIQUIDATED DAMAGES WILL TERMINATE UPON THE EARLIER OF THE EXPIRATION OF SUCH PERIOD (WHETHER IT BE TEN YEARS OR ONE YEAR) OR THE DATE ON WHICH THE PROJECT IS OPENED TO THE PUBLIC FOR BUSINESS. THE PARTIES ACKNOWLEDGE THAT THE PAYMENT OF THE LIQUIDATED DAMAGES TO DISTRICT WILL BE DISTRICT'S SOLE REMEDY AGAINST OPTIONEE FOR ANY DAMAGES SUFFERED BY DISTRICT AS A RESULT OF OPTIONEE'S FAILURE TO SATISFY ITS OBLIGATIONS HEREUNDER. THE TERMS OF THIS PARAGRAPH 8 WILL BE SUPERCEDED BY THE LIQUIDATED DAMAGES PROVISIONS SET FORTH IN THE LEASE IF OPTIONEE EXERCISES THE OPTION AND EXECUTES THE LEASE. IF THE OPTION IS NOT EXERCISED AND THE LEASE DOES NOT BECOME EFFECTIVE, THEN THE TERMS OF THIS PARAGRAPH 8 WILL SURVIVE THE TERM AND REMAIN IN EFFECT UNTIL SUCH TIME AS OPTIONEE HAS SATISFIED ITS OBLIGATION TO PAY LIQUIDATED DAMAGES PURSUANT TO THE TERMS OF THIS AGREEMENT.

District:

WMB  
(initials)

Optionee:

[Signature]  
(initials)

Unless and until this Agreement is terminated or expires, Optionee will retain all of its rights under this Agreement, and will continue to use its best efforts to complete the Project pursuant to the terms of this Agreement, and District will continue to perform its obligations in accordance with the terms of this Agreement.

9. Pledge Securing Liquidated Damages Amount.

9.1 Guarantee of Liquidated Damages Amount. Optionee represents and warrants that it is the owner of the Hyatt Hotel and is the lessee from District of the property upon which the Hyatt Hotel is located (the "Hyatt Lease"). Optionee is also a party to an Operating Agreement (the "Operating Agreement") between Optionee and Hyatt Corporation ("Hyatt") concerning the operation of the Hyatt Hotel. Pursuant to the Hyatt Lease, the Operating Agreement may not be amended by Optionee and Hyatt without the prior written consent of District. Optionee, in its capacity as owner of the

Hyatt Hotel, hereby agrees to pay to District the Liquidated Damages Amount, if any pursuant to the terms of this Paragraph 9.

9.1.1 Within ninety (90) days following the execution of this Agreement, Optionee will deliver to Hyatt irrevocable instructions (in form reasonably acceptable to District) to pay District the liquidated damages owed by Optionee under the terms of Paragraph 8 upon notice from District to do so, without any inquiry by Hyatt as to the reasons for or accuracy of such notification. In order to receive payment of liquidated damages from Hyatt, District must notify Hyatt that Optionee owes District liquidated damages under the terms of this Agreement and such notice will specify that the liquidated damages have not been paid. District will concurrently deliver a copy of such notice to Optionee. Thereafter, until such time as Optionee has satisfied its obligation to pay liquidated damages under this Agreement or such obligation has been extinguished, Hyatt will, on the first day of each month following January 2, 2004, as such date may be extended pursuant to the terms of Paragraph 6.2 of this Agreement, pay directly to District, from funds otherwise payable by Hyatt to Optionee pursuant to the Operating Agreement, a sum equal to 1/12<sup>th</sup> of \$5,000,000.

9.1.2 The irrevocable instructions to Hyatt will specifically identify District as an intended third-party beneficiary with respect to the irrevocable instructions and the Operating Agreement, and shall also further specify that neither the instructions nor the Operating Agreement may be amended or terminated without District's prior written approval, for so long as Optionee remains obligated to pay liquidated damages under the terms of this Agreement or the Lease. Optionee will use its best efforts to obtain Hyatt's written acknowledgment of the irrevocable instructions and an agreement from Hyatt that it will follow such instructions until receiving written notice from Optionee and District that Optionee is no longer obligated to pay liquidated damages.

9.1.3 If Hyatt timely makes the payment of liquidated damages to District in the manner specified in Paragraph 9.1.1 above, then all other funds which would otherwise be payable by Hyatt to Optionee pursuant to the Operating Agreement shall be available for distribution to Optionee. Alternatively, if the payment described above is not timely made by Hyatt to District, and Optionee does not otherwise pay the liquidated damages as they are owed, then (i) no further distributions can be made to Optionee by Hyatt pursuant to the Operating Agreement; (ii) all distributions that would otherwise have been made by Hyatt to Optionee under the terms of the Operating Agreement will be made to a bank account established by District in which District holds a perfected first-priority security interest until such time as the balance in such account has reached \$5,000,000; (iii) the unpaid portion of the liquidated damages will accrue and bear interest at a rate equal to the lesser of (a) the prime rate then in effect plus one percentage point, and (b) the maximum rate permitted by applicable law, until such time as the delinquent amount is paid; and (iv) notwithstanding the terms of any other provision of this Agreement, if this Agreement (or, if applicable, the Lease) has not already been terminated, then District may terminate this Agreement (or the Lease if it is

then in effect), and Optionee will remain obligated to pay liquidated damages until such time as Optionee has paid the Liquidated Damages Amount pursuant to Paragraph 8.1. Before District may terminate this Agreement or the Lease pursuant to item (iv) in the preceding sentence, District will provide Optionee notice and a 15-day period (commencing on the date such notice is received) to pay the liquidated damages then due and payable.

9.1.4 The irrevocable instructions provided for in Paragraph 9.1.1 above shall terminate upon written notice to Hyatt by District and Optionee when Optionee has satisfied its obligation to pay liquidated damages or such obligation is terminated pursuant to the terms of this Agreement or the Lease, whichever is then effect.

9.2 Hyatt Refinancing. District hereby agrees to amend the provisions of this Paragraph 9, and any and all other agreements (if any) which may have been entered into in order to effectuate the terms hereof (herein collectively referred to as the "Security Agreements"), in order to satisfy any reasonable requirements of a lender in connection with any financing of the Hyatt Hotel; provided that District has received assurances which, in the exercise of the District's good faith discretion, satisfy District that (i) the obligations of Optionee under the Security Agreements will not be reduced or released, and (ii) the funds available for payment to District pursuant to Paragraph 9.1.1 above will, at all times that Optionee remains obligated to pay liquidated damages pursuant to Paragraph 8.1 or Paragraph 8.2, continue to be not less than Five Million Dollars (\$5,000,000.00) per year. District further agrees that Optionee's obligations under the Security Agreements, and District's rights thereunder, will at all times be subject and subordinate to any financing by Optionee of the Hyatt Hotel which has been approved by District pursuant to the terms of the Hyatt Lease, this Agreement, or any of the Security Agreements.

#### 10. Force Majeure Event.

10.1 Each of the following events, if it causes a delay in the development of the Project despite Optionee's best efforts to proceed with such development, will constitute a "Force Majeure Event": (i) riots; (ii) natural disasters and other acts of God, including fires, earthquakes, floods, and hurricanes; (iii) war; (iv) governmental laws, rules, regulations, or restrictions affecting development of the Project; (v) actions by third parties beyond Optionee's reasonable ability to control, including, without limitation, any challenge to the EIR for the Project, the adjacent Parking Garage, or the PMPA; and (vi) a third party's failure to perform certain actions required to develop the Project, including, without limitation, Campbell's failure to complete remediation of the site by March 1, 2001.

10.2 Under no circumstances will Optionee's inability or failure to obtain financing for the construction or development of the Project be considered a Force Majeure Event, including conditions beyond Optionee's control.



## 11. Assignment of Letter Agreement.

Optionee agrees, that in order to facilitate District's acquisition of Campbell's leasehold interest in the Premises, Optionee will assign to District Optionee's interest in that certain letter agreement ("Letter Agreement") between Campbell and Optionee (as successor-in-interest to TUDCLP), dated April 21, 1998, as amended. Upon execution of this Agreement, Optionee will execute an assignment of the Letter Agreement to District in a form reasonably acceptable to Optionee and District and deliver such document to District. The assignment of the Letter Agreement will not be deemed to have become effective unless and until District provides written notice to Optionee of District's election to make the assignment effective. District's election to exercise its right to receive an assignment of Optionee's interest in the Letter Agreement will be in District's sole and absolute discretion and will be at no cost to District. If this Agreement terminates for any reason before District provides written notice to Optionee that District has elected to make the assignment effective, then District will return to Optionee the assignment document and such document will be null and void and of no further effect. The assignment of the Letter Agreement will not adversely affect Optionee's rights under this Agreement or the Lease.

## 12. Restrictions on Transfers.

12.1 Optionee acknowledges that District would not enter into this Agreement except in reliance on Optionee's expertise, reputation, prior experience in developing and constructing commercial real property, and District's knowledge of Optionee. The personal qualifications of the person controlling Optionee (i.e. Douglas F. Manchester) are part of the consideration for granting the Option, and such person shall maintain active control and supervision of performance of this Agreement. Therefore, any transfer or assignment of this Agreement or any rights or duties hereunder, whether by operation of law or otherwise, without the prior written consent of District (which will be approved or rejected in District's sole and absolute discretion) will be void and will have no effect. Subject to the terms of Paragraph 6.3 above, such impermissible transfer or assignment will provide District the right, in its sole discretion, to terminate this Agreement. If District elects to terminate this Agreement following an impermissible transfer or assignment, then District will retain the Deposit. Any impermissible assignment or transfer of any partnership, corporate or other interest in Optionee or in any partner of Optionee, or change in form or ratio of ownership of Optionee (whether Optionee is a corporation, partnership, or other form of business entity) made without District's written consent will also be void and have no effect.

12.2 Notwithstanding the above, Optionee (a) may make any changes in the respective interests of the limited partners of the partnership named herein as Optionee, including without limitation any withdrawal, admittance, or change of said limited partnership interests, without District's consent so long as Optionee furnishes District with written notification of any such change by certified mail delivered no later than 10 days after said change, and (b) may transfer or assign this Agreement or its rights hereunder to another entity which is formed by Optionee in connection with Optionee's obtaining of financing for the Project; provided that such transfer or assignment must be to an entity owned or controlled by Douglas F. Manchester, District must receive notice

in advance of such transfer or assignment, and a condition to the transfer or assignment will be that Optionee remains liable for all of its duties and obligations under this Agreement after the transfer or assignment becomes effective. Notwithstanding any provision of this Agreement, in no event will any transfer or assignment under this Paragraph 12 release Optionee from its duties or obligations under this Agreement.

12.3 Nothing in this Paragraph 12 will be deemed to prohibit Optionee from entering into an executory agreement which provides for assignment of Optionee's interest in the Lease upon or following execution thereof, provided that such assignment is in accordance with the terms of Section 11 of the Lease.

13. Notices. All notices and communications required under this Agreement will be in writing, and all notices and payments will be made as follows:

All notices to Optionee will be given or sent by certified mail to:

Manchester Resorts, L.P.  
One Market Place, 33rd Floor  
San Diego, CA 92101  
Attention: Mr. Douglas F. Manchester

All payments and notices to District will be given or sent by certified mail to:

Real Estate Operations  
San Diego Unified Port District  
3165 Pacific Highway  
P.O. Box 120488  
San Diego, CA 92112-0488  
Attention: Senior Director of  
Real Estate Operations

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

14. Time is of the Essence.

Time is of the essence of all the conditions and obligations contained in this Agreement.

15. Remediation of the Premises.

Optionee understands and agrees that, except as set forth in this Paragraph 15, if the Option is exercised and the Lease is executed, the Premises will be leased to Optionee in an "as is, with all faults" condition. Subject to the limitations set forth in Paragraph 4.13, District will cause the remediation of, and demolition of all existing improvements on, the Premises. District will notify Optionee when the remediation and demolition of the Premises has been completed. If within 30 days after such notice, Optionee, as a

result of a Phase 1 noninvasive audit or as a result of Phase 2 invasive testing (both performed in accordance with ATSM standards at Optionee's sole cost and expense unless such audits are required to be performed in accordance with the remediation plan approved by District as provided in Paragraph 4.13 above), identifies existing Contaminants (as defined in Section 42 of the Lease) on the Premises which were not removed or caused to be removed by Campbell or District, then Optionee will obtain bids for the clean-up and remediation of such Contaminants as recommended by the Phase 1 and Phase 2 environmental audit and testing. Provided that the existing Contaminants are timely identified, District will review the bids and remediation specifications and will approve them in its reasonable discretion. Upon approval of the bids and remediation specifications, District will contribute up to \$4 million (inclusive of all amounts contributed by District in connection with Campbell's remediation of the Premises) to remediate the Contaminants, and will contribute up to \$3 million (inclusive of all amounts contributed by District in connection with Campbell's obligation to demolish the Premises) to demolish any remaining structures which must be removed to remediate the newly identified Contaminants. If the cost of the required remediation, as identified in the approved remediation specifications, is estimated to exceed the sum of (i) the \$4 million for remediation and \$3 million for demolition described above, and (ii) any amounts available to District under the terms of the agreement for acquisition of the Campbell leasehold ("Lease Termination Agreement"), including without limitation the environmental remediation policy obtained by Campbell, and (iii) any amounts required to be paid by Campbell pursuant to the Lease Termination Agreement, then District may terminate this Agreement by providing notice of such termination to Optionee. Upon District's termination notice because of excessive environmental costs, Optionee may elect to cancel such termination notice and cause this Agreement to continue by agreeing to pay the remediation costs in excess of the amounts District will pay pursuant to this Paragraph 15. Optionee must inform District in writing of its agreement to pay the remaining remediation costs and Optionee's intent to cause this Agreement to remain in effect within 20 days after receiving District's termination notice. If Optionee fails to inform District that Optionee intends to pay the remaining remediation costs within such 20 day period, then District may elect to pay such costs (in which event this Agreement will remain in effect) or cause its termination notice to become effective. If District elects to terminate this Agreement because the cost to remediate and demolish the Premises exceeds District's contribution amount of \$7 million (and any proceeds under the environmental policy or other amounts payable by Campbell pursuant to the Lease Termination Agreement), and Optionee has not agreed to assume such excess costs, then Optionee will be entitled to a return of the Deposit and this Agreement will have no further force and effect. If the bids to remediate the Contaminants are less than \$4 million (total cost of remediation), but during the course of remediation, the project cost is revised to exceed said sum, then the provisions set forth in this Paragraph 15 will apply as to termination and Optionee's right to contribute. Subject to the provisions of Paragraph 10, District and Optionee agree and acknowledge that nothing in this Paragraph 15 will be construed to extend the Term as set forth in Paragraph 2 above.

16. No Obligations to Third Parties.

Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than Optionee and District and their respective permitted successors and assigns. Nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement.

17. Term of the Lease.

If a court of competent jurisdiction determines that the term of the Lease violates any provision of law, then the term of the Lease will be reduced to the extent necessary to conform with the requirements of such law, and the parties agree to prepare, execute, acknowledge, deliver and record an amendment to the Lease, or an amended and restated lease, to reflect such reduction in term, and otherwise will take any and all actions necessary and proper to ensure that the Lease remains in full force and effect except for the required change in term.

18. Recovery of Fees and Costs.

If the parties to this Agreement engage in a legal action, arbitration, mediation, or other proceeding arising from the obligations, covenants or conditions contained in the Agreement or any other portion of the subject matter of this Agreement, then the prevailing party will be entitled to recover reasonable expenses, including attorneys' fees and costs.

19. Waiver of Claims and Limitation of Remedies.

Optionee acknowledges and agrees that Optionee's right and ability to exercise the Option, execute the Lease, and develop the Project is subject to various consents and approvals, including, without limitation, environmental review under CEQA and other consents and approvals as set forth in Paragraph 4.1 above. Optionee accepts the risk that District or the Coastal Commission may withhold these consents and approvals in their sole discretion. District will have no liability, and Optionee will have no claim, cause of action, or right of compensation against District if Optionee does not obtain, for any reason whatsoever, any or all of the consents and approvals necessary to exercise the Option or construct the Project Optionee proposes to develop on the Premises. Except for the right to conduct an arbitration in limited circumstances, as set forth in Paragraph 32 below, Optionee will have no claim or cause of action in equity (including, without limitation, any action seeking specific performance, injunctive relief, mandamus or other extraordinary writ), or right of compensation for consequential damages against District, and Optionee hereby waives its right to seek to recover such equitable remedies and consequential damages. In any suit or action against District arising from the terms of this Agreement or in connection with the development of the Project, Optionee will be entitled to seek to recover its legal damages only, and hereby agrees that such legal damages will be limited to Optionee's out of pocket costs and expenses in furtherance of the development of the Project. In addition, Optionee and District agree that neither party will bring any action, claim, or cause of action against the other for any costs, damages,

expenses, obligations, or liabilities for any acts or failure to act by either party arising from or relating to any negotiations, discussions, or actions in connection with the development of the Project, or negotiation, execution, or termination of this Agreement. Additionally, with respect to any third party ("Third Party Releasor") who signs the release of Optionee (and its affiliates) the form of which is attached hereto as Exhibit D, and subject to the execution of such release by all third parties identified therein, however, no later than JANUARY 31, 2000, Optionee will also waive all claims, causes of action, and rights of compensation against such Third Party Releasor. Optionee acknowledges and agrees that so long as each release becomes effective by virtue of the execution and delivery thereof by all third parties identified in the release, if Optionee thereafter initiates any action against a Third Party Releasor asserting any claim that has been released thereunder, then Optionee will be in default under this Agreement. To the extent requested by Optionee, District will use reasonable efforts (provided such efforts do not involve the expenditure of funds by District ) to obtain from each such Third Party Releasor its support of the development of the Project, including without limitation, District's attempt to cause the City to expedite the processing and issuance of all permits required by Optionee to complete the development of the Project. With respect to any third party, without regard to whether it has signed the release in the form attached hereto as Exhibit D, and to the extent requested by Optionee, District will use reasonable efforts (provided such efforts do not involve the expenditure of funds by District ) to obtain from each such third party an agreement to support the development of the Project, including without limitation, each such third party's attempt to cause the City to expedite the processing and issuance of all permits required by the Optionee to complete the development of the Project.

Q13  
CMB

20. Right to Use Premises.

Optionee acknowledges that after District acquires the Premises from Campbell, and until such time as the Option is exercised and the Lease is executed by the parties, District will have the right to use or lease the Premises for parking and other legal uses.

21. District's Consent.

Unless otherwise stated, wherever in this Agreement the consent or approval of District, the Board, or their designees is required, such consent or approval may be given or denied in the reasonable discretion of District, the Board, the Executive Director of District, or any of their designees, as appropriate. In addition, unless otherwise stated, any approvals or consents to be given by the Board of Port Commissioners and the Executive Director of District will be given or denied within 20 days.

22. Computation of Time Periods.

If any date or time period specified in this Agreement is or ends on a Saturday, Sunday or federal, state or legal holiday, such date will automatically be extended until 5 p.m., Pacific Time, of the next day which is not a Saturday, Sunday or federal, state or legal holiday.

23. Counterparts.

This Agreement may be executed in multiple counterparts, each of which will be deemed an original, but all of which, together, will constitute one and the same instrument.

24. Captions.

All captions to, or headings of, the paragraphs or sub-paragraphs of this Agreement are solely for the convenience of the parties, are not a part of this Agreement and will not be used for the interpretation or determination of the validity of this Agreement or any provision hereof.

25. Exhibits and Schedules.

The exhibits and schedules attached to this Agreement are hereby incorporated herein by this reference for all purposes.

26. Amendment To This Agreement.

The terms of this Agreement may not be modified or amended except by an instrument in writing executed by each of the parties.

27. No Waiver.

The waiver or failure to enforce any provision of this Agreement will not operate as a waiver of such party's right to enforce future breaches of any such provision or any other provision of this Agreement.

28. Applicable Law.

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

29. Entire Agreement.

This Agreement supersedes all prior agreements, negotiations and communications, oral or written, and contains the entire agreement between District and Optionee as to the subject matter hereof.

30. Parking Garage.

District and Optionee hereby agree that District will be obligated to construct or cause to be constructed a parking garage with a minimum of 800 parking spaces for use in connection with the operation of the Project. District and Optionee agree to negotiate in good faith to reach an agreement with commercially reasonable terms setting forth Optionee's rights to use the parking garage in connection with the operation of the Project. District agrees that it will rent to Optionee spaces in the parking garage on a daily basis at a rate equal to one hundred and twenty percent (120%) of whatever the

then-posted rate is that District charges to other patrons of the Convention Center parking structure. If, during the processes in which the Coastal Commission approves the PMPA and the EIR is certified, more than 800 parking spaces are required to be available for use in connection with the Project, then District will make such minimum number of required spaces available; provided that in no event will the parking garage contain fewer than 800 parking spaces which are allocated to the Project. District agrees that the parking garage will be designed to complement and be cohesive with the design of the Project, and that Optionee will have the right to review and approve (such approval not to be unreasonably withheld or delayed) the plans and specifications for the design and operation of the parking garage. District also agrees to promptly undertake such landscaping and related improvements as are reasonably necessary to enhance the appearance of the loading dock areas of the Convention Center.

### 31. Partial Invalidity.

If any portion of this Agreement is declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, that portion will be deemed severed from this Agreement and the remaining parts of this Agreement will remain in full force as fully as though the invalid, illegal or unenforceable portion had never been part of this Agreement.

### 32. Limited Arbitration.

If at any time before the expiration of the Term, a dispute arises with respect to whether District has failed to satisfy an obligation of District hereunder or has improperly terminated this Agreement, and District disagrees (hereafter, a "Dispute"), then Optionee may elect to resolve the Dispute pursuant to the terms of this Paragraph 32. Optionee must notify District within five business days after Optionee determines, or reasonably should have determined, that District's action (or failure to act) has given rise to a Dispute which Optionee desires to arbitrate. Within three business days thereafter, the parties shall meet to negotiate in good faith in an attempt to resolve the Dispute. If the Dispute is not resolved by mutual agreement or compromise within five days after the parties meet regarding the Dispute, then the parties will resolve the Dispute by binding arbitration in accordance with the following procedures:

On the next business day following the expiration of the five-day resolution period described above, each party will designate a representative to select an arbitrator. The two representatives will attempt to mutually agree on an arbitrator who will conduct the proceeding to resolve the Dispute. If either party fails to designate a representative to the other party, or such representative fails to attend a mutually agreed-upon meeting of the representatives, then the representative so designated and in attendance at the scheduled meeting will select the arbitrator. If, after meeting, the two representatives cannot agree on an arbitrator within three days after each representative has been designated, then the arbitrator will be randomly selected from the list of arbitrators set forth on Exhibit E. If the first arbitrator randomly selected by the parties cannot serve as the arbitrator, will not offer reasonable assurances that he or she will comply with the time periods set forth in this Paragraph 32, or will not affirmatively assert that no grounds

for disqualification exist which would cause disqualification of a judge as specified in California Code of Civil Procedure § 170.1, then a second person will be randomly selected from the remaining names set forth on Exhibit E. In addition, both parties will have a one-time right, without cause, to reject an arbitrator who is randomly selected and otherwise satisfies the criteria set forth in the preceding sentence. The random selection process will repeat until such time as one of the selected potential arbitrators set forth on Exhibit E satisfies the criteria set forth above and is not rejected by a party. If no person listed on Exhibit E is selected pursuant to the above-described process and willing to act as the arbitrator under the above-described conditions, then the parties will petition to the Presiding Judge of the Superior Court of San Diego to appoint an arbitrator, and the person so appointed will serve as the arbitrator. The person selected as the arbitrator during this process will be hereafter referred to as the "Arbitrator."

Except as otherwise stated herein, the Arbitrator will resolve the Dispute in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("Rules"). To the extent the Rules are silent, the Arbitrator will apply the procedures set forth in California Code of Civil Procedure §§ 1280 *et. seq.* The powers of the Arbitrator will be limited as follows: (i) the Arbitrator will follow the substantive laws of the State of California, including the California Rules of Evidence; (ii) the Arbitrator will not consider anything outside the record unless notice is given to all parties with the opportunity to respond to such matters; and (iii) the Arbitrator will only interpret and apply the terms and provisions of this Agreement and will not change any such terms or provisions or deprive either party of any right or remedy expressly or impliedly provided in this Agreement. Each party may submit a written brief and other relevant documents to the Arbitrator, but no depositions or discovery may be conducted unless ordered by the Arbitrator. The Arbitrator will conduct a hearing in the County of San Diego within 20 days after being selected, and will issue a written ruling with respect to the Dispute promptly. In no event will the Arbitrator's written ruling be issued more than 10 days after the hearing.

The Arbitrator's written decision will resolve the Dispute by determining, as the case may be, whether District impermissibly terminated this Agreement under the terms hereof, or breached an obligation of District under this Agreement. Such written decision will be binding on the parties and not appealable. Neither party may petition a court to correct or vacate the ruling. If, and only if, Optionee is the prevailing party under the arbitration, then (i) if the Dispute is related to District's termination of this Agreement, then this Agreement will be reinstated in its entirety, (ii) if the Dispute is related to any other action or failure to act by District, then District will act or refrain from acting as provided in the Arbitrator's written ruling, and (iii) the dates by which Optionee must satisfy its obligations will be extended one day for each day of the arbitration process in accordance with the terms of Paragraph 6.2 of this Agreement. An arbitration ruling causing this Agreement to be reinstated will not prohibit District from later terminating this Agreement if District determines that Optionee has subsequently breached its obligations under the terms hereof.



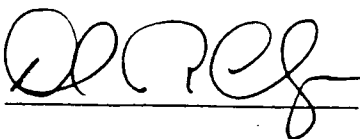
Each party will bear its own costs and one-half of any fees or costs charged by the Arbitrator before the Arbitrator issues a written ruling. If the Arbitrator issues a written ruling, then the prevailing party, as determined by the Arbitrator, will be entitled to recover all of its costs (including the fees charged by the Arbitrator) and reasonable attorneys' fees from the nonprevailing party, and the nonprevailing party will pay all remaining fees owed to the Arbitrator.


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

"District"

Port Attorney

SAN DIEGO UNIFIED PORT DISTRICT,  
a public corporation.

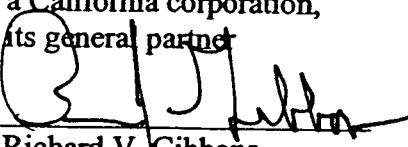
By: 

By:   
Executive Director

"Optionee"

MANCHESTER RESORTS, L.P.  
a California limited partnership

By: MANCHESTER RESORTS, INC.  
a California corporation,  
its general partner

By:   
Richard V. Gibbons  
President



PARCEL NO. 1

Commencing at Harbor Line Station No. 460 on the U.S. Bulkhead Line, as said U.S. Bulkhead Line is now established for the Bay of San Diego and delineated on map entitled "Harbor Lines, San Diego Bay, California, File No. (D.O. Series) 426", approved by the Secretary of the Army, April 29, 1963, and filed in the Office of the District Engineer, Los Angeles, California; thence along said U.S. Bulkhead Line north 50°19'08" west a distance of 235.87 feet to the TRUE POINT OF BEGINNING of Parcel No. 1; thence continuing along said U.S. Bulkhead Line north 50°19'08" west a distance of 1,227.68 feet; thence leaving said U.S. Bulkhead Line north 39°40'52" east a distance of 185.00 feet; thence south 50°19'08" east a distance of 395.57 feet to a point on the southerly right-of-way line of Eighth Avenue; thence along the southerly right-of-way line of Eighth Avenue north 71°20'52" east a distance of 385.47 feet to the beginning of a tangent curve concave to the south and having a radius of 399.50 feet; thence along the arc of said curve through central angle of 6°37'44" an arc distance of 46.22 feet to a point which bears north 11°57'47" west from the center of said 399.50 foot radius curve; thence north 78°02'13" west a distance of 57.62 feet to the beginning of a tangent curve concave to the north and having a radius of 400.50 feet; thence along the arc of said curve through a central angle of 6°37'44" an arc distance of 46.34 feet to a point which bears south 18°35'31" from the center of said 400.50 foot radius curve thence north 71°24'29" east a distance of 116.38 feet to the beginning of a tangent curve concave to the north and having a radius of 622.50 feet; thence along the arc of said curve through a central angle of 12°28'08" an arc distance of 135.47 feet to a point of reverse curvature the common radial bears south 31°03'39" east from the center of the 622.50 foot radius curve; thence leaving said southerly right-of-way line of Eighth Avenue along the arc of a 29.50 foot curve concave to the southwest through a central angle of 14°10'52" an arc distance of 7.30 feet to a point on the southwesterly right-of-way line of Harbor Drive (Dist. Doc. No. 71, 75) which bears north 16°52'47" west from the center of said 29.50 foot curve; thence along said southwesterly right-of-way line south 51°34'56" east a distance of 124.07 feet; thence leaving said southwesterly right-of-way line of Harbor Drive south 39°40'08" west a distance of 489.08 feet; thence south 50°19'08" east a distance of 180.00 feet; thence 39°40'52" west a distance of 250.00 feet; thence south 50°19'08" east a distance of 113.87 feet; thence south 39°40'52" west a distance of 125.00 feet to the TRUE POINT OF BEGINNING of Parcel No. 1, containing 474,058 square feet or 10.88 acres of tideland area.

**PRELIMINARY DRAWING  
FOR PLANNING PURPOSES ONLY**

DRAWN <u>JD/np</u>	<b>SAN DIEGO UNIFIED PORT DISTRICT</b> Tideland Lease Within Corporation Limits of San Diego CONVENTION CENTER HOTEL SITE	DATE <u>10 November 1999</u>
CHECKED _____		SCALE _____
REVIEWED _____		REF. <u>7696</u>
APPROVED _____		DRAWING NO. <u>019-044</u>
SR. DIRECTOR / PUBLIC WORKS		

*R* - 292702 39819 2

Also: Reserving therefrom a nonexclusive public access roadway, utility and landscape easement extending 130.0 feet from the Harbor Drive right-of-way line (northeasterly property line) and extending from the northerly property line to the southerly property line. Said easement is reserved for the purpose of providing access to the Port District General Services facility, the 10<sup>th</sup> Avenue Marine Terminal and for other access authorized by the San Diego Unified Port District.

Also: Reserving therefrom a public activity open space easement located at the terminus of Eighth Avenue at Convention Way. Said easement being 185.0 feet by 235.0 feet in dimension.

Also: Reserving therefrom a Port multi-tenant joint use signage area easement located within the access roadway and landscape easement area southeasterly of Harbor Drive and Eighth Avenue. Said area is 25.0 feet by 15.0 feet in size and is located southerly of the pedestrian pathway. The signage easement is under direct jurisdiction of the Port of San Diego.

Also: Reserving therefrom a 6.0 foot wide landscape easement located southerly of the northerly property line at Convention Way.

Also: Reserving therefrom two 25.0 foot wide nonexclusive public pedestrian and bicycle path easements extending from Convention Way perpendicular to the waterfront. Location of said easements are further delineated on Port Document 019-044. Courses referred to in the above description are based upon the California Coordinate System, Zone 6 (N.A.D. 1983).

The above described areas are those described on Drawing No. 019-044 dated 10 November, 1999 and made a part of this agreement. Document No. 019-044 is an updated and revised drawing based on Document No. 019-019.

**PRELIMINARY DRAWING  
FOR PLANNING PURPOSES ONLY**

DRAWN <u>JD/np</u>	<b>SAN DIEGO UNIFIED PORT DISTRICT</b>	DATE <u>10 November 1999</u>
CHECKED _____		SCALE _____
REVIEWED _____	Tideland Lease	REF. <u>7696</u>
PROVED _____	Within Corporation Limits of San Diego	DRAWING NO.
SL. DIRECTOR / PUBLIC WORKS	CONVENTION CENTER HOTEL SITE	<u>019-044</u>

R- 292702 39819 2

PARCEL NO. 2

Beginning at the True Point of Beginning of Parcel No. 1, said point also being the TRUE POINT OF BEGINNING of Parcel No. 2; thence south 39°40'52" west a distance of 16.07 feet; thence south 71°20'52" west a distance of 122.80 feet; thence north 78°35'51" west a distance of 844.36 feet; thence north 50°19'08" east a distance of 420.00 feet; thence north 39°40'52" east a distance of 520.00 feet to a point on the above described U.S. Bulkhead Line south 50°19'08" east a distance of 1,227.68 feet to the TRUE POINT OF BEGINNING of Parcel No. 2, containing 460,698 square feet or 10.58 acres of water covered area.

Above described U.S. bulkhead line; thence along said U.S. bulkhead line south 50°19'08" east a distance of 1,227.68 feet to the true point of beginning of Parcel No. 2, containing 460,698 square feet or 10.58 acres of water covered area.

EASEMENTS RESERVED FROM PARCEL NO. 1

Reserving therefrom a nonexclusive public pedestrian and bicycle pathway access easement 35.0 feet in width, the center line of which lies 17.5 feet northerly and parallel with the southerly property line of the above described Parcel No. 1. (Land Parcel)

Also: Reserving therefrom a nonexclusive public pedestrian and bicycle pathway access easement 20.0 feet in width, the northerly property lines of Parcel No. 1 adjacent to Eighth Avenue, this pedestrian pathway is located between two 12 foot wide landscape easements described below.

Also: Reserving therefrom two 12 foot wide landscape easements; the first being located between and parallel to the back of curb line of Eighth Avenue (also being the northerly property line of Parcel No. 1) and the 20.0 foot pedestrian pathway; the second landscape easement located southerly of the pedestrian pathway, being located between 32.0 feet and 44.0 feet southerly of the northerly property line at Eighth Avenue. The landscape easement nearest the street is further reserved for Port District directional signage, streetlights and other utilities as deemed necessary for the construction and operation of the public street (Eighth Avenue.)

**PRELIMINARY DRAWING  
FOR PLANNING PURPOSES ONLY**

DRAWN	JD/vsp
CHECKED	
REVIEWED	
APPROVED	
SR. DIRECTOR / PUBLIC WORKS	

**SAN DIEGO UNIFIED PORT DISTRICT**

Tideland Lease

Within Corporation Limits of San Diego  
CONVENTION CENTER HOTEL SITE

DATE	10 November 1999
SCALE	
REF.	7696

DRAWING NO.  
019-044

R-292702 39819 27

SAN DIEGO UNIFIED PORT DISTRICT

LEASE TO

MANCHESTER RESORTS, L.P.

OF PROPERTY LOCATED AT

SOUTHWEST CORNER OF EIGHTH AVENUE AND HARBOR DRIVE

SAN DIEGO, CALIFORNIA

FOR SIXTY-SIX (66) YEARS,

COMMENCING           [TO BE INSERTED WHEN KNOWN]          , 200    

AND ENDING           [TO BE INSERTED WHEN KNOWN]          , 206

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## LEASE AGREEMENT

THIS LEASE AGREEMENT ("Lease"), made and entered into as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation ("Lessor"), and MANCHESTER RESORTS, L.P., a California limited partnership ("Lessee").

### RECITALS

1. Lessor owns that certain real property consisting of approximately 475,430 square feet of land and approximately 460,698 square feet of water (collectively, "Premises"), as more particularly delineated on Drawing No. 019-044, dated November 5, 1999, and attached hereto as Exhibit A, and the Premises as more particularly described on Exhibit B attached hereto.
2. On November \_\_\_\_, 1999, Lessor and Lessee entered into that certain Option Agreement a copy of which is on file with the Clerk of Lessor as Document No. \_\_\_\_\_ ("Option Agreement") attached hereto and incorporated herein as Exhibit C. Pursuant to the Option Agreement, Lessor granted Lessee, as Optionee, the option to execute this Lease after certain conditions were satisfied by the parties.
3. The conditions set forth in the Option Agreement have been satisfied, and Lessee desires to enter this Lease under the terms and conditions set forth herein and build a convention center hotel ("Project") in conformance with working drawings approved by Lessor pursuant to the Option Agreement. The Project will consist of approximately one thousand two hundred (1,200) rooms, and include between eight-five thousand (85,000) and one hundred thousand (100,000) square feet of meeting and conference rooms, a minimum of two (2) restaurants and cocktail lounges, a health spa, approximately two hundred thirty (230) marina slips, and parking facilities.

**NOW THEREFORE**, in reliance on the foregoing recitals and in consideration of the mutual terms and conditions set forth in this Lease, the receipt and sufficiency of which are hereby acknowledged, Lessor, for the consideration hereinafter set forth, hereby leases to Lessee for the term described in this Lease, a portion of the land conveyed to Lessor 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.

**TO HAVE AND TO HOLD** the Premises for the term of the Lease and upon the following conditions:

1. **TERM:** Subject to the terms and conditions of this Lease, Lessee will lease the Premises for a term of sixty-six (66) years ("Term"), commencing \_\_\_\_\_ [to be inserted when known], 200\_\_ ("Commencement Date"), and ending on \_\_\_\_\_ [to be inserted when known], 206\_\_ ("Termination Date") unless sooner terminated as herein provided.

2. **RENTAL:** During the first twenty-five (25) years of the Term, Lessee agrees to pay to Lessor the greater of: (i) the minimum annual rent set forth in Section 2.1 or; (ii) the cumulative total of annual percentage rents ("Percentage Rent") set forth in Section 2.2 (collectively, "Rent"). The Rent will be determined in accordance with the following schedules and procedures:

2.1 First Twenty-Five (25) Years. For the twenty-five (25) year period commencing on the Commencement Date and ending on the date that is twenty-five (25) years after the Commencement Date, a minimum of Four Hundred Thousand Dollars (\$400,000) during the first (1st) and second (2nd) years; a minimum of Seven Hundred Fifty Thousand Dollars (\$750,000) during the third (3rd) and fourth (4th) years; a minimum of One Million Eight Hundred Thousand Dollars (\$1,800,000) during the fifth (5th) year; then a minimum of Two Million Seven Hundred Thousand Dollars (\$2,700,000) per year during the sixth (6th) through twenty-fifth (25th) years or the cumulative total of Percentage Rent per year as provided in Section 2.2 below, whichever is greater.

If the Project is opened for business on or before January 2, 2004 (as such date has previously been extended pursuant to Paragraph 6.2 of the Option Agreement or is further extended pursuant to Section 5[g] of this Lease), then Lessee will be entitled to a rent credit equal to one-twelfth (1/12th) of Five Million Dollars (\$5,000,000) per month prorated based upon a three hundred sixty-five- (365-) day year for a maximum of six (6) months. If the rent credit set forth in the preceding sentence exceeds the rent due in any month, Lessee's credit will be carried over to the next month until such time as Lessee has received the full rent credit to which it is entitled.

2.2 Percentage Rent. Percentage Rent shall be calculated as set forth in this Section 2.2. Percentage Rent for any month during the Term shall be payable on the twentieth (20th) day of the next succeeding calendar month, and shall consist of the following percentages of the gross income derived from the operations and businesses conducted on or from the Premises:

- (a) Seven Percent (7%) of the gross income from the rental of guest rooms (including the gross income from in-room movies and similar forms of in-room entertainment) and rental of conference and banquet rooms (including related accommodation sales and services provided to conference and banquet room users).
- (b) Six Percent (6%) of the gross income paid to Lessee from telephone services provided to hotel guests.
- (c) Three Percent (3%) of the gross income from food sold from restaurants, snack bars, and delicatessens.
- (d) Three Percent (3%) of the gross income from off-sale alcoholic and nonalcoholic beverage sales.
- (e) Five Percent (5%) of the gross income from on-sale alcoholic and nonalcoholic beverage sales.
- (f) Five Percent (5%) of the gross income from the sale of gifts, novelties, souvenirs, clothing, luggage, jewelry, cigars, cigarettes, candy, sundries, and incidentals of any kind.
- (g) Five Percent (5%) of the gross income from barber and beauty shop operations.
- (h) Twenty Percent (20%) of the gross income from rentals of slips or other storage locations for boats or other water vessels.
- (i) Ten Percent (10%) of the gross income of all rentals of boats, jet skis, wave runners, or other water transportation devices.
- (j) Six Percent (6%) of the gross income from all boat charters, tours, or other tourist-related transportation conducted under Lessee's supervision.
- (k) Twenty-Five Percent (25%) of the gross income from any commission or other compensation paid to Lessee for the right to install or operate coin-operated vending or service machines or devices, including telephones, or Five Percent (5%) of the gross income of any such coin-operated machines or devices owned, rented, or leased by Lessee or any approved sublessee.
- (l) Subject to the terms of any subsequent agreement relating to Lessor's development of a public parking facility on the Premises, Ten Percent (10%) of the gross income from all parking fees derived from sources other than such parking facility.

- (m) Three Percent (3%) of the gross income of the operations and businesses conducted on or from "outside retail" establishments. For purposes of this Section, "outside retail" establishments are those operations and businesses on the ground floor of a building that are accessible from the exterior of the building without having to enter any interior public access areas.
- (n) Ten Percent (10%) of the gross income from any and all activities and businesses allowed under this Lease and not otherwise provided for in this Section 2.2.

2.3 Rent During Remaining Term. The remaining term of this Lease shall be divided into a series of rental periods, each (except for the last) consisting of one hundred twenty (120) months (each a "Rental Period"). The first (1st) Rental Period will begin on the first (1st) day following the twenty-fifth (25th) anniversary of the Commencement Date. The Rent for each successive Rental Period, including the first (1st) Rental Period shall be the fair market value for the rental of the Premises. The Lease, during all Rental Periods, will continue to have a minimum annual rent and Percentage Rent component. Each successive Rental Period shall commence upon the expiration of the immediately preceding Rental Period. The last Rental Period shall be reduced in term in order to coincide with the expiration of this Lease. The parties agree that the annual minimum rent established for any Rental Period will be not less than seventy-five percent (75%) of the average annual Percentage Rent due during the immediately preceding three (3) accounting years.

2.4 Dispute Resolution. If the parties cannot agree on the fair market Rent for a Rental Period, the controversy as to Rent for said period shall be determined by three (3) arbitrators. After notice by either party to the other requesting arbitration, one (1) arbitrator shall be appointed by each party. Notice of the appointment shall be given by each party to the other when made. The two (2) arbitrators shall immediately choose a third (3rd) arbitrator to act with them. If they fail or are unable to select a third (3rd) arbitrator, on application by either party, the third (3rd) arbitrator shall be promptly appointed by the then presiding judge of the Superior Court of the State of California, County of San Diego, acting in his individual capacity. The party making the application shall give the other party notice of his application. All of the arbitrators shall be qualified real estate appraisers with a minimum of ten (10) years experience in the Metropolitan San Diego area. Each party shall bear the expenses of its own appointed arbitrator and shall bear other expenses pursuant to Section 1284.2 of the Code of Civil Procedures of California or its successor provisions. Hearings shall be held in the city of San Diego, California. The determination of the Rent owed shall be the decision of not less than

two (2) of the arbitrators. Said determination shall be the Rent which Lessor would derive from the Premises if the Premises were vacant without any improvements thereon and made available on the open market for new leasing purposes for hotel, marina, and related businesses including restaurants, cocktail lounges, retail shops, and recreation at the commencement of the Rental Period under arbitration. For the purpose of this arbitration procedure, the arbitrators shall assume that the Lessor has a fee simple absolute estate. In determining what Rent Lessor could derive from the Premises, if it were made available on the open market for new leasing purposes, the arbitrators shall consider the benefits and burdens of all the provisions of this Lease. The arbitrators' determination of Rent shall be based upon recognized real estate appraisal principles and methods, supported by relevant research and analysis and fully documented in a written report. The arbitrators shall make copies of their report available to any ethical practice committee of any recognized professional real estate organization. The arbitration shall be conducted under and subject to Section 1280 through 1294.2 of the Code of Civil Procedure of California or any then-existing successors to these Code Sections. The award determined by the arbitrators shall be effective and retroactive to the first (1st) day of the Rental Period under arbitration.

- 2.5 Definition of Gross Income. Gross income, upon which the Percentage Rent is to be based, shall include all income resulting from occupancy or use of the Premises in any manner whether by Lessee, its sublessees, licensees, concessionaires, or parties operating through Lessee, its sublessees, licensees, or concessionaires, from whatever source derived and whether for cash or credit.

Gross income, however, shall not include any of the following: (1) sales of United States postage; (2) any sales or excise taxes payable by Lessee to any governmental agency as a direct result of operations under this Lease, provided that the amount of such taxes are shown on the books and records elsewhere herein required to be maintained; and (3) gratuities, provided the customer voluntarily determines the amount of said gratuity to be paid, or the customer is aware that the Lessee has added a pre-established gratuity to the charge for the services rendered and said additional amount is segregated and identified as a gratuity on the billing to the customer.

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

Bad debt losses shall not be deducted from gross income.

2.6 Reporting of Gross Income. Commencing in the first (1st) calendar month after the date in which construction of any component of the Project is open to the public for business, on or before the twentieth (20th) day of each month Lessee shall deliver to Lessor, in a form prescribed by Lessor, a detailed report of gross income for that portion of the accounting year which ends with and includes the last day of the previous calendar month. The accounting year shall be twelve (12) full calendar months. The first (1st) accounting year shall begin on the first (1st) day of the first (1st) month during which the Percentage Rent described in this Lease becomes effective. Subsequent accounting years shall begin upon each anniversary of that date during the Lease Term or any extension thereof. Each report shall be signed by Lessee or its responsible agent under penalty of perjury and shall include the following:

- (a) The total gross income for said portion of the accounting year itemized as to each of the business categories for which a separate Percentage Rent category is established in Section 2.2 above.
- (b) The related itemized amounts of Percentage Rent computed as provided in Section 2.2 above and the total thereof.
- (c) The total Rent previously paid by Lessee for the accounting year within which the preceding month falls.

2.7 Calculation of Percentage Rent. Concurrently with the rendering of each monthly statement, Lessee shall pay the greater of the following two (2) amounts:

- (1) The total Percentage Rent computed for that portion of the accounting year ending with and including the last day of the preceding month (Item [b] above), less total Rent previously paid for the accounting year (Item [c] above); or
- (2) One-twelfth (1/12th) of the minimum annual rent, multiplied by the number of months from the beginning of the accounting year to and including the preceding month, less total Rent previously paid for accounting year (Item [c] above).

2.8 Delivery of Rent Payment. All Rent payments shall be delivered to and statements required above shall be filed with the Treasurer of the Lessor. Checks shall be made payable to the Treasurer and mailed to the Office of the Treasurer, San Diego Unified Port District, Post Office Box 120488, San Diego, California 92112-0488, or delivered to the Office of the Treasurer, 3165 Pacific Highway, San Diego, California. The designated place of payment and filing may be changed at any time by Lessor upon

ten (10) days' written notice to Lessee. Lessee assumes all risk of loss and responsibility for late charges, as hereinafter described, if payments are made by mail.

- 2.9 Late Payment of Rent. Lessee hereby acknowledges that late payment by Lessee to Lessor of Rent and other sums due hereunder will cause Lessor to incur costs not contemplated by this Lease. Accordingly, in the event Lessee is delinquent in rendering to Lessor an accounting of Rent due or in remitting the Rent due in accordance with the Rent provisions of this Lease, then the rent not paid when due shall bear interest at the rate of ten percent (10%) per annum from the date due until paid. If Lessee continues to be delinquent after ten (10) days written notice from Lessor, Lessee shall pay, in addition to the unpaid Rent and interest due, five percent (5%) of the delinquent Rent. If Rent is still unpaid at the end of twenty-five (25) days following such notice, Lessee shall pay, in addition to the unpaid Rent and interest due, an additional five percent (5%) (being a total of ten percent [10%]). The parties hereby agree that said late charges are appropriate to compensate Lessor for loss resulting from Rent delinquency including, without limitation, lost interest, opportunities, legal costs, and the cost of servicing the delinquent account. Acceptance of such late charges and any portion of the late payment by Lessor shall in no event constitute a waiver of Lessee's default with respect to such overdue amount, nor prevent Lessor from exercising any of its other rights and remedies. The Executive Director of Lessor shall have the right to waive for good cause any late charges upon written application of Lessee for any such delinquency period.
- 2.10 Method of Rent Payment. All payments by Lessee to Lessor shall be by a good and sufficient check. No payment made by Lessee or receipt or acceptance by Lessor of a lesser amount than the correct amount of Rent due under this Lease shall be deemed to be other than a payment on account of the earliest Rent due hereunder, nor shall any endorsement or statement on any check or any letter accompanying any check or payment be deemed an accord and satisfaction, and Lessor may accept such check or payment without prejudice to Lessor's right to recover the balance or pursue any other available remedy.
- 2.11 Financial Record Keeping.
- (a) Lessee shall, at all times during the Term of this Lease, keep or cause to be kept, accurate and complete records and double entry books of account of all financial transactions in the operation of all its business activities, of whatever nature, conducted in connection with the rights and obligations granted in this Lease. 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) shall be prepared not less than annually.

- (b) All retail sales shall be recorded by means of cash registers except as expressly provided for herein. All cash registers shall be equipped with sales totalizer counters for all sales categories, as herein provided, which counters are locked in, constantly accumulating, and which cannot be reset.
- (c) Said registers shall further contain tapes upon which sales details are imprinted. Beginning and ending sales totalizer counter readings shall be made a matter of daily record. Retail sales may be recorded by a system other than cash registers provided such system is approved in writing by the Executive Director of Lessor in his sole and absolute discretion. In addition to the above, if Lessee charges admission or cover charges, Lessee shall also issue preprinted serially numbered tickets for each such admission or cover charge. Further, if Lessee rents vehicles, boats, or other vessels, Lessee shall issue preprinted serially numbered rental agreements for each such rental transaction. Lessee shall keep a sequential record of said tickets and agreements, both issued and unissued.

#### **2.12 Audit of Lessee's Financial Records.**

- (a) All Lessee'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 as are acceptable to Lessor. Lessor shall have the right at any and all reasonable times to examine and audit said books, records, financial statements, and documentation, without restriction, for the purpose of determining the accuracy thereof, the accuracy of the monthly statements of gross income submitted, and the accuracy of the Rent paid to the Lessor.
- (b) Lessee's failure to keep such books of account, records, financial statements, and documentation and make them available for inspection by Lessor is a breach of this Lease and cause for termination. The Executive Director of Lessor shall have the discretion to require the installation of any additional accounting methods or controls he may deem necessary, subject to prior written notice. In the event the

Lessee does not make available the original records and books of account at the Premises or within the limits of San Diego County, Lessee agrees to pay all necessary travel expenses incurred by Lessor in conducting an audit at the location where said records and books of account are maintained.

- (c) Additionally, if the audit reveals a discrepancy of more than five percent (5%) between the Rent due as reported by Lessee and the Rent due as determined by the audit, and/or Lessee has failed to maintain complete and accurate books of account, records, financial statements, and documentation in accordance with this Lease, then Lessee shall pay the cost of the audit, as determined by the Executive Director of Lessor, plus the Rent determined to have been underpaid. In addition, should Lessee fail to pay said amounts within thirty (30) days after written notice from Lessor, then Lessee shall pay an additional fee of ten percent (10%) of said unpaid amounts as compensation to Lessor for administrative costs and loss of interest as previously described herein, along with the Rent determined to have been underpaid.
- (d) Furthermore, if the audit reveals that Rent due to Lessor is less than five percent (5%) between the Rent due as reported by Lessee and the Rent due as determined by the audit, and should Lessee fail to pay said unpaid Rent within thirty (30) days after written notice from Lessor, then Lessee shall pay an additional fee of ten percent (10%) of said unpaid Rent as compensation to Lessor for administrative costs and loss of interest as previously described herein, along with the Rent determined to have been underpaid.
- (e) Lessee agrees to pay such amounts and further agrees that the specific late charges represent a fair and reasonable estimate of the costs that Lessor will incur from Lessee's late payment. Acceptance of late charges and any portion of the late payment by Lessor shall in no event constitute a waiver of Lessee default with respect to late payment, nor prevent Lessor from exercising any of the other rights and remedies granted in this Lease. The Executive Director of Lessor shall have the right to waive for good cause any late charges upon written application of Lessee for any such delinquency period.

3. USE: Lessee agrees that the Premises may only be used for hotel and marina purposes including related businesses such as restaurants, cocktail lounges, retail shops, recreation, and for purposes connected therewith and incidental thereto and for no other purposes whatsoever, unless Lessee obtains the prior written consent of Lessor, as evidenced by resolution, first had and obtained. Lessor shall not unreasonably withhold its consent for any proposed change of use which would be allowable under Lessor's Port Master Plan and which would not require an Environmental Impact Report (EIR) pursuant to the California Environmental Quality Act. If a proposed change in use requires an EIR, then Lessor's consent may be granted in Lessor's sole discretion.

4. EFFECT OF OPTION AGREEMENT: The rights, duties, and obligations of the parties as set forth in the Option Agreement, attached hereto as Exhibit C, shall be incorporated into and form part of this Lease. In the event of any conflict between the terms of the Option Agreement and this Lease, the provisions of this Lease shall prevail.

5. CONSTRUCTION OF PROJECT: By no later than two (2) months from the Commencement Date of this Lease, Lessee shall commence construction and diligently proceed to completion of the development of the Project on the Premises in accordance with this Section. The Project shall be constructed on the Premises and shall include a hotel up to five hundred (500) feet in height and having between one thousand (1,000) and one thousand two hundred (1,200) guest room equivalents and up to one hundred thousand (100,000) square feet of banquet and meeting room space (exclusive of pre-function and breakout areas), with restaurants, cocktail lounges, retail shops, a two hundred thirty- (230-)slip marina, and supporting facilities and amenities substantially in accordance with the working drawings and specifications heretofore approved by Lessor, subject to such changes thereto as shall hereafter be approved by Lessor in writing, which working drawings and specifications and any such approved changes thereto are by this reference made a part hereof. The construction described in this Section 5 shall be completed by no later than January 2, 2004 ("Completion Date"), unless such date previously has been extended pursuant to Paragraph 6.2 of the Option Agreement, or is further extended pursuant to Section 5(g) of this Lease.

- (a) Except as provided below, in the event: (i) such construction is not completed by the Completion Date; or (ii) Lessee fails to actively make progress with respect to the construction for a period of one hundred twenty (120) days and fails to commence construction thereafter within thirty (30) days following written notice from Lessor, then Lessor shall have the right, but not the obligation, to terminate this Lease. In the event this Lease is terminated pursuant to this Section, Lessee shall execute and record in the Official Records of San Diego County, California, any necessary documents to ensure that the Project can be operated on the Premises, including without limitation, a quitclaim deed executed by Lessee in favor of Lessor relinquishing all Lessee's right, title, and interest in the Premises and/or a lease termination agreement (to be determined by Lessor) executed by Lessor and Lessee terminating this Lease.

- (b) No construction of any improvement upon the Premises shall commence without the prior approval of the Executive Director of Lessor, as evidenced in writing, and all such construction shall be in accordance with plans and specifications which must be submitted to and approved by the Executive Director in writing prior to the commencement of any such construction.
- (c) When required by Lessor, Lessee shall pave or plant ground cover, at Lessee's own cost and expense, over the entire area of the Premises not covered by other improvements installed pursuant to plans and specifications approved by Executive Director of Lessor. All paving or ground cover shall be in accordance with plans and specifications approved by the Executive Director in writing prior to the commencement of any such paving or planting.
- (d) Lessee expressly covenants and agrees that the total investment for the construction of the improvements described in Section 5 of this Lease (including furniture, furnishings, fixtures, and equipment), shall be in excess of Two Hundred Million Dollars (\$200,000,000).
- (e) Within sixty (60) days following completion of any substantial improvement or installation within the Premises, Lessee shall furnish Lessor an itemized statement of the actual construction cost of such improvement or installation. The statement of cost shall be sworn to and signed by Lessee or his responsible agent under penalty of perjury.
- (f) For purposes of this Lease, construction shall be deemed to have commenced only after a City of San Diego grading or building permit has been issued and a significant breaking of ground has occurred pursuant to those permits and the construction plans thereto which have been previously expressly approved in writing by Lessor; and construction shall be deemed to have been completed when the same shall have been substantially completed in fact, subject only to the completion of "punch-list" items and a valid notice of completion is recorded in the office of the County Recorder of San Diego County with respect to the contract for the improvements or the last major portion of the improvements. Lessor agrees that if a lender to which Lessor has consented under Section 10 so requests, Lessor will execute, acknowledge, and deliver, within thirty (30) days following a request therefore, to such lender an estoppel certificate stating and acknowledging that the provisions of this Section 5 relating to the timely commencement and/or completion of construction have been complied with, or if in Lessor's judgment such provisions have not been complied with, then specifying the requirements that have not been complied with.

- (g) Force Majeure Event: Each of the following events, if it causes a delay in the development of the Project despite Lessee's best efforts to proceed with such development, will constitute a "Force Majeure Event": (i) riots; (ii) natural disasters and other acts of God, including fires, earthquakes, floods, and hurricanes; (iii) war; (iv) governmental laws, rules, regulations, or restrictions affecting development of the Project; (v) actions by third parties beyond Lessee's reasonable ability to control, including, without limitation, any third party's failure to perform certain actions required to develop the Project. Notwithstanding the termination provisions set forth in this Section 5, the Completion Date will be extended one (1) day for each day an obligation is not satisfied due to a delay caused by a Force Majeure Event (as defined above).

6. LIQUIDATED DAMAGES: Lessee will be obligated to pay Liquidated Damages to Lessor in accordance with the provisions as set forth in this Section 6.

6.1 Ten (10) Year Liquidated Damages Obligation. Lessee will pay Liquidated Damages in the amount of Five Million Dollars (\$5,000,000) per year (prorated on a daily basis for a three hundred sixty-five- [365-] day year) for a maximum of ten (10) years and a maximum amount of Fifty Million Dollars (\$50,000,000) ("Liquidated Damages Amount") only if: (i) the Project is not open to the public for business on or before January 2, 2004 (unless such date has been extended pursuant to Paragraph 6.2 of the Option Agreement and/or the provisions of Section 5[g] of this Lease); and (ii) Lessor has not elected to terminate this Lease as a result of a default of Lessee. Under no circumstances will Lessee's failure, for any reason whatsoever, to obtain financing for the Project, including without limitation, failure to obtain financing due to economic or other conditions beyond Lessee's reasonable control, be considered or treated as an event which extends the date by which the Project shall be open to the public for business. Lessee will pay such Liquidated Damages monthly on a prorated basis for each day after January 2, 2004 (unless such date has been extended pursuant to Paragraph 6.2 of the Option Agreement and/or the provisions of Section 5[g] of this Lease), that the Project is not open to the public for business.

6.2 One (1) Year Liquidated Damages Obligation. In the alternative, and notwithstanding any other provision of this Lease, Lessee will pay Liquidated Damages in the amount of Five Million Dollars (\$5,000,000) per year (prorated on a daily basis for a three hundred sixty-five- [365-] day year) for a maximum of one (1) year and a maximum of Five Million Dollars (\$5,000,000) if: (i) the Project is not open to the public for business on or before January 2, 2004 (unless such date is extended pursuant to the

provisions of Paragraph 6.2 of the Option Agreement and/or Section 5[g] of this Lease); and (ii) Lessor has elected to terminate this Lease as a result of a default of Lessee. Lessee will pay such Liquidated Damages monthly on a prorated basis for each day after January 2, 2004 (unless such date has been extended pursuant to the provisions of Section 5[g] of this Lease), that the Project is not open to the public for business. Under no circumstances will Lessee's failure, for any reason whatsoever, to obtain financing for the Project, including without limitation, failure to obtain financing due to economic or other conditions beyond Lessee's reasonable control, be considered or treated as an event which extends the date by which the Project shall be open to the public for business.

LESSEE AND LESSOR AGREE AND ACKNOWLEDGE THAT IF THE PROJECT IS NOT OPEN TO THE PUBLIC FOR BUSINESS ON OR BEFORE JANUARY 2, 2004 (AS SUCH DATE MAY BE EXTENDED PURSUANT TO THE PROVISIONS OF PARAGRAPH 6.2 OF THE OPTION AGREEMENT AND/OR SECTION 5[g] OF THIS LEASE), THEN LESSOR WILL SUFFER DAMAGES IN AN AMOUNT WHICH IS SUBSTANTIAL, BUT IS NOT READILY SUSCEPTIBLE OF DETERMINATION. THEREFORE, LESSOR WILL HAVE THE RIGHT TO RECEIVE FROM LESSEE LIQUIDATED DAMAGES IF THE PROJECT IS NOT OPEN TO THE PUBLIC FOR BUSINESS ON OR BEFORE JANUARY 2, 2004 (UNLESS SUCH DATE IS EXTENDED PURSUANT TO THE PROVISIONS OF PARAGRAPH 6.2 OF THE OPTION AGREEMENT AND/OR SECTION 5[g] OF THIS LEASE), FOR ANY REASON WHATSOEVER. THE LIQUIDATED DAMAGES WILL BE IN THE AMOUNT OF FIVE MILLION DOLLARS (\$5,000,000) PER YEAR (SUBJECT TO PRORATION AS DESCRIBED ABOVE) WITH A MAXIMUM DURATION OF TEN (10) YEARS IF THIS LEASE IS NOT TERMINATED AND A MAXIMUM DURATION OF ONE (1) YEAR IF THIS LEASE IS TERMINATED. THE AMOUNT OF LIQUIDATED DAMAGES OWED WILL BE REDUCED BY THAT PORTION OF THE DEPOSIT (AS DEFINED IN THE OPTION AGREEMENT) NOT APPLIED AS A RENT CREDIT PURSUANT TO PARAGRAPH 3(g) OF THE OPTION AGREEMENT. LESSEE'S OBLIGATION TO PAY LIQUIDATED DAMAGES WILL TERMINATE UPON THE EARLIER OF THE EXPIRATION OF SUCH PERIOD (WHETHER IT BE TEN [10] YEARS OR ONE [1] YEAR) OR THE DATE ON WHICH THE PROJECT IS OPENED TO THE PUBLIC FOR BUSINESS. THE PARTIES ACKNOWLEDGE THAT THE PAYMENT OF THE LIQUIDATED DAMAGES TO LESSOR WILL BE LESSOR'S SOLE REMEDY AGAINST LESSEE FOR ANY DAMAGES SUFFERED BY LESSOR AS A RESULT OF LESSEE'S FAILURE TO SATISFY ITS OBLIGATIONS HEREUNDER.

Lessor:

\_\_\_\_\_  
(initials)

Lessee:

\_\_\_\_\_  
(initials)

6.3 Guarantee of Liquidated Damages Amount. Lessee represents and warrants that it is the owner of the Hyatt Hotel and is the lessee from Lessor of the property upon which the Hyatt Hotel is located (the "Hyatt Lease"). Lessee is also a party to an Operating Agreement (the "Operating Agreement") between Lessee and Hyatt Corporation ("Hyatt") concerning the operation of the Hyatt Hotel. Pursuant to the Hyatt Lease, the Operating Agreement may not be amended by Lessee and Hyatt without the prior written consent of Lessor. Lessee, in its capacity as owner of the Hyatt Hotel, hereby agrees to pay to Lessor the Liquidated Damages Amount, if any, pursuant to the terms of this Section 6.

6.3.1 Lessee has delivered to Hyatt irrevocable instructions (in form reasonably acceptable to Lessor) to pay Lessor the Liquidated Damages owed by Lessee under the terms of Section 6 upon notice from Lessor to do so, without any inquiry by Hyatt as to the reasons for or accuracy of such notification. In order to receive payment of Liquidated Damages from Hyatt, Lessor must notify Hyatt that Lessee owes Lessor Liquidated Damages under the terms of this Lease and such notice will specify that the Liquidated Damages have not been paid. Lessor will concurrently deliver a copy of such notice to Lessee. Thereafter, until such time as Lessee has satisfied its obligation to pay Liquidated Damages under this Lease or such obligation has been extinguished, Hyatt will, on the first (1st) day of each month following January 2, 2004, as such date may be extended pursuant to Paragraph 6.2 of the Option Agreement and/or the terms of Section 5(g) of this Lease, pay directly to Lessor, from funds otherwise payable by Hyatt to Lessee pursuant to the Operating Agreement, a sum equal to one-twelfth (1/12th) of Five Million Dollars (\$5,000,000).

6.3.2 The irrevocable instructions to Hyatt specifically identify Lessor as an intended third-party beneficiary with respect to the irrevocable instructions and the Operating Agreement, and further specify that neither the instructions nor the Operating Agreement may be amended or terminated without Lessor's prior written approval, for so long as Lessee remains obligated to pay Liquidated Damages under the terms of this Lease. Lessee will use its best efforts to obtain Hyatt's written acknowledgment of the irrevocable instructions and an agreement from Hyatt that it will follow such instructions until receiving written notice from Lessee and Lessor that Lessee is no longer obligated to pay Liquidated Damages.

6.3.3 If Hyatt timely makes the payment of Liquidated Damages to Lessor in the manner specified in Section 6.3.1 above, then all other funds which would otherwise be payable by Hyatt to Lessee pursuant to the Operating Agreement shall be available for distribution to Lessee. Alternatively, if the payment described above is not timely made by Hyatt to Lessor, and Lessee does not otherwise pay the Liquidated Damages as they are owed, then: (i) no further distributions can be made to Lessee by Hyatt pursuant to the Operating Agreement; (ii) all distributions that would otherwise have been made by Hyatt to Lessee under the terms of the Operating Agreement will be made to a bank account established by Lessor in which Lessor holds a perfected first-priority security interest until such time as the balance in such account has reached Five Million Dollars (\$5,000,000); (iii) the unpaid portion of the Liquidated Damages will accrue and bear interest at a rate equal to the lesser of {a} the prime rate then in effect plus one (1) percentage point, and {b} the maximum rate permitted by applicable law, until such time as the delinquent amount is paid; and (iv) notwithstanding the terms of any other provision of this Lease, Lessor may terminate this Lease, and Lessee will remain obligated to pay Liquidated Damages until such time as Lessee has paid the Liquidated Damages Amount pursuant to this Section 6. Before Lessor may terminate this Lease pursuant to item (iv) in the preceding sentence, Lessor will provide Lessee notice and a fifteen- (15-) day period (commencing on the date such notice is received) to pay the Liquidated Damages then due and payable.

6.3.4 The irrevocable instructions provided for in Section 6.1.1 above shall terminate upon written notice to Hyatt by Lessor and Lessee when Lessee has satisfied its obligation to pay Liquidated Damages or such obligation is terminated pursuant to the terms of this Lease.

6.4 Hyatt Refinancing. Lessor hereby agrees to amend the provisions of this Section 6, and any and all other agreements (if any) which may have been entered into in order to effectuate the terms hereof (herein collectively referred to as the "Security Agreements"), in order to satisfy any reasonable requirements of a lender in connection with any financing of the Hyatt Hotel; provided that Lessor has received assurances which, in the exercise of the Lessor's good faith discretion, satisfy Lessor that: (i) the obligations of Lessee under the Security Agreements will not be reduced or released; and (ii) the funds available for payment to Lessor pursuant to this Section 6 will, at all times that Lessee remains obligated to pay the Liquidated Damages Amount, continue to be not less than Five



Million Dollars (\$5,000,000) per year. Lessor further agrees that Lessee's obligations under the Security Agreements, and Lessor's rights thereunder, will at all times be subject and subordinate to any financing by Lessee of the Hyatt Hotel which has been approved by Lessor pursuant to the terms of the Hyatt Lease, this Lease, or any of the Security Agreements.

7. **IMPROVEMENTS:** Lessee may, at its own expense, make any alterations or changes in the Premises or cause to be built, made, or installed thereon any structures, machines, appliances, utilities, signs, or other improvements necessary or desirable for the use of said Premises as a hotel and marina, and may alter and repair any such structures, machines, or other improvements; provided, however, that (except for repairs or replacements of operating furniture, furnishings, fixtures, and equipment not affecting the structural integrity of the improvements or the exterior aesthetics of the project) no alterations and changes shall be made and no structures, machines, appliances, utilities, signs, or other improvements shall be made, built, or installed, and no major repairs thereto shall be made except in accordance with plans and specifications previously submitted to and approved by Executive Director of Lessor.

Lessee further agrees that no banners, pennants, flags, eye-catching spinners, or other advertising devices, nor any temporary signs shall be permitted to be flown, installed, placed, or erected on the Premises without written consent of Executive Director of Lessor.

Lessee shall notify Lessor before applying for any development or construction permit or license from any governmental regulatory agency pertaining to the Premises (except for repairs or replacements of operating furniture, furnishings, fixtures, and equipment not affecting the structural integrity of the improvements or the exterior aesthetics of the Project). Lessee shall provide Lessor with a copy of said application within five (5) days of making it, along with all plans submitted as part of the application. Lessee shall provide Lessor with a copy of any permit, license, or other authorization subsequently issued within ten (10) days of receipt thereof by Lessee.

Lessor shall not be liable in damages to anyone submitting plans and specifications for approval, as provided in this Lease, or to any owner, occupant, tenant, licensee, or other person subject to or affected by this Lease on account of: (i) Lessor's approval or disapproval of any plans or specifications, whether or not defective; (ii) any construction, performance, or nonperformance by Lessee of any work on the Premises whether or not pursuant to approved plans and specifications; (iii) any mistake in judgment, negligence, action, or omission in exercising Lessor's rights, powers, and responsibilities hereunder; or (iv) the enforcement or failure to enforce any of the provisions contained herein. Every person who submits plans or specifications to Lessor for approval agrees by submission of such plans and specifications, and every owner, tenant, licensee, or other occupant of the Premises or any portion thereof agrees by acquiring its interest therein, not to bring any suit or actions against Lessor seeking to recover any such damages. Lessor's approval of such plans and specifications shall not

constitute the assumption of any responsibility by Lessor or its representatives for the accuracy, efficacy, or sufficiency thereof, and Lessee shall be solely responsible therefor.

8. **TITLE TO IMPROVEMENTS:** Structures, installations, or improvements of any kind now existing or hereafter placed on the Premises by Lessee shall be and remain the property of Lessee during the Term of this Lease and shall at the option of Lessor be removed by Lessee at Lessee's expense. Lessor may exercise said option as to any or all of the structures, installations, and improvements either before or after the expiration or sooner termination of this Lease. If Lessor exercises such option, Lessee shall remove such structures, installations, or improvements within sixty (60) days after the expiration of the Term of this Lease or sooner termination thereof. If Lessee fails to remove such structures, installations, or improvements within said sixty (60) days, the Lessor shall have the right to have such structures, installations, or improvements removed at the expense of Lessee. As to any or all structures, installations or improvements that Lessor does not exercise said option for removal, Lessee shall have no right to remove such structures, installations, or improvements, and title thereto shall vest in the Lessor without cost to Lessor and without any payment to Lessee.

Machines, appliances, equipment, and trade fixtures of any kind now existing or hereafter placed on the Premises by Lessee shall be and remain the property of Lessee and shall be removed by Lessee within sixty (60) days after the expiration of the Term of this Lease or sooner termination thereof; provided, however, Lessee agrees to repair any and all damage occasioned by the removal thereof. If any such machines, appliances, equipment, and trade fixtures are not removed within sixty (60) days after the termination of this Lease, then they may be considered abandoned and shall thereupon become the property of Lessor without cost to the Lessor and without any payment to Lessee; except that Lessor shall have the right to have them removed at the expense of Lessee.

During any period of time employed by Lessee under this Section 8 to remove structures, installations, improvements, machines, appliances, equipment, and trade fixtures, Lessee shall pay Rent to Lessor in accordance with the Lease which said Rent shall be prorated daily.

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

In the event that any such lien, or any other liens or levy whatsoever of any nature caused by Lessee or Lessee's sublessees, contractors, and agents, is filed against the Premises or the leasehold interests of the Lessee therein, the Lessee shall, upon written request of Lessor, deposit with Lessor a bond conditioned for the payment in full of all

claims upon which said lien or levy has been filed. Such bond shall be approved by Lessor in its sole and absolute discretion and shall name Lessee as principal and be issued by a corporation licensed by the Insurance Commissioner of the State of California to transact the business of a fidelity and surety insurance company. Lessor shall have the right to declare this Lease in default in the event the bond required by this Section 9 has not been deposited with the Lessor within ten (10) days after written request has been delivered to Lessee.

10. LEASE ENCUMBRANCE: Lessee understands and agrees that it will be a default under this Lease if it encumbers this Lease, leasehold estate, the Premises, or the improvements thereon by a deed of trust, mortgage, or other security instrument to assure the payment of a promissory note of Lessee without the prior express written consent by resolution of Lessor in each instance.

Lessor agrees to negotiate in good faith with any financial institution with whom Lessee is negotiating to secure a loan to be secured by a deed of trust, mortgage or other security instrument encumbering the leasehold; and to amend this Lease to provide such terms as the proposed lender may reasonably require in order to provide such financing; provided, however, such amended terms will not include any economic concession by Lessor nor will Lessor be obligated to amend the Lease in any way which is inconsistent with Lessor's fiduciary duty to its Tidelands Trust or with its customary hotel leasing practices.

If a deed of trust, mortgage, or other security instrument which Lessor has consented to by resolution should at any time be in default, the consented-to lender shall have the right to accept an assignment of the Lease in lieu of foreclosure and shall also have the right to cause such foreclosure sale to be held, pursuant to either judicial proceedings or power of sale contained in its deed of trust or other security instrument, as provided by law, without the prior consent of the Lessor; provided, that with the exception of the consented-to lender, no assignment to the successful bidder shall be effective without the prior express written consent by resolution of the Lessor. Before the consented-to lender or any other to be consented-to assignee acquires the leasehold, it shall, as an express condition precedent, agree in writing to assume each and every obligation under this Lease. Furthermore, before any said consented-to lender, or any other consented-to assignee or purchaser, may subsequently assign or sublet all or any of its leasehold interest, it shall obtain the Lessor's prior express written consent by resolution in each instance. Following an assignment of the leasehold estate to an assignee approved by Lessor in accordance with this Section 10, a consented-to lender that has acquired the leasehold estate and assumed the Lessee's obligations, or has entered into a new lease pursuant to Section 12 of this Lease concurrently with a termination of this Lease, shall be released from all further obligations under this Lease, from and after the effective date of such assignment.

Whenever a lender, consented to by resolution of the Lessor as provided above, is required by the provisions of this Section 10 to obtain the Lessor's prior consent to an assignment to the successful bidder upon a foreclosure by such lender, or an assignment or subletting of all or substantially all of the Premises by said consented-to lender should it become the Lessee by reason of being the successful bidder upon said foreclosure or an assignment in lieu of foreclosure, or by reason of being the Lessee of a new lease entered into pursuant to Section 12 of this Lease, the Lessor will give such consent if the principals of such assignee, purchaser, or subtenant are reputable (meaning the absence of a reputation for dishonesty, criminal conduct, or association with criminal elements -- "reputable" does not mean "prestigious" nor does the determination whether one is reputable involve considerations of personal taste or preference), and they possess sufficient business experience and financial net worth demonstrating the ability to perform Lessee's obligations under this Lease (according to the standards for business experience and financial means applied generally by Lessor to new or renewed tenants of Lessor and actually met by such tenants at or about the time the request for Lessor's consent is made), and the assignee, purchaser, or subtenant agrees in writing to assume each and every obligation under this Lease; and Lessor will not unreasonably or arbitrarily withhold such consent; provided, however, that no such sublessee, assignee, or purchaser shall subsequently assign, transfer, or sublet any or all of the Premises without the express written consent by resolution of Lessor in accordance with Section 11 of this Lease, or encumber the Lease, leasehold estate, and improvements without the express written consent by resolution of Lessor in accordance with this Section 10 (except that if said consented-to lender becomes the lessee by reason of being the successful bidder upon foreclosure or an assignment in lieu of foreclosure, or by reason of being the lessee of a new lease entered into pursuant to Section 12 of this Lease) it may, upon a subsequent assignment or subletting of all or substantially all of the Premises by it, take back from its assignee, purchaser, or sublessee a purchase money deed of trust, mortgage, or security instrument provided it executes and submits to Lessor documentation substantially in the same form and content as was submitted to Lessor when Lessor's original consent to the encumbrance was granted. Only said consented-to lender or the successful bidder upon such foreclosure may enforce the provisions of this Section 10, and no other third-party shall have the rights or remedies, as third-party beneficiaries or otherwise, hereunder. The burden of producing evidence and the burden of proof showing to the Lessor that a prospective assignee, purchaser, or subtenant meets each and all of the above qualifications and standards shall be on said consented-to lender or successful bidder upon foreclosure. The Lessor's decision shall be made in light of the Lessor's high duty of care in administering a valuable public resource which it holds in trust for the people, and shall be final in the absence of fraud or arbitrary or unreasonable action in applying or failing to apply the above standards. In the event Lessor rejects the successful bidder upon foreclosure or an assignee or sublessee of the consented-to lender (said successful bidder or consented-to lender being sometimes referred to hereinafter as the "Aggrieved

Party," and said successful bidder or proposed assignee or sublessee from the consented-to lender being sometimes referred to hereinafter as the "Applicant"), the sole remedy of the Aggrieved Party shall be to seek relief in the nature of specific performance through the arbitration procedure hereinafter established, and in no event shall Lessor be liable to the Aggrieved Party or Applicant, or any person or firm whatsoever, for money damages (except that the Aggrieved Party shall be entitled to recover such damages, if any, as it may sustain as a result of a failure or refusal of Lessor to abide by an order of the Superior Court confirming an award in favor of the Aggrieved Party in the Arbitration hereinafter referred to). The issue to be submitted to arbitration shall be whether the record before Lessor's Board of Port Commissioners contains substantial evidence to support the decision to reject the Applicant in accordance with the standards of reputation, business experience, and financial means as provided above. Said issue may be submitted by the Aggrieved Party to arbitration, which shall be conducted, as limited hereby, pursuant to Title 9 of Part 3 of the California Code of Civil Procedure or its successor statutes (section references herein shall be to the Code of Civil Procedure), as amplified and modified by the following provisions: Arbitration shall be initiated by a written demand for arbitration which shall be filed with Lessor no later than thirty (30) days following the adoption by Lessor of a resolution rejecting the Applicant. If the Aggrieved Party so elects, Lessor shall be deemed to have adopted a resolution rejecting an Applicant if Lessor has not acted within sixty (60) days after a written application to approve the Applicant is filed with Lessor. The arbitration shall be by a single neutral arbitrator who shall not be resident of the County of San Diego. If the parties have not agreed on the selection of the arbitrator within five (5) days after the demand for arbitration is filed with Lessor, either party may petition the court to select the arbitrator pursuant to Section 1281.6. Each party shall submit its nominees, if any, to the court within five (5) days after said petition is served and filed. The arbitrator shall not conduct a trial de novo but shall consider only said record before Lessor's Board of Port Commissioners (except that the arbitrator may also consider evidence outside said record, which was not reasonably discoverable prior to the Board's decision, of any fraudulent conduct of a representative of Lessor materially affecting said decision). The arbitrator shall make his award within forty-five (45) days after his appointment. The right of any party to take depositions for discovery purposes, as provided in Section 1283.05, is hereby waived. Certain periods of time set forth in said Title 9 (or its successor provisions), shall be adjusted as follows: Sections 1284, 1288.4, 1290.2, and 1290.6 — time is one-half (1/2) of that provided; Section 1288—time is thirty (30) days, and fifteen (15) days; and Section 1288.2 — time is fifteen (15) days. Venue of the arbitration hearing and any court proceedings shall be in San Diego, California. The decision of the Superior Court in any proceeding to confirm, correct, or vacate the award shall be final, and the parties to the arbitration waive any rights to appeal therefrom, as provided in Sections 1294 and 1294.2 or otherwise. The parties shall bear their costs, fees and expenses incurred in connection with the arbitration in accordance with the provisions of Section 1284.2. Said consented-to lender shall cause a statement to be included in any notice of foreclosure sale covering the foregoing requirements for the Lessor's consent to an

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assignment upon such foreclosure. Except for subleases and utility easements, and other necessary rights of way granted pursuant to Section 22 of this Lease, Lessor shall not expressly consent to a subsequent lien or encumbrance against the Premises without the prior written consent of said existing consented-to lender.

Said consented-to lender shall not assign its said security interest in the Premises in whole or in part without the prior written consent by resolution of the Lessor in each instance, except that the Lessor's consent will be deemed given (and such assignee will for all purposes of this Lease be deemed a consented-to lender and a lender consented-to by the Lessor by resolution) to such an assignment if it is to: 1) the parent company of said consented-to lender; 2) a wholly owned subsidiary of said consented-to lender so long as such subsidiary is in good legal standing under the laws of its jurisdiction of incorporation and has assets exceeding Five Hundred Million Dollars (\$500,000,000); 3) a financial institution in good legal standing under the laws of its jurisdiction of incorporation having assets exceeding Five Hundred Million Dollars (\$500,000,000); 4) a wholly owned subsidiary of a financial institution described in {3} above so long as such subsidiary is in good legal standing under the laws of its jurisdiction of incorporation and has assets exceeding Five Hundred Million Dollars (\$500,000,000), provided that at such time as the improvements described in Section 5, above, are complete and a Certificate of Occupancy has been issued for all the improvements referred to in such Section 5, a parent company guarantee guaranteeing Lessee's obligations under this Lease should such subsidiary of the consented-to lender foreclose its leasehold mortgage in accordance with the provisions of this Section 10 and become the Lessee hereunder may be delivered to Lessor in lieu of satisfying the Five Hundred Million Dollars (\$500,000,000) asset requirement; 5) the United States of America or any State thereof, or any agency thereof; or 6) an assignee by operation of law (such as, for example, a State insurance department engaged in supervising the liquidation or rehabilitation of an insurance company lender); provided that for purposes of the foregoing provisions "financial institution" shall mean either an insurance company qualified to do business in the State of California, or a federally or State chartered bank, savings bank, or savings and loan association, or 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, (such as, for example, the California State Teachers' Retirement System); provided that no further assignment by such assignee will be permitted without complying with the requirements of this Section 10; provided, further, that a duplicate original of the instrument or instruments of such assignment and, in case of an assignment where the Lessor's consent is deemed given, reasonably satisfactory evidence that such assignee complies with the foregoing requirements shall be promptly delivered to the Lessor, and the assignee shall expressly agree to take such assignment subject to all the rights of the Lessor under this Lease.

The term "consented-to lender" as used in this Lease may include one or more lenders holding obligations of the Lessee secured by a single deed of trust, mortgage, or other security instrument. A consented-to lender may act for its own account or as a trustee so long as when it acts as a trustee, the trust maintains a net worth of not less than Five Hundred Million Dollars (\$500,000,000).

11. ASSIGNMENT - SUBLEASE: Lessee shall not assign or transfer the whole or any part of this Lease or any interest therein, nor sublease the whole or any part of the Premises or any right or privilege appurtenant thereto, nor contract for the management or operation of the whole or any part of the Premises, nor permit the occupancy of any part thereof by any other person or entity, nor permit transfer of the Lease or possession of the Premises by merger, consolidation, or dissolution, without the consent of Lessor, evidenced by resolution, first had and obtained in each instance. Except as the result of death or disability, no changes in the general partner of the partnership named herein as Lessee, in the managing officer of said general partner or in the control of said general partner (on the date of execution of this Lease, control is held by Mr. Douglas F. Manchester) shall be made without the consent of Lessor, evidenced by resolution, first had and obtained in each instance. Any changes in the respective interests of the limited partners of the partnership named herein as Lessee, including without limitation any withdrawal, admittance, or change of said limited partnership interests, or dissolution of said limited partnership interests, may be made without the consent of Lessor so long as Lessee furnishes Lessor with written notification of any such change by certified mail delivered no later than ten (10) days after said change.

It is mutually agreed that the personal qualifications of the person controlling the general partner of the partnership herein named as Lessee are a part of the consideration for the granting of this Lease, and said person does hereby agree to maintain active control and supervision of the operations conducted on the Premises. Except as provided above, any such assignment, transfer, hypothecation, withdrawal, admittance, dissolution, or change, in whole or in part, including without limitation as a result of an election or action by the partners, whether voluntary or involuntary, by operation of law or otherwise, of the Lease or any interest therein, or any sublease, or any management or operating contract, or, including without limitation, changes in the respective partnership interests of any of the partners of the partnership herein named as Lessee, shall be deemed an assignment or sublease prohibited hereby and shall not be valid or effective without the prior express written consent of Lessor, first had and obtained in each instance; provided, however, nothing herein contained shall be construed to prevent the occupancy of said Premises by an employee or business invitee of Lessee.

Lessor shall give such consent if the principals of such assignee, purchaser, or subtenant are reputable (meaning the absence of a reputation for dishonesty, criminal conduct, or association with criminal elements -- "reputable" does not mean "prestigious" nor does the determination whether one is reputable involve considerations of personal taste or preference), and they possess sufficient business experience and financial means to perform the Lessee's obligations under this Lease (according to the

standards for business experience and financial means applied generally by Lessor to new or renewed tenants of Lessor and actually met by such tenants at or about the time the request for Lessor's consent is made), and the assignee, purchaser, or subtenant agrees in writing to assume each and every obligation under this Lease.

In the event any consent of Lessor is given for any Lease assignment or transfer, the following shall apply in each instance: (i) in the event the assignment or transfer occurs on or after the twenty-fifth (25th) anniversary of the Commencement Date of this Lease, the Lessor shall be paid additional Rent, which may be Percentage Rent, to equal the full fair market rent, commencing on the effective date of such proposed assignment or transfer, unless on that date the Rent being paid under this Lease is equal to the full fair market rent; and (ii) the Assignee hereby agrees and assumes each and every obligation under the Lease. Notwithstanding, item (i) shall not apply in the event of: (a) a Lease assignment or transfer to a third party from a consented-to lender which acquired title to the Lease by foreclosure or deed in lieu of foreclosure or a new Lease pursuant to the provisions of Section 12; or (b) assignment or transfer of the Lease to a consented-to lender by deed in lieu of foreclosure, or to a consented-to lender or a third (3rd) party as the successful bidder at a foreclosure sale. The Rent under this Lease and any change resulting therein effective upon any Lease assignment or transfer as provided in this Section shall be for the remainder of the rental period during which it occurs, and any said Rent shall thereafter be subject to rental review at the commencement of subsequent and succeeding rental periods in accordance with the provisions of Section 2 of this Lease.

In the event any consent of Lessor is given to sublease, the following shall apply in each instance: (i) in the event the sublease occurs on or after the twenty-fifth (25th) anniversary of the Commencement Date of this Lease, the Lessor shall be paid additional Rent, which may be Percentage Rent, to equal the full fair market rent for the sublease area, commencing on the effective date of such proposed sublease and continuing for a specified period of time which shall not extend beyond the remainder of the master Lease rental period during which it occurs or until the termination of the sublease, whichever occurs first, unless on that date the Rent being paid under this Lease for said area is equal to the full fair market rent; and (ii) other conditions and qualifications determined by the Board of Port Commissioners of Lessor. As long as said sublease is in effect, said Rent for the sublease area shall thereafter be subject to rental review at the commencement of subsequent and succeeding master Lease rental periods, in accordance with the provisions of Section 2 of this Lease.

In the event the parties cannot agree to an amount that is equal to the full fair market rent described in this Section, the full fair market rent shall be determined by the arbitration described in Section 2.4 of this Lease, except that the arbitration award shall be for a limited period of time commencing and ending as provided in this Section and not for a "rental period" as specified in said Section 2.4. Until said full fair market rent is determined pursuant to said Section 2.4, the Lessee shall continue to make rental payments as required by this Lease at the same rate or rates in effect on the effective



date of the Lease assignment or sublease. Because of this provision, underpayment of Rent, if any, shall be paid to Lessor within ten (10) days of the date that the full fair market rent is determined by said arbitration procedure.

## 12. DEFAULTS AND REMEDIES:

12.1 Defaults. The occurrence of any one (1) or more of the following events shall constitute a default hereunder:

- (a) Failure to use the Premises in accordance with Section 14 hereof for a period of ten (10) days or longer following completion of the construction described in Section 5, where such failure continues for a period of thirty (30) days after written notice thereof.
- (b) Failure by Lessee to make any payment of Rent or other payment or charge required to be made by Lessee hereunder as and when due, where such failure shall continue for a period of ten (10) days after written notice thereof.
- (c) Failure by Lessee to submit any report of gross income required under this Lease as and when due, where such failure shall continue for a period of five (5) days after written notice thereof.
- (d) Failure by Lessee to perform any other express or implied covenants or provisions herein contained should such failure continue for sixty (60) days after written notice thereof from Lessor to Lessee specifying the particulars of such default; provided, further, that if the nature of Lessee's default is such that more than sixty (60) days are reasonably required for its cure, then Lessee shall not be deemed to be in default if Lessee shall commence such cure within said sixty (60) day period and thereafter diligently prosecute such cure to completion.
- (e) Subject to any restrictions or limitations placed on Lessor by applicable laws governing bankruptcy, Lessee's: (a) application for, consent to, or suffering of the appointment of a receiver, trustee, or liquidator for all or for a substantial portion of its assets; (b) making a general assignment for the benefit of creditors; (c) admitting in writing its inability to pay its debts or its willingness to be adjudged a bankrupt; (d) being adjudged a bankrupt; (e) filing a voluntary petition or suffering an involuntary petition under any bankruptcy, arrangement, reorganization, or insolvency law (unless in the case of an involuntary petition, the same is dismissed within sixty [60] days of such filing); or (f) suffering or permitting to continue unstayed and in effect for thirty (30)

consecutive days any attachment, levy, execution, or seizure of all or a substantial portion of Lessee's assets or of Lessee's interest in this Lease.

The conditions of Section 12.1(e) shall not be applicable or binding on the beneficiary in any deed of trust, mortgage, or other security instrument on the Premises which is of record with Lessor and has been consented to by resolution of Lessor, or to said beneficiary's successors in interest consented to by resolution of Lessor, as long as there remains any monies to be paid by Lessee to such beneficiary under the terms of such deed of trust; provided that such beneficiary or its successors in interest, continuously pays to the Lessor all Rent due or coming due under the provisions of this Lease and the Premises are continuously and actively used in accordance with Section 14 of this Lease.

**12.2 Remedies.** In any of such uncured events of default and in addition to any or all other rights or remedies of Lessor hereunder or by law provided, Lessor may exercise the following remedies at its sole option:

- (1) **Termination.** Terminate Lessee's right to possession of the Premises by any lawful means, in which case this Lease shall terminate and Lessee shall immediately surrender possession of the Premises to Lessor. In such event Lessor shall be entitled to recover from Lessee:
  - (a) The amount, at the time of award, of the unpaid Rent which had been earned at the time of termination;
  - (b) The amount, at the time of award, by which the unpaid Rent which would have been earned after termination until the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided;
  - (c) The amount, at the time of award, by which the unpaid Rent for the balance of the Term of this Lease after the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided; and
  - (d) Any other amount necessary to compensate Lessor for all the detriment proximately caused by Lessee's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result therefrom including, but not limited to, 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.

(e) The "amount at the time of award," as used in subparagraphs (a) and (b) shall be computed by allowing interest at ten percent (10%) per annum from the dates such amounts accrued to Lessor. The amount at the time of award of the amount referred to in subparagraph (c) shall be computed by discounting such amount at one (1) percentage point above the discount rate of the Federal Reserve Bank of San Francisco at the time of award.

(2) Reletting. Without terminating or effecting a forfeiture of the Lease or otherwise relieving Lessee of any obligation hereunder, Lessor may, but need not, relet the Premises or any portion thereof at any time or from time to time and for such terms and upon such conditions and rental as Lessor, in its sole discretion, may deem proper. Whether the Premises are relet or not, Lessee shall pay to Lessor all amounts required by Lessee hereunder up to the date that Lessor terminates Lessee's right to possession of the Premises; provided, however, that following a default, Lessor shall not unreasonably withhold its consent to an assignment of this Lease or a subletting of the Premises requested by Lessee unless Lessor shall also elect to terminate this Lease and Lessee's right to possession of the Premises, as provided in Section 12. Such payments by Lessee shall be due at the times provided in the Lease and Lessor need not wait until the termination of the Lease to recover them by legal action or in any other manner. If Lessor relets the Premises or any portion thereof, such reletting shall not relieve Lessee of any obligation hereunder, except that Lessor shall apply the Rent or other proceeds actually collected by it for such reletting against amounts due from Lessee hereunder to the extent such proceeds compensate Lessor for nonperformance of any obligation of Lessee hereunder. Lessor may execute any lease made pursuant hereto in its own name and the Lessee thereunder shall be under no obligation to see the application by Lessor of any proceeds to Lessee nor shall Lessee have any right to collect any such proceeds. Lessor shall not by any reentry or other act be deemed to have accepted any surrender by Lessee of the Premises or Lessee's interest therein or be deemed to have terminated this Lease or to have relieved Lessee of any obligation hereunder unless Lessor shall have given Lessee express written notice of Lessor's election to do so, as set forth herein.

In the event Lessor consents to an encumbrance of the Lease for security purposes in accordance with Section 10 of this Lease, it is understood and agreed that Lessor shall furnish copies of all notices of defaults to the beneficiary or mortgagee under said encumbrance by certified mail (provided Lessee has delivered to Lessor written request therefore, together with the name and address of any such beneficiary or mortgagee) contemporaneously with the furnishing of such notices to Lessee, and in the event Lessee shall fail to cure such default or defaults within the time

allowed above, said beneficiary or mortgagee shall be afforded the right to cure such default at any time: 1) within fifteen (15) days following the expiration of the period within which Lessee may cure such default as to monetary defaults; and 2) within one hundred twenty (120) days following the expiration of the period within which Lessee may cure such default as to nonmonetary defaults, provided, however, Lessor shall not be required to furnish any further notice of default to said beneficiary or mortgagee.

In the event of the termination of this Lease pursuant to the provisions of this Section, Lessor shall have any rights to which it would be entitled in the event of the expiration or sooner termination of this Lease under the provisions of Section 8.

Notwithstanding the foregoing, should a default not be cured within the grace periods referred to above, said Lease shall nevertheless not be terminated as to said beneficiary or mortgagee unless the Lessor first legally offers in writing to enter into a valid Lease with said beneficiary or mortgagee, and the latter accepts the offer in writing within thirty (30) days after it is made, and such new Lease is entered into as a condition concurrent to such termination, for the then balance of the Term of this Lease and otherwise with the same terms, conditions, and priority as this Lease, provided the mortgagee or beneficiary promptly cures all then existing defaults under this Lease when and to the extent it is able to cure them. Such new Lease may be entered into even though possession of the Premises has not been surrendered by the defaulting lessee, and, in such event, the Lessor shall proceed, unless legally restrained, promptly to obtain possession of the Premises and to deliver possession to said mortgagee or beneficiary as soon as the same is obtained. Should the mortgagee or beneficiary fail to accept said offer in writing within said thirty (30) day period, or having so accepted said offer should it fail promptly to cure all existing defaults under this Lease when and to the extent it is able to cure them, then such termination shall also be effective as to said mortgagee or beneficiary.

Furthermore, in the event this Lease is rejected in connection with a bankruptcy proceeding (or any proceeding referred to in subparagraph 12.1[e] above), Lessor shall, within thirty (30) days thereafter, offer in writing to the applicable beneficiary or mortgagee to enter into a valid lease in the same manner and under the same terms, covenants, and conditions as provided for with respect to a new lease entered into in the event of the termination of this Lease as provided in the immediately preceding provisions.

13. EMINENT DOMAIN:

- (1) If the whole or a substantial part of the Premises shall be taken by any public authority under the power of eminent domain, then the Term of this Lease shall cease as to the part so taken, from the day the possession of that part shall be taken for any public purpose, and the Rent shall be paid by Lessee up to that day, and from that day Lessee shall have the right either to cancel this Lease and declare the same null and void or to continue in the possession of the remainder of the same under the terms herein provided, except that the minimum Rent shall be reduced in proportion to the amount of the Premises taken. If less than the whole or a substantial part of the Premises hereby leased shall be taken by any public authority under the power of eminent domain, then the Term of this Lease shall cease as to the part so taken, from the day the possession of that part shall be taken for any public purpose, and this Lease shall otherwise remain in full force and effect as to the remainder of the same under the terms herein provided, except that the minimum Rent shall be reduced in proportion to the value of the Premises taken. A part of the premises taken shall be deemed "substantial" if it is of such a nature and to such an extent that the part remaining is not reasonably and economically usable by Lessee for the purposes allowed by this Lease. If Lessor and Lessee cannot agree upon a fair and equitable reduction in minimum Rent reflecting the value of the part taken, then the same shall be determined in accordance with the arbitration procedures set forth in Section 2.4 of this Lease.
- (2) Lessee may not exercise its right to terminate this Lease as provided above without the prior written consent of a lender consented-to in accordance with Section 10 of this Lease. Further, all amounts payable to Lessee pursuant to this Section 13 shall be paid to said lender to be applied by it in accordance with the arrangements between Lessee and said lender; and any such lender shall have the right to participate in any condemnation proceeding affecting the Premises.
- (3) From the award for a taking pursuant to the power of eminent domain, Lessee shall receive the then present worth of the use of the improvements and personal property constructed and installed by Lessee on, in, and to the Premises that are taken over the remaining Term of this Lease but in any event no less than the unpaid principal amount of the indebtedness of Lessee to a lender consented-to pursuant to Section 10 of this Lease, provided that Lessee shall assert no claim for loss of bonus value in this Lease; and Lessor shall receive the balance of the award.

- (4) Title to improvements and personal property constructed and installed by Lessee shall remain vested in Lessee for all purposes in connection with this Section 13.
- (5) For purposes of this Section 13, all amounts paid pursuant to any agreement with any condemning authority made in settlement of or under threat of condemnation affecting the Premises shall be deemed an award for purposes of this Section 13.
- (6) If the use or occupancy of the Premises or any part thereof shall be temporarily requisitioned by any governmental authority, then this Lease shall continue in full force and effect, unless any such taking is for a period extending to or beyond the end of the Term of this Lease, in which case the taking shall be treated under the foregoing provisions for total, substantial, or less-than-substantial takings. The award for such temporary requisition shall be apportioned between Lessor and Lessee so as to reflect as nearly and fairly as possible, the respective returns from the operation and use of the property as the parties enjoyed prior to the taking; provided, that in no event shall Lessee receive less than the unpaid principal amount of the indebtedness of the Lessee to a consented-to lender (as defined in Section 10 of this Lease) with respect to the property requisitioned. If the parties are unable to agree, then the award shall be apportioned by arbitration conducted in accordance with the procedures set forth in Section 2.4.
- (7) In the event of a partial taking or requisition not involving the total termination of this Lease, Lessee shall, at its expense, repair and restore any damage caused by any such taking or requisition in conformity with the requirements of this Lease so that after the completion of such restoration the Premises shall be, as nearly as possible, in a condition as good as the condition thereof immediately prior to such taking or requisition. In the event of any such partial taking the award therefor, after deduction of costs, fees, and expenses of the collection thereof, shall be made available to Lessee for payment and reimbursement of the costs of such repairs and restoration, and the balance, if any, shall be distributed to the parties as otherwise provided in this Section 13.
- (8) 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 any of Lessee's personal property; for compensation pursuant to the provisions of California Government Code Section 7262 et seq.; for compensation for loss of good will pursuant to California Code of Civil Procedure Section 1263.510 et seq.; and for any other personal rights and remedies to which the

occupancy and user of condemned premises may be entitled under law. Said amounts shall not be deemed a part of an "award" as provided above.

14. **USE OBLIGATION:** Lessee must actively and continuously use and operate the Premises for the uses expressly provided for in Section 3 of this Lease, except for failure to so use caused by reason of a Force Majeure Event (as defined in Section 5[g] of this Lease) or substantial damage to or destruction of the Premises or the Improvements or other events or causes beyond Lessee's reasonable control other than a failure to obtain financing or maintain sufficient working capital (so long as Lessee is not in default under the provision of Section 27 of this Lease). Said active and continuous use and operation enhances the value of the tidelands, provides needed public service; and provides additional employment, taxes, and other benefits to the general economy of the area. Lessee, however, shall not and is expressly prohibited from using the Premises for any other purpose or use whatsoever, whether it is purported to be in addition to or in lieu of the particular exclusive use expressed in Section 3 of this Lease.

15. **MAINTENANCE AND REPAIR:** As part of the consideration for the leasing thereof, Lessee agrees to assume full responsibility for the operation, maintenance, including painting, and repair of the Premises and improvements, throughout the Term and without expense to the Lessor. Lessee will perform all maintenance, repairs, and replacements necessary to maintain and preserve the Premises in a good, safe, healthy, and sanitary condition satisfactory to Lessor and in compliance with all applicable laws. Lessee shall maintain the Premises in a condition at least equal in quality generally in a range represented by hotels operated by Hyatt, Marriott, Sheraton, Hilton, and Westin and in conformance with the operating agreement with the hotel's operator. Lessee waives all right to make repairs at the expense of Lessor as provided in Section 1942 of the California Civil Code and all rights provided by Section 1941 of said Code (or the successors to such code sections, if any).

For the purpose of keeping the Premises in a good, safe, healthy, and sanitary condition, Lessor shall always have the right but not the duty, to enter, view, inspect, determine the condition of, and protect its interests in, the Premises. If inspection discloses that the Premises are not in the condition described, Lessee must perform the necessary maintenance work within thirty (30) days after written notice from the Lessor, or, if the nature of the condition is such that more than thirty (30) days are reasonably required, the Lessee shall not be deemed in default if Lessee shall commence such cure within said thirty (30) day period and thereafter diligently prosecute such cure to completion. If Lessee does not commence such cure within the thirty (30) day period described above, then Lessor may commence the cure and complete the maintenance work itself and bill the cost of such work (including the time of Lessor's employees spent working on such cure) to Lessee as part of the next month's Rent. However, Lessor shall not be required at any time to maintain or to make any improvements or repairs whatsoever on or for the benefit of the Premises. The rights reserved in this Section shall not create any obligations or increase any obligations for Lessor elsewhere in this Lease.

16. **PERFORMANCE BOND:** No major construction shall be commenced upon the Premises by Lessee including construction of the Project, until Lessee, has secured and submitted to Lessor performance bonds in favor of Lessor as co-obligee in the amount of the total estimated construction cost of improvements to be constructed by Lessee guaranteeing that the construction described in Section 5 will be timely completed. The bonds described in this Section 16 must be issued by a company qualified to do business in the State of California and be drawn on a surety and be in a form acceptable to Lessor, in its sole and absolute discretion.

17. **TAXES AND UTILITIES:** This Lease may result in a taxable possessory interest and be subject to the payment of transfer taxes, property taxes, and/or possessory interest taxes. Lessee agrees to and shall pay before delinquency all taxes and assessments of any kind assessed or levied upon Lessee or the Premises by reason of this Lease or of any buildings, machines, or other Improvements of any nature whatsoever erected, installed, or maintained by Lessee or by reason of the business or other activities of Lessee upon or in connection with the Premises. Lessee shall also pay any fees imposed by law for licenses or permits for any business or activities of Lessee upon the Premises or under this Lease, including, but not limited to, all required liquor licenses, and shall pay before delinquency any and all charges for utilities at or on the Premises.

18. **CONFORMANCE WITH LAWS AND REGULATIONS:** Lessee agrees that in all activities on or in connection with the Premises and in all uses thereof, including the making of any alterations or changes and the installation of any machines or other improvements, it will abide by and conform to all laws and regulations prescribed by the San Diego Unified Port District Act, all ordinances of the City in which the Premises are located, including the Building Code thereof, all ordinances and general rules of Lessor, including tariffs, and all applicable laws of the State of California and Federal Government, as any of the same now exist or may hereafter be adopted or amended. In particular and without limitation, Lessee shall have the sole and exclusive obligation and responsibility to comply with the requirements of the Americans With Disabilities Act of 1990 to the extent required (including regulations promulgated thereunder), and Lessor shall have no such obligations or responsibilities.

19. **NONDISCRIMINATION:** Lessee agrees at all times to fully comply with all laws prohibiting discrimination against any person or class of persons by reason of sex, color, race, religion, handicap, or national origin. If the use provided for in this Lease allows the Lessee to offer accommodations or services to the public, such accommodations or services shall be offered by the Lessee to the public on fair and reasonable terms. In complying with all such laws, including, without limitation, the Americans With Disabilities Act of 1990 to the extent required, Lessee shall be solely responsible for such compliance and required programs and there shall be no allocation of any such responsibility between Lessor and Lessee.



20. **HOLD HARMLESS:** Except to the extent of loss, damage, or injury attributable to Lessor's sole active negligence or sole willful misconduct, Lessor shall not be liable, and Lessee waives on its behalf all claims and demands against Lessor, for any loss, damage, or injury of any kind or character to any person or property (i) arising from any use of the Premises or any part thereof; (ii) caused by any defect in any building, structure, or other improvement thereon or in any equipment or other facility located therein; (iii) caused by or arising from any act or omission of Lessee or of any of its agents, employees, licensees, or invitees; (iv) arising from any accident on the Premises or any fire or other casualty thereon; (v) occasioned by the failure of Lessee to maintain the Premises in a safe condition; or (vi) arising from any other cause whatsoever relating to the Premises. Except to the extent loss, damage, or injury is caused by Lessor's sole active negligence or sole willful misconduct, Lessee, as a material part of the consideration of this Lease, hereby waives on its behalf all claims and demands against Lessor for any loss, damage, or injury of Lessee or Lessee's property of the kind or character described in subsections (i) through (vi) above.

Except to the extent loss, damage, or injury is caused by Lessor's sole active negligence or sole willful misconduct, Lessee shall, to the fullest extent provided by law, defend and indemnify Lessor and save it harmless from and against any and all claims, actions, damages, liability, and reasonable expenses, including reasonable attorneys' fees, in connection with loss of life, personal injury, and/or damage to property arising from or out of any occurrence in, upon, or at the Premises or the occupancy or use by Lessee of the Premises or any part thereof, or arising from or out of Lessee's failure to comply with any provision of this Lease or otherwise occasioned wholly or in part by any act or omission of Lessee, its agents, representatives, contractors, employees, servants, customers, or licensees. In case Lessor shall be made a party to any litigation commenced by or against Lessee within the scope of the foregoing provisions of this Section 20, Lessee shall accept a tender of the defense and handling of such litigation by Lessor, and Lessee shall, notwithstanding any allegation of negligence or fault on the part of Lessor, defend Lessor; hold Lessor harmless; and pay all costs, expenses, and reasonable attorneys' fees incurred or paid by Lessor in connection with any such litigation; provided, however, to the extent Lessor is ultimately held to be responsible or liable for all or part of such loss, damage, or injury (and Lessor is not entitled to indemnity under this Section 20), then Lessor shall reimburse Lessee its proportionate share of the cost of any expenses and attorneys' fees incurred by Lessee and attributable to Lessor. Lessor may, at its option, require Lessee to assume Lessor's defense in any action covered by this Section 20 through counsel reasonably satisfactory to Lessor.

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

22. **EASEMENTS:** This Lease and all rights given hereunder are subject to all easements and rights-of-way previously granted or reserved by Lessor in, to, or over the Premises for any purpose whatsoever, and shall be subject to future easements and rights-of-way for reasonable access, gas, electricity, water, sewer, drainage, telephone, telegraph, television transmission, and other Lessor or public facilities as may be determined from time to time by Lessor to be in the best interests of the development of the tidelands. Lessor agrees that such future easements and rights-of-way required by Lessor shall be so located and facilities installed as to produce a minimum amount of interference to the business of Lessee. Lessee shall not be entitled to any monetary payment or other remuneration for any such future easements provided that Lessor shall reimburse Lessee for reasonable out-of-pocket costs paid or incurred by Lessee in complying with or conforming to Lessor's requirements as provided in this Section 22.

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

24. **INSURANCE:** Lessee shall maintain insurance acceptable to Lessor in full force and effect at all times throughout the Term of this Lease. The policies and liability amounts for said insurance shall, as a minimum, provide the following:

24.1 Forms of Coverage.

- (a) "OCCURRENCE" form Commercial General Liability covering premises, operations, and contractual liability assumed by Lessee in this Lease in the amount of not less than Two Million Dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage. Either the general aggregate limit shall apply separately to this location or the general aggregate limit shall be five (5) times the required occurrence limit.

If alcoholic beverages are served or sold on the Premises, Lessee must obtain and maintain Liquor Liability coverage in the amount of not less than One Million Dollars (\$1,000,000).

- (b) Fire and Extended Coverage, including water damage and debris cleanup provisions, in an amount not less than ninety percent (90%) of full replacement value of all improvements located within the Premises. The fire and extended coverage policies shall be endorsed to state that any insurance proceeds in excess of Twenty-Five Thousand Dollars (\$25,000) resulting from a loss under said policies shall be payable jointly to Lessor and Lessee in order that said proceeds will be reinvested in rebuilding and/or repairing the damaged portions of the Premises; provided, however, that

within the period during which there is in existence a mortgage or deed of trust upon the leasehold given by Lessee with the prior consent of Lessor, then and for that period all fire and extended coverage policies shall be made payable jointly to the mortgagee or beneficiary and Lessee, and any proceeds collected therefrom shall be held by said mortgagee or beneficiary for the following purposes:

- (i) As a trust fund to pay for the reconstruction, repair, or replacement of the damaged or destroyed improvements in kind and scope in progress payments as the work is performed with any excess remaining after completion of said work to be retained by said mortgagee or beneficiary and applied to reduction of the debt secured by such mortgage or deed of trust and with any excess remaining after full payment of said debt to be paid over to Lessee; or
- (ii) In the event that this Lease is terminated with consent of both Lessor and mortgagee or beneficiary and said improvements are not reconstructed, repaired, or replaced, the insurance proceeds shall be retained by said mortgagee or beneficiary to the extent necessary to fully discharge the debt secured by said mortgage or deed of trust and said mortgagee or beneficiary shall hold the balance thereof without liability to restore the premises to a neat and clean condition and then for Lessor and Lessee as their interests may appear.
- (iii) Pollution Liability for any Underground Storage Tanks

If any underground storage tanks are operated on the Premises, Lessee will comply with Subpart H of 40 CFR (Code of Federal Regulations) or Title 23, Division 3, Chapter 18 of California Code of Regulations (collectively, "applicable UST law"). At the time Lessee is required to comply with any provisions of applicable UST law requiring financial assurance mechanisms, Lessee shall provide Lessor with a certified copy of its Certification of Financial Responsibility. If Lessee's program for financial responsibility includes insurance, then Lessee's policy(ies) shall name Lessor, its officers, officials, and employees as additional insureds, and, all other terms of Section 24.2, below, shall apply. Any time Lessee changes its financial assurance mechanisms, Lessee shall provide Lessor with a certified copy of its revised Certification of Financial Responsibility.

24.2 General Requirements.

- (a) Lessee shall have in effect all required insurance commencing the first (1st) day of the Term of this Lease. The cost of all required insurance shall be borne by Lessee. Certificates in a form acceptable to Lessor evidencing the existence of the necessary insurance policies, and original endorsements effecting coverage required by this clause, shall be kept on file with Lessor during the entire Term of this Lease. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The Lessor reserves the right to require complete, certified copies of all required policies at any time.
- (b) All liability insurance policies will name, or be endorsed to name, Lessor, its officers, officials, and employees as additional insureds and protect Lessor, its officers, officials, and employees against any legal costs in defending claims. All insurance policies will be endorsed to state that coverage will not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested has been given to Lessor. All insurance policies will be endorsed to state that Lessee's insurance is primary and not excess or contributory to any insurance issued in the name of Lessor. And, all insurance companies must be satisfactory to Lessor.
- (c) Any deductibles or self-insured retentions must be declared and acceptable to Lessor. If the deductibles or self-insured retentions are unacceptable to Lessor, then Lessee shall have the option of either:
  - (i) reducing or eliminating such deductibles or self-insured retentions as they affect Lessor, its officers, officials, and employees; or,
  - (ii) procuring a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses.
- (d) Lessor shall retain the right at any time to review the coverage, form, and amount of the insurance required hereby. If, in the opinion of Lessor, the insurance provisions in this Lease do not provide adequate protection for Lessor and/or for members of the public using the Premises, Lessor may require Lessee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. Lessor's requirements shall be reasonable but shall be designed to assure protection from and against the kind and extent of risk which exist at the time Lessor requires a change in insurance.

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- (e) Lessor shall notify Lessee in writing of changes in the insurance requirements. With respect to changes in insurance requirements that are available from Lessee's then existing insurance carrier, Lessee shall deposit certificates evidencing acceptable insurance policies with Lessor incorporating such changes within sixty (60) days of receipt of such notice. With respect to changes in insurance requirements that are not available from Lessee's then existing insurance carrier, Lessee shall deposit certificates evidencing acceptable insurance policies with Lessor, incorporating such changes within one hundred twenty (120) days of receipt of such notice. In the event Lessee fails to deposit insurance certificates as required herein, this Lease shall be in default without further notice to Lessee, and Lessor shall be entitled to all legal remedies provided under this Lease.
- (f) If Lessee fails or refuses to maintain insurance as required in this Lease, or fails to provide proof of insurance, Lessor has the right to declare this Lease in default without further notice to Lessee and Lessor shall be entitled to exercise all legal remedies provided under this Lease.
- (g) The procuring of such required policies of insurance shall not be construed to limit Lessee's liability hereunder, nor to fulfill the indemnification provisions and requirements set forth in this Lease. Notwithstanding said policies of insurance, Lessee shall be obligated for the full and total amount of any damage, injury, or loss caused by negligence or neglect connected with this Lease or with the use or occupancy of the Premises.
- (h) Lessee agrees not to use the Premises in any manner, even if use is for purposes stated herein, that will result in the cancellation of any insurance Lessor or Lessee may have on the Premises or on adjacent premises, or that will cause cancellation of any other insurance coverage for the Premises or adjoining premises. Lessee 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 on the Premises. Lessee shall, at its sole expense, comply with any and all requirements, in regard to the Premises, of any insurance organization necessary for maintaining fire and other insurance coverage at reasonable cost.
- (i) Lessor and Lessee each waive any rights either may have against the other on account of any loss or damage occasioned to Lessor or Lessee, as the case may be, their respective property, the Premises or the contents of the Premises, arising from any risk covered by

casualty insurance carried or required to be carried to this Section 24, when and to the extent, that such loss or damage is actually compensated pursuant to such insurance. Lessor and Lessee also agree that any insurance policies obtained by each of them pursuant to this Lease shall contain endorsements waiving any right of subrogation which the insurer may otherwise have against the noninsuring party. The foregoing release and the foregoing requirement for waivers of subrogation shall be operative only so long as the same shall neither preclude the obtaining of such insurance nor diminish, reduce, or impair the liability of any insurer.

25. **WAGE POLICY:** It is the policy of the Lessor that prevailing wage rates shall be paid to all persons who are employed by Lessee on the tidelands owned by Lessor.

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

27. **DAMAGE TO OR DESTRUCTION OF PREMISES:** In the event of damage to or destruction by fire, the elements, acts of God, or any other cause, of Lessee-constructed improvements located within the Premises or in the event Lessee-constructed improvements located within the Premises are declared unsafe or unfit for use or occupancy by a public entity with the authority to make and enforce such declaration, Lessee shall, within ninety (90) days, commence and diligently pursue to completion the repair, replacement, or reconstruction of improvements necessary to permit full use and occupancy of the Premises for the purposes required by this Lease. Repair, replacement, or reconstruction of improvements within the Premises shall be accomplished in a manner and according to plans approved by Lessor; provided, however, Lessee shall not be obligated to repair, reconstruct, or replace the improvements following their destruction in whole or substantial part except to the extent the loss is covered by insurance required to be carried by Lessee pursuant to Section 24 of this Lease (or would be covered if such required insurance is not actually in effect). If Lessee elects not to restore, repair, or reconstruct as herein provided, then the Lease shall terminate and Lessor shall have any rights to which it would be entitled under the provisions of Section 8.

28. **QUITCLAIM OF LESSEE'S INTEREST UPON TERMINATION:** Upon termination of this Lease for any reason, including but not limited to, termination because of default by Lessee, Lessee shall execute, acknowledge, and deliver to Lessor within thirty (30) days after receipt of written demand therefor a good and sufficient deed whereby all right, title, and interest of Lessee in the Premises is quitclaimed to Lessor. Should Lessee fail or refuse to deliver the required deed to Lessor, within such thirty (30) day period, then

Lessor may prepare and record a notice reciting the failure of Lessee to execute, acknowledge, and deliver such deed and said notice shall be conclusive evidence of the termination of this Lease and of all right of Lessee or those claiming under Lessee in and to the Premises.

29. **PEACEABLE SURRENDER:** Upon the expiration of this Lease or the earlier termination or cancellation thereof, as herein provided, Lessee will peaceably surrender the Premises to Lessor in as good condition as said Premises were at the date of this Lease, ordinary wear and tear excepted, subject to Section 8 of this Lease. If Lessee fails to surrender the Premises at the expiration of this Lease or the earlier termination or cancellation thereof, Lessee shall defend and indemnify Lessor from all liability and expense resulting from the delay or failure to surrender, including, without limitation, any succeeding lessee's claims based on Lessee's failure to surrender.

30. **WAIVER:** Any waiver by either party of any breach by the other party of any one or more of the covenants, conditions, or agreements set forth in this Lease shall not be or be construed to be a waiver of any subsequent or other breach of the same or any other covenant, condition, or agreement set forth in this Lease, nor shall any failure on the part of either party to require or exact full and complete compliance by the other party with any of the covenants, conditions, or agreements of this Lease be construed as in any manner changing the terms hereof or preventing the enforcement in full of the provisions hereof. The subsequent acceptance of Rent hereunder by Lessor shall not be deemed to be a waiver of any preceding breach by Lessee of any term, covenant, or condition of this Lease, other than the failure of Lessee to pay the particular rental so accepted, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such Rent.

31. **HOLDOVER:** This Lease shall terminate without further notice at expiration of the Term. Any holding over by Lessee after either expiration or termination shall not constitute a renewal or extension or give Lessee any rights in or to the Premises. If Lessee, with Lessor's consent, remains in possession of the Premises after expiration or termination of the Term or after the date in any notice given by Lessor to Lessee terminating this Lease, such possession by Lessee shall be deemed to be a month-to-month tenancy terminable on thirty (30) days' notice given at any time by either party. During any such month-to-month tenancy, Lessee shall pay all Rent required by this Lease, and if Percentage Rent is required by the Lease, it shall be paid monthly on or before the tenth (10th) day of each month.

All provisions of this Lease, except those pertaining to Term, shall apply to the month-to-month tenancy.

32. **SECTION HEADINGS:** The Table of Contents and section headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision of this Lease.

33. ENTIRE UNDERSTANDING: As of the Commencement Date, this Lease contains the entire and only understanding and agreement of the parties, and Lessee, by accepting the same, acknowledges that there is no other written or oral understanding or agreement between the parties with respect to the Premises and that this Lease supersedes all prior negotiations, discussions, obligations, and rights of the parties hereto. No waiver, modification, amendment, or alteration of this Lease shall be valid unless it is expressly in writing and signed by authorized persons of the parties hereto and approved by any consented-to lender referred to in Section 10 of this Lease. Each of the parties to this Lease acknowledges that no other party, nor any agent or attorney of any other party, has made any promise, representation, waiver, or warranty whatsoever, expressed or implied, which is not expressly contained in writing in this Lease, and, each party further acknowledges that it has not executed this Lease in reliance upon any collateral promise, representation, waiver, or warranty, or in reliance upon any belief as to any fact not expressly recited in this Lease.

Lessor agrees not to accept the voluntary surrender, cancellation, or termination of this Lease before the normal expiration of the Term, as the same may be extended without the prior written consent of a consented-to lender referred to in Section 10 of this Lease so long as any amount remains payable to said consented-to lender.

34. TIME IS OF THE ESSENCE: Time is of the essence of each and all of the terms and provisions of this Lease and this Lease shall inure to the benefit of and be binding upon the parties hereto and any successors of Lessee as fully and to the same extent as though specifically mentioned in each instance, and all covenants, stipulations, and agreements in this Lease shall extend to and bind any assigns and sublessees of Lessee.

35. NOTICES: Notices given or to be given by Lessor or Lessee to the other may be personally served upon Lessor or Lessee or any person hereafter authorized by either in writing to receive such notice, may be served by certified letter addressed to the appropriate address hereinafter set forth or to such other address as Lessor and Lessee may hereafter designate by written notice, or may be served by facsimile, or other form of delivery commonly used by both parties for sending and receiving such notices, provided that the sender is able to verify the time and date on which such notice was delivered to the other party. If served by certified mail, forty-eight (48) hours after deposit in the U.S. Mail, service will be considered completed and binding on the party served.

To Lessor

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

To Lessee

Manchester Resorts, L.P.  
One Market Place, 33rd Floor  
San Diego, California 92101



Said notices shall also be delivered in a manner acceptable under this Section 35 to the beneficiary of any deed of trust, mortgage, or other security instrument of record with Lessor and consented to by resolution of Lessor who has notified Lessor in writing of its desire to receive said notice.

**36. REMOVAL OF MATERIALS:** Subject to Section 8 of this Lease, Lessee hereby agrees that upon the expiration of this Lease or the sooner termination as herein provided, it will remove within sixty (60) days all ships, vessels, barges, hulls, debris, surplus, and salvage materials from the land area forming a part of or adjacent to the Premises, so as to leave the same in as good condition as when first occupied by Lessee, subject to reasonable wear and tear; provided, however, that if Lessee does not remove any ships, vessels, barges, hulls, debris, surplus, and salvage materials within sixty (60) days, Lessor may remove, sell, or destroy the same at the expense of Lessee and Lessee hereby agrees to pay to Lessor the reasonable cost of such removal, sale, or destruction; or at the option of Lessor, in its sole discretion, Lessee will not remove such ships, vessels, barges, hulls, debris, surplus, and salvage materials and title thereto shall become the property of Lessor without cost to Lessor and without any payment to Lessee.

During any period of time employed by Lessee under this Section to remove ships, vessels, barges, hulls, debris, surplus, and salvage materials, or to test for and/or remediate Contaminants as required in this Lease, Lessee shall continue to pay the full rental to Lessor in accordance with this Lease which said rental shall be prorated daily.

**37. ACCEPTANCE OF PREMISES:** By signing this Lease, Lessee represents and warrants that it has independently inspected the Premises and made all tests, investigations, and observations necessary to satisfy itself of the condition of the Premises and hereby accepts the Premises in its "As Is" and "With all faults" condition. Lessee agrees it is relying solely on such independent inspections, tests, investigations, and observations in agreeing to enter this Lease. Lessee further acknowledges that the Premises are in the condition called for by this Lease, and that, subject to Lessor's continuing obligations under the Option Agreement, Lessor has performed all work with respect to the Premises and that Lessee does not hold Lessor responsible for any defects in the Premises. Lessee accepts and shall be responsible for any risk of harm to any person and property, including without limitation employees of Lessee, from any latent defects in the Premises.

**38. WASTE/NUISANCE:** Lessee shall not use the Premises in a manner that constitutes waste or nuisance.

**39. GENDER/SINGULAR/PLURAL:** In this Lease, the neuter gender includes the feminine and masculine, the masculine includes the feminine and neuter, and the feminine includes the masculine and neuter, and each includes corporation, partnership, or other legal entity when the context so requires. The singular number includes the plural whenever the context so requires.

40. **EQUAL EMPLOYMENT OPPORTUNITY:** Lessee agrees at all times to fully comply with all applicable laws prohibiting discrimination against any person or class of persons for employment because of race, color, religion, sex, handicap, or national origin and, shall take affirmative action to assure applicants are employed and that employees are treated during employment without regard to race, color, religion, sex, handicap, or national origin. Except during the time Lessee is exempt pursuant to written policy of Lessor, Lessee shall submit to Lessor for review and approval a written affirmative action program to attain improved employment for racial and ethnic minorities and women and during the Term of this Lease shall further make available employment records to Lessor upon request. Lessee shall certify in writing to Lessor that Lessee is in compliance and throughout the Term of this Lease will comply with Title VII of the Civil Rights Act of 1964, as amended, the California Fair Housing Act, and any other applicable Federal, State, and local law, regulation and policy (including without limitation those adopted by Lessor) relating to equal employment opportunity and affirmative action programs, including any such law, regulation, and policy hereinafter enacted.

Compliance and performance by Lessee of the equal employment opportunity and affirmative action program provision of this Lease is an express condition hereof and any failure by Lessee to so comply and perform shall be a default as provided in this Lease and Lessor may exercise any right as provided herein and as otherwise provided by law.

41. **ATTORNEYS' FEES:** In the event any action is commenced to enforce, protect, or establish any right or remedy of the parties under the terms and conditions of this Lease, including without limitation a summary action commenced by Lessor under the laws of the State of California relating to the unlawful detention of property, the prevailing party shall be entitled to have and recover from the losing party reasonable attorneys' fees and costs of suit.

42. **HAZARDOUS MATERIALS:** Lessee shall comply with all laws (including but not limited to, those laws and regulations promulgated pursuant to CERCLA, RCRA, OSHA, Cal-OSHA, Proposition 65, the Hazardous Waste Control Act, the Underground Storage of Hazardous Materials Release Act, the Hazardous Materials Release Response Plans and Inventory Act, the Hazardous Substance Account Act, the Porter-Cologne Water Quality Control Act and any successor statutes to these Acts, as well as the implementing regulations published by the Environmental Protection Agency, Water Resources Control Board and Department of Health Services) regarding hazardous substances, materials, or wastes, or petroleum products or fraction thereof, including, without limitation, those materials identified in Chapter 11, Division 4.5 of Title 22 of the California Code of Regulations as amended from time to time (herein collectively referred to as "Contaminants") as such laws relate to Lessee's occupancy and use of the Premises. Lessee shall be liable and responsible for any Contaminants arising out of the occupancy or use of the Premises by Lessee. Such liability and responsibility shall include, but not be limited to: (i) removal from the Premises of any such Contaminants; (ii) removal from any area outside the Premises, including but not limited to surface and

groundwater, of any such Contaminants generated as part of the operations on the Premises; (iii) damages to persons, property, and the Premises; (iv) all claims resulting from those damages; (v) fines imposed by any governmental agency; and (vi) any other liability as provided by law. Lessee shall defend, indemnify, and hold harmless the Lessor, its officials, officers, agents, and employees from any and all such responsibilities, damages, claims, fines, liabilities, including without limitation any costs, expenses, and attorney's fees therefor. Lessor shall have a direct right of action against Lessee even if no third party has asserted a claim. Furthermore, Lessor shall have the right to assign the indemnity provisions in this Section 42.

If Lessee has in the past or continues to use, dispose, generate, or store Contaminants on the Premises, Lessor, or its designated representatives, at Lessor's sole discretion, may at any time during the Term of this Lease, enter upon the Premises and make any inspections, tests, or measurements Lessor deems necessary in order to determine if a release of Contaminants has occurred. Lessor shall give Lessee a minimum of twenty-four (24) hours' notice in writing prior to conducting any inspections or tests, unless, in Lessor's sole judgment, circumstances require less notice; and such tests shall be conducted in a manner so as to minimize any inconvenience and disruption to Lessee's operations. If such tests indicate a release of Contaminants, then Lessor, at Lessor's sole discretion, may require Lessee, at Lessee's sole expense, and at any time during the Term of this Lease, to have tests for such Contaminants conducted by a qualified party or parties on the Premises. If Lessor has reason to believe that any Contaminants that originated from a release on the Premises have contaminated any area outside the Premises, including but not limited to surface and groundwater, then Lessor, at Lessor's sole discretion, may require Lessee at any time during the Term of this Lease, to have tests for such Contaminants conducted by a qualified party or parties on said area outside the Premises. In the event such Contaminants are found as a result of such tests, Lessee shall bear the costs of the testing; in the event no such Contaminants are discovered, Lessor shall reimburse Lessee for the reasonable costs of the testing.

The tests conducted by Lessee's qualified party shall include, but not be limited to, applicable comprehensive soil, emission, or groundwater sampling tests or other procedures to determine any actual or possible contamination. Lessee shall expeditiously, but no longer than thirty (30) days after Lessor's request for such tests, furnish to Lessor the results of said tests, sampling plans, and analysis thereof identifying any Contaminants which exceed then applicable levels permitted by federal, state, or local laws. If Lessee determines that any Contaminants on the Premises or that originated from the Premises exceed applicable levels, then Lessee shall deliver to Lessor a plan to remediate such Contaminants within seventy-two (72) hours, which Plan will include Lessee's efforts to diligently proceed to identify the extent of contamination, how it will be remediated, when it will be remediated, by whom, and the cost of such remediation.

Lessee shall notify Lessor, and provide to Lessor a copy or copies, of the following environmental permits, disclosures, applications, entitlements, or inquiries relating to the Premises: Notices of violation, notices to comply, citations, inquiries, reports filed pursuant to self-reporting requirements and reports filed or applications made pursuant to any governmental law or regulation relating to Hazardous Materials and underground tanks. Lessee shall report to Lessor, as soon as possible after each incident, any unusual, potentially important incidents, including but not limited to, the following (where applicable, references to statutes, laws, or other requirements will be deemed to include any successor statutes or amendments thereto enacted after the Commencement Date):

- a. All required reports of spills of hazardous materials, including notices of any release of hazardous materials as required by Superfund, EPCRA, and California Health and Safety Code Section 25359.7;
- b. All fires;
- c. All instances where asbestos has been or may be released;
- d. All notices of suspension of any permits;
- e. All notices of violation from Federal, State or local environmental authorities;
- f. All orders under the State Hazardous Waste Control Act and the State Hazardous Substance Account Act and corresponding federal statutes, concerning investigation, compliance schedules, clean up, or other remedial actions;
- g. All orders under the Porter-Cologne Act, including corrective action orders, cease and desist orders, and clean-up and abatement orders;
- h. Any notices of violation from OSHA or Cal-OSHA concerning employees' exposure to Contaminants; and
- i. All complaints and other pleadings filed against Lessee and/or Lessor relating to Lessee's use, storage, or disposal of Contaminants on the Premises.

Lessee may submit copies of the foregoing reports, notices, complaints, pleadings, and other documents, if any, in lieu of a separate report. The foregoing reporting requirements shall not require Lessee to report to Lessor routine infractions or citations. In the event of a release of any Contaminants into the environment, Lessee shall, as soon as possible after the release, furnish to Lessor a copy of any and all reports relating thereto and copies of all correspondence with governmental agencies relating to the release. Upon request of Lessor, Lessee shall furnish to Lessor a copy or copies of any

and all other environmental entitlements or inquiries relating to or affecting the Premises including, but not limited to, all permit applications, permits, and reports including, without limitation, those reports and other matters which may be characterized as confidential.

43. **UNDERGROUND STORAGE TANKS:** In the event any underground storage tanks are located on the Premises or placed on the Premises by any party during the Term of this Lease, Lessee shall be responsible for tank monitoring of all such underground storage tanks as required by the County of San Diego Hazardous Material Management Division (HMMD) or any other responsible agency. Lessee further agrees to take responsibility for reporting unauthorized releases to HMMD and Lessor within twenty-four (24) hours of such unauthorized release. Lessee will be responsible for all fees and costs related to the unauthorized release of Contaminants including but not limited to investigative, surface and groundwater cleanup, and expert and agency fees. Lessee shall maintain evidence of financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by a release from the underground tank system. Lessee further agrees to be responsible for maintenance and repair of the storage tanks, obtaining all applicable tank permits, filing a business plan with HMMD or other responsible agency, and for paying all required underground storage tank fees, permit fees, and other regulatory agency fees relating to underground storage tanks. Lessee agrees to keep complete and accurate records on the Premises for a period of not less than thirty-six (36) months from the applicable events, including, but not limited to permit applications, monitoring, testing, equipment installation, repairing, and closure of the underground storage tanks, and any unauthorized releases of Contaminants and make such records available for Lessor or any responsible agency to inspect. Lessee further agrees to include a copy of Health and Safety Code, Chapter 6.7, Section 25299, as part of any agreement between Lessee and any operator of such underground storage tanks.

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

44. **ABOVEGROUND STORAGE TANKS:** Lessee shall be responsible for any aboveground storage tanks on the Premises. Lessee shall, in accordance with this Lease and applicable laws and regulations, secure and pay for all necessary permits and approvals, prepare a spill prevention control counter measure plan, and conduct periodic inspections to ensure compliance therewith, including conformance with the latest version of said laws and regulations. In addition, Lessee shall maintain and repair said tanks and conform and comply with all other applicable laws and regulations for aboveground storage tanks, including without limitation all of the requirements of Health & Safety Code, Sections 25270 through 25170.13 as presently existing or as hereinafter amended or replaced, including without limitation conducting daily visual inspection of said tanks, allowing the San Diego Regional Water Quality Control Board,

Lessor, or any applicable responsible agency, to conduct periodic inspections and complying with valid orders of said Board, 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. Lessee shall be responsible for all costs associated with an unauthorized release from such tanks, including but not limited to, costs of investigations, surface and groundwater cleanup, and expert and agency fees.

45. **JOINT AND SEVERAL LIABILITY:** If Lessee, as a party to this Lease, is a partnership or joint venture, or is or during the Term becomes comprised of more than one party or entity or a combination thereof, the obligations imposed on Lessee under this Lease shall be joint and several, and each general partner, joint venturer, party, or entity of Lessee shall be jointly and severally liable for all of Lessee's obligations under this Lease. Notwithstanding the foregoing, any limited partners (or member, if a limited liability company) of Lessee shall not have any further liability under the provisions of this Section 45 than they would have as limited partners (or member, if a limited liability company) under California law. Furthermore, nothing contained herein shall be deemed or construed as creating a partnership or joint venture between Lessor and Lessee or between Lessor and any other entity or party, or cause Lessor to be responsible in any way for the debts or obligations of Lessee, or any other party or entity.

46. **PARTIAL INVALIDITY:** In the event it is determined by a final judgment of a court of competent jurisdiction that the Term of this Lease violates any provision of law, then the Term of this Lease shall be reduced to the extent necessary to conform with the requirements of such law, and the parties agree to prepare, execute, acknowledge, deliver, and record an amendment to this Lease, or an amended and restated lease, to reflect such reduction in Term, and otherwise shall take any and all action necessary and proper to ensure that this Lease remains in full force and effect except for the required change in Term. In addition, if any term, covenant, condition, or provision of this Lease is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

47. **MEMORANDUM OF LEASE:** On or before the Commencement Date, Lessor and Lessee agree to execute and deliver to each other a Short Form Memorandum of Lease for recording purposes, in the form of Exhibit D attached hereto, setting forth the Term Commencement Date and the expiration date of this Lease.

48. **BROKERS:** Lessee represents and warrants that it has not had any dealings with any realtors, brokers, or agents in connection with the negotiation of this Lease, and agrees to defend and hold Lessor harmless from any cost, expense, or liability for any compensation, commission or charges claimed by any realtors, brokers, or agents claiming by, through or on behalf of Lessee with respect to this Lease and/or the negotiation hereof.

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

Port Attorney

**SAN DIEGO UNIFIED PORT DISTRICT,**  
a public corporation

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

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

**MANCHESTER RESORTS, L.P.**  
a California limited partnership

By: **MANCHESTER RESORTS, INC.**  
a California corporation,  
its general partner

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

**Richard V. Gibbons**  
President

EXHIBIT "D"  
FORM OF SHORT FORM MEMORANDUM

RECORDING REQUESTED BY )  
AND WHEN RECORDED MAIL TO: )  
 )  
 )  
 )  
 )

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(Space above for recorder)

LEASE AGREEMENT

(Short Form Memorandum)

This Short Form Memorandum of Lease ("Memorandum"), dated as of the \_\_\_\_\_ day of \_\_\_\_\_, 200\_, is by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation ("Lessor") and MANCHESTER RESORTS, L.P., a California limited partnership ("Lessee").

For good and valuable consideration, Lessor hereby leases to Lessee that certain real property described in Exhibits A and B attached hereto and made a part hereof (the "Premises") for the Term and under the terms and conditions contained in the Lease ("Lease"), including, without limitation provisions prohibiting assignment, subleasing, and encumbering said Lease without the express written consent of Lessor in each instance, all as more specifically set forth in said Lease. The terms of the Lease are hereby incorporated in this Memorandum by reference.

The Term of the Lease is sixty-six (66) years, commencing on the date hereof and terminating on \_\_\_\_\_ 206\_\_.

If this Memorandum is executed in counterparts, each is hereby declared to be an original; all, however, shall constitute but one (1) and the same Memorandum.

This Memorandum is not a complete summary of the Lease. Provisions in this Memorandum shall not be used in interpreting the Lease. In the event of a conflict, ambiguity, or inconsistency between this Memorandum and the Lease, the terms and conditions of the Lease shall prevail.

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The parties hereto have executed this Memorandum as of the day, month, and year first above written.

Port Attorney

\_\_\_\_\_

"Lessor"

SAN DIEGO UNIFIED PORT DISTRICT,  
a public corporation

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

"Lessee"

MANCHESTER RESORTS, L.P.,  
a California limited partnership

By: MANCHESTER RESORTS, INC.,  
a California corporation,  
its general partner

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

Richard V. Gibbons  
President

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**MANCHESTER RESORTS/CONVENTION CENTER HOTEL  
CRITICAL PATH TIMELINE**

<b>Task Name</b>	<b>Start</b>	<b>Finish</b>	<b>Resource Names &amp; Option Agreement Reference</b>
Prepare and Submit Financial Capabilities	6/18/99	7/01/99	Manchester/complete
Approve Financial Capabilities	7/02/99	7/15/99	Port/complete
Submit Project Proforma	7/16/99	7/16/99	Manchester/complete
Agreement with Campbell	9/08/99	12/01/99	Campbell, Port (Article 4.13)
<b>Site Demolition &amp; Remediation</b>	<b>12/01/99</b>	<b>3/01/01</b>	<b>Campbell (Article 15)</b>
Agree to Lease Terms	10/05/99	11/16/99	Manchester, Port
Prepare and Submit Conceptual Drawings (30%)	6/18/99	12/01/99	Manchester (Article 4.3)
Staff Review of Conceptual Drawings	12/02/99	1/11/00	Port
Board Approval	1/18/00	1/18/00	Port
Accelerated Milestone for Hyatt Expansion Ground Breaking	3/01/00	3/01/00	Manchester (Article 4.8)
<b>Environmental Review and Entitlement Period</b>	<b>6/14/99</b>	<b>3/06/01</b>	<b>Article 4.1</b>
Issue NOP for EIR	7/14/99	8/12/99	Port/complete
Draft EIR	12/1/99	3/30/00	Port
Screen Check #1	1/28/00	2/11/00	Port
Screen Check #2	3/17/00	3/24/00	Port
Circulate Draft EIR/Public Review Period	3/31/00	5/15/00	Port
Responses to Comments	5/16/00	6/15/00	Port
Review Comments & Finalize EIR	6/16/00	8/15/00	Port
Findings/Statement of Overriding Considerations	6/16/00	8/15/00	Port
PMPA Approval/EIR Certification	8/29/00	8/29/00	Port (Article 4.14)
Coastal Commission (CCC) Submittal & Approval Period	9/01/00	12/01/00	Port (Article 6.2(ii))
Outside Date for CCC Approval		12/01/00	Port (Article 6.2(ii))
Legal Challenge	12/04/00	2/01/01	Port
Appealable Coastal Development Permit	2/06/01	3/06/01	Port

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<b>MANCHESTER RESORTS/CONVENTION CENTER HOTEL CRITICAL PATH TIMELINE</b>			
<b>Task Name</b>	<b>Start</b>	<b>Finish</b>	<b>Resource Names &amp; Option Agreement Reference</b>
<b>Design Development, Construction Documents, Final Approvals and Construction</b>	<b>8/30/00</b>	<b>1/01/04</b>	<b>Manchester</b>
Prepare and Submit Design Development Plans	8/30/00	12/31/00	Manchester (Article 4.4)
Review & Approve Design Development Plans	1/01/01	1/31/01	Port
Prepare and Submit Construction Documents	2/01/01	5/30/01	Manchester (Article 4.5)
Approve Construction Documents	6/01/01	6/30/01	Port
Plan Check and Issuance of Building Permits	6/01/01	1/01/02	City of San Diego (Article 4.10)
Obtain Evidence of Financing	1/01/02	1/01/02	Manchester (Article 4.7.1)
Submit Short List of General Contractors	5/30/01	1/01/02	Manchester
Negotiate Construction Contract	11/01/00	1/01/02	Manchester (Article 4.12)
Submit Executed Management Agreement	10/01/01	10/01/01	Manchester (Article 4.6)
Performance Bond	1/01/02	1/01/02	Manchester (Article 4.11)
Exercise Option/Option Expiration Date	1/01/02	1/01/02	Port, Manchester (Article 2)
Ground Breaking Ceremony	1/01/02	1/01/02	Manchester
Construction Period (24 Months)	1/01/02	1/01/04	Manchester
Hotel Grand Opening	1/01/04	1/01/04	Manchester

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## MUTUAL RELEASE

This Mutual Release ("Release") is made and entered into between Manchester Resorts, L.P., a California limited partnership, Manchester Resorts, Inc., a California corporation, and Douglas Manchester, an individual (collectively referred to as "Manchester") and \_\_\_\_\_ "Third Party Releasor" and is effective upon execution of all parties (collectively "Parties") hereto.

### RECITALS

A. WHEREAS, Manchester and Third Party Releasor agree to release all claims against one another which both arose before the date of this Release and also are directly connected to either Manchester's interest in or plans to develop the Project or Manchester's interest in or plans to acquire the rights to the Premises. (The Project is a hotel and related development to be constructed on the existing site of the Campbell Shipyard, and is defined more fully in the Option Agreement between Optionee and the San Diego Port District "District" attached hereto as Exhibit "A." The Optionee and the Premises are also defined in the Option Agreement.)

B. WHEREAS, The Parties intend this Release to become effective upon the occurrence of each of the following:

- (1) The District's acquisition of the Premises;
- (2) Optionee's and the District's execution of the Option Agreement;
- (3) The execution of this Release by all Parties hereto; and
- (4) The execution of this form of Release by Optionee, on the one hand, and each of the following persons (and their affiliates), on the other hand: the City of San Diego; the San Diego Padres; JMI Realty; John Moores; MARCO; Campbell; CCDC; and the City of San Diego Redevelopment Agency.

NOW, THEREFORE, in consideration of their releases, Optionee and Third Party Releasor agree as follows:

1. Release of Claims.

The Parties, for themselves and each and all of their respective subsidiaries and/or parent corporations, divisions, agencies, departments, affiliates, insurers, past and present officers, directors, governors, heirs, assigns, executors, successors, representatives, employees, independent contractors, attorneys, principals, partners and agents, and each and all of the foregoing persons' heirs, assigns, executors, administrators and successors, hereby release and forever discharge one another of and from any and all claims, demands, actions and causes of

action, in law or in equity, suits, liabilities, losses, costs or expenses, known or unknown, suspected or unsuspected, that the Parties now have or may have had against one another in the past, with regard to any of the Parties' statements, activities or other actions relative to the acquisition of the Premises, the negotiations concerning or execution of the Option Agreement or the Lease referred to in the Option Agreement or any term sheet which preceded the Option Agreement, or development of the Project.

2. Release and Dismissal of Claims.

The Parties acknowledge that they are aware of and familiar with Section 1542 of the California Civil Code which provides as follows:

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

The Parties after independent advice of their respective counsel, hereby waive and relinquish all rights and benefits which they or any of them may have under Section 1542 of the California Civil Code, or the law of any other state or jurisdiction, or common law principle, to the same or similar effect respecting the terms hereof. It is understood and agreed by the Parties hereto that the foregoing release is expressly conditioned upon the provisions of paragraph 5 of this Release, and any breach of paragraph 5 shall render the foregoing release null and void.

3. Warranties and Representations.

3.1. Each party to this Release represents and warrants as follows: (i) that he, she or it has the authority to enter into this Release on his, her or its own behalf and to bind all persons or entities who may claim through him, her or it; (ii) that he, she or it has freely executed this Release without duress or any imbalance in bargaining position; and (iii) that this Release has been reviewed by each of the Parties, and each such party has had a full opportunity to negotiate the contents hereof.

3.2. The Parties expressly waive any common law or statutory rule of construction that ambiguities should be construed against the drafter of this Release.

4. No Admission.

The Parties enter into this Release with the understanding that in doing so they are not admitting any wrongdoing, or accusing any other party of any wrongdoing.

5. Cooperation.

The Third Party Releasor agrees to support, and not oppose, the development of the Project, and will do nothing to prevent or impair in any manner whatsoever Manchester's

efforts to develop the Project on time and within budget. Third Party Releasor further covenants that upon the request of the District, it will exercise reasonable and good faith efforts to attempt to cause the City of San Diego to expedite the processing and issuance of all permits required by the Optionee to complete the development of the Project.

6. Entire Agreement.

The Parties further declare and represent that this Release contains the entire agreement between them respecting the subject matter hereof, contains the full and only consideration for the terms agreed to herein, and that the terms of this Release are contractual and not a mere recital. Except as expressly stated in this Release, no party to this Release (including any officer, agent, employee, representative, or attorney of or for any party), has made any statement or representation to any other party to this Release regarding any fact relied upon in entering into this Release, and each party does not rely upon any statement, representation or promise of any other party (or of any officer, agent, employee, representative, or attorney for any other party), in executing this Release, or in making the settlement provided for herein. This Release may be amended or modified only by a written instrument executed by each of the Parties, or their successors in interest, which specifically identifies the portion of this Release which is to be amended or modified thereby.

7. Attorney's Fees.

In the event of any dispute whatsoever between the Parties with regard to the interpretation or enforceability of this Release, or in the event any action is taken by any party hereto in violation of this Release, the prevailing party shall be entitled to reasonable attorneys fees and costs incurred as a result thereof.

8. Enforceability.

This Release may be signed in counterparts by the Parties, and if so executed, each counterpart shall have the full force and effect of an original. This Release shall be construed in accordance with the laws of the State of California, and any suit to interpret or enforce this Agreement shall be brought in the Superior Court of the State of California, for the County of San Diego.

DATED: \_\_\_\_\_

\_\_\_\_\_  
DOUGLAS MANCHESTER

DATED: \_\_\_\_\_

MANCHESTER RESORTS, L.P.

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

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DATED: \_\_\_\_\_

MANCHESTER RESORTS, INC.

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

DATED: \_\_\_\_\_

Name: \_\_\_\_\_  
THIRD PARTY RELEASOR

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

**EXHIBIT B**

**STREET IMPROVEMENTS**



① PARKING / EVENT TRAVEL LANE

BALL PARK

IMPERIAL AVENUE

PARK AVENUE

⑤ ACCESS ROAD UNDER HARBOR DRIVE BRIDGE

⑥ ADJUST MEDIANS

⑥ ADJUST MEDIANS

HARBOR DRIVE

② DECELERATION LANE

CONVENTION CENTER

④ POSSIBLE THIRD LANE ON 8th AVE. FOR VEHICLES ENTERING HOTEL

8th AVENUE

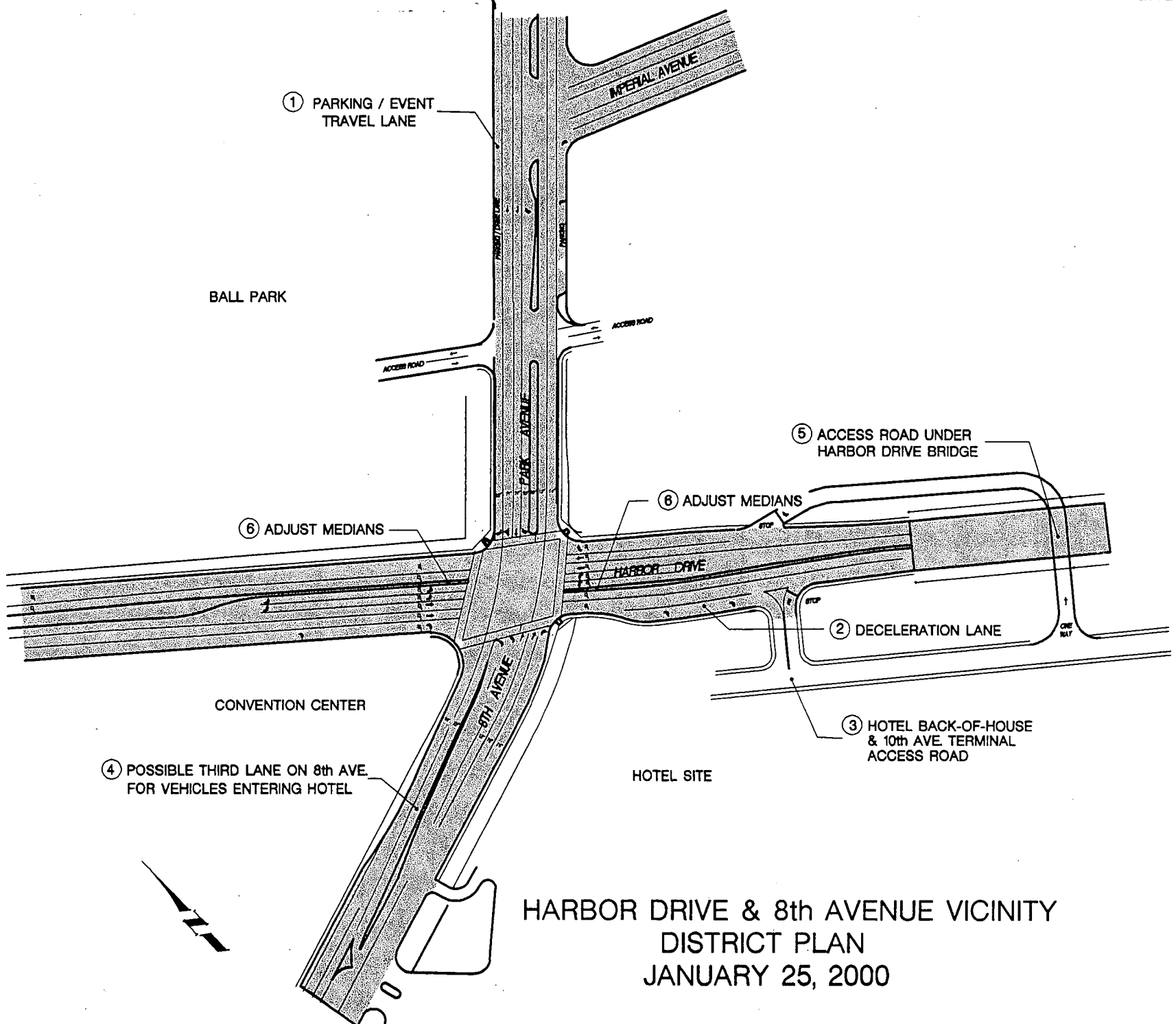
③ HOTEL BACK-OF-HOUSE & 10th AVE. TERMINAL ACCESS ROAD

HOTEL SITE

HARBOR DRIVE & 8th AVENUE VICINITY DISTRICT PLAN  
JANUARY 25, 2000

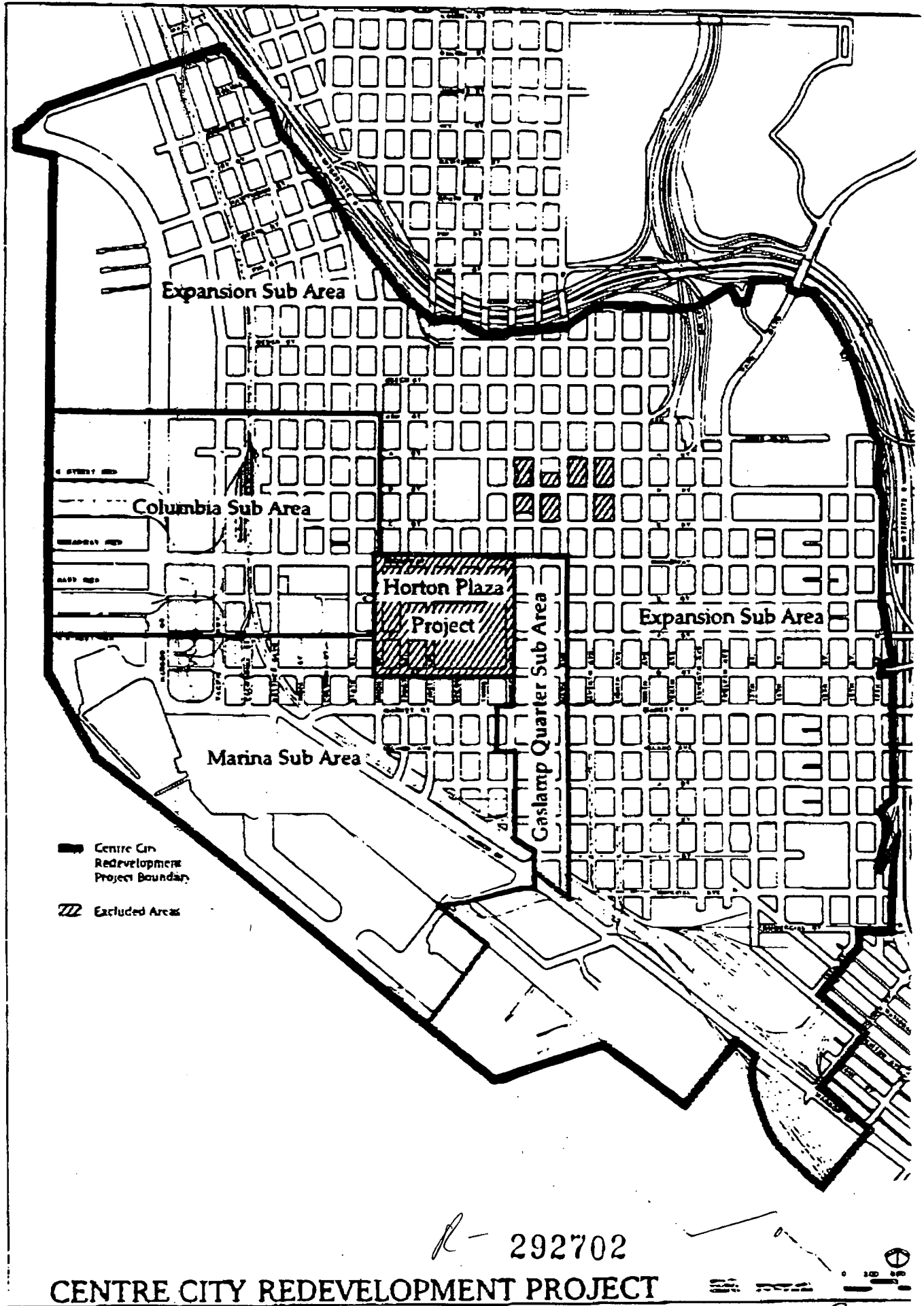
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EXHIBIT B



**EXHIBIT C**

**CENTRE CITY REDEVELOPMENT PROJECT AREA**



CENTRE CITY REDEVELOPMENT PROJECT