

LEASE AGREEMENT [(WITH OPTIONS FOR RENEWAL)]

BY AND BETWEEN

**City of Newport Beach, a California municipal corporation
("Lessor")**

AND

_____, a _____
("Lessee")

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This Lease Agreement [(With Options for Renewal)] ("Agreement") is entered into this ____ day of _____, 20__ by and between the City of Newport Beach, a California municipal corporation and charter city ("Lessor" or "City"), and _____, a _____ ("Lessee").

RECITALS

- A. Pursuant to the Tidelands Grant, the State of California granted to Lessor, as trustee, certain Tidelands. The Tidelands must be used to promote the public's interest in water-dependent or water-oriented activities, as described more fully in the Tidelands Grant;
- B. The Tidelands Grant provides that the Tidelands shall not, at any time, be granted, conveyed, given, or alienated to any individual, firm or corporation for any purpose whatever except pursuant to Lessor's grant of either a franchise or lease;
- C. The Tidelands Grant authorizes Lessor to enter into leases of the Tidelands for a period not exceeding fifty (50) years so long as such leases are consistent with Lessor's obligations to hold the Tidelands in trust for the uses and purposes contained in the Tidelands Grant;
- D. On _____, 20__ the City Council approved this Agreement by adopting Resolution No. __-____, as required by Municipal Code section 17.60.060(A); therefore, subject to the terms and conditions of this Agreement, Lessor desires to lease a portion of the Tidelands defined as the Premises to Lessee and Lessee desires to lease the Premises;
- E. The City previously issued City Pier Permit Number _____ for the Premises; City Pier Permit Number _____ has not been renewed and Lessee or any other party has no continuing rights in this permit;
- F. The parties desire to enter this Agreement for a term of less than fifty (50) years and to grant Lessee an option to extend the term of this Agreement; and
- G. To Lessee's knowledge, Lessee represents and warrants that it has obtained all rights necessary from third parties (including former pier permit holders and adjacent landowners) to use the piers and other Improvements located on the Premises, previously operated pursuant to City Pier Permit Number _____; and

In consideration of the mutual promises and obligations contained in this Agreement, the receipt and sufficiency of which is hereby acknowledged, and the Recitals above, which are incorporated by this reference, Lessee and Lessor hereby enter into this Agreement on the following terms and conditions:

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Definitions

Capitalized terms that are not otherwise defined in the body of this Agreement (which are identified in parentheses (" ")) have the meanings attributed in Exhibit "A."

2. Leased Premises

Lessor hereby leases to Lessee, for the Term specified in Section 3, the Premises. The rights granted to Lessee by this Agreement are subject to Lessee's compliance with the terms, covenants and conditions in this Agreement. Lessee covenants, as a material part of the consideration for this Agreement, to keep and perform each and every term, covenant and condition of this Agreement.

3. Term

- (a) Initial Term: The Term of this Agreement shall be ____ (__) years commencing on the 1st day of _____, 20__, which shall be the "Commencement Date," and terminating on the ____ day of _____, 20__, unless sooner terminated as provided in this Agreement.
- (b) Option for Renewal Term(s): If Lessee is not in default of its obligations in this Agreement, then Lessee shall have the option to extend the Term of this Agreement for ____ (__) additional successive "Renewal Term(s)" of ____ (__) years each, on the same terms and conditions contained in this Agreement. As provided by the Tidelands Grant, in no event shall the Term and any Renewal Terms exceed a total of fifty (50) years.
- (i) Each Renewal Term for which an option is exercised shall commence at the expiration of the immediately preceding Term. Lessee must exercise its option to a Renewal Term by giving a written "Option Notice" of its election to Lessor no earlier than one hundred and eighty (180) calendar days and no later than one hundred and twenty (120) calendar days prior to the expiration of the immediately preceding Term.
- (ii) Should Lessee fail to timely give an Option Notice, then the option for the Renewal Term and all subsequent Renewal Terms shall be null and void and of no further force and effect. Rent for the Renewal Term shall be determined and adjusted as described in Section 4 below.

4. Rent

- (a) Rent: Beginning on the Commencement Date, Lessee shall pay to Lessor, at the times prescribed within this Agreement, an annual "Rent" during a Lease Term Year in the sums identified in subsection 4(a)(i) as adjusted pursuant to subsection 4(a)(i) and Section 4(b).
- (i) Rent: Rent shall be calculated on an annual basis as follows:
- First, the Lessor shall determine the "Target Indexed Rate" as follows: the "Aggregate 20% Equivalent Rent" shall be determined, which is comprised of Gross Revenue for Slip Rentals for the preceding calendar year of all marinas included within the Marina Index (as set forth in 4(a)(ii) below) multiplied by point twenty (0.20) (*i.e.*, if aggregate Gross Revenue for Slip Rentals is \$14,000,000, multiply \$14,000,000 by 0.20 to yield an Aggregate 20% Equivalent Rent of \$2,800,000). If a Lessee of a marina included in the Marina Index fails to provide Gross Revenue for Slip

Rentals for any calendar year the Lessor shall use the Lessee's immediate prior Gross Revenue for Slip Rentals as adjusted by the Consumer Price Index ("CPI"). The Aggregate 20% Equivalent Rent shall then be divided by the aggregate Premises' square footage for all marinas included in the Marina Index to determine the Target Indexed Rate for the succeeding twelve (12) months of Rent beginning on March 1 (*i.e.*, if the Aggregate 20% Equivalent Rent is \$2,800,000 and the aggregate square footage for all marinas in the Marina Index is 1,111,111 square feet, the Target Index Rate would be \$2.52 a square foot [\$2,800,000 divided by 1,111,111 square feet]). The Premises for the individual Marina Index marinas will be based on known amounts determined by reference to existing City or County permits or leases. Where the square footage of a Marina Index marina is not known, it shall be estimated in good faith by the Lessor, in its sole and absolute discretion, using the same method employed to determine square footage for marinas currently under City permit or lease. The Target Index Rate shall be calculated annually by the Lessor in accordance with this paragraph as soon as practicable after December 31 of each calendar year.

For Lease Term Year beginning March 1, 2020, and thereafter, Rent shall equal the then applicable Target Index Rate, rounded to the nearest cent, times the Premises square footage as set forth in this Agreement (*i.e.*, if the Target Index Rate is \$2.52 and the Premises is 10,000 square feet the annual Rent would be \$25,200. Until March 1, 2020, Rent will be set in accordance with a phase-in procedure as follows: From the Commencement Date until March 1, 2014 the Rent shall be equal to the Premises' square feet multiplied by thirty-six cents (\$0.36). Thereafter, Rent shall be calculated annually each March 1 by reference to the following methodology: Target Index Rate minus the prior calendar year square footage rate divided by the number of years remaining within the seven (7) year phase-in period plus the prior calendar year square footage rate. An example of the Rent calculation is provided below in Table #1 of Exhibit B, for illustrative purposes only.

(ii) Marina Index Composition: The Marina Index shall be comprised of the following marinas:

- 1) Ardell
- 2) Bayshores Marina
- 3) Bayside Marina
- 4) Lido Yacht Anchorage
- 5) Harbor Towers Marina
- 6) Newport Dunes Marina
- 7) Newport Marina

To be included within the Marina Index, a Lessee must agree to the terms provided in Exhibit "C". The marinas included in the Marina Index may be revised by the City Council at a regular or special meeting in the event that an index marina ceases operation, fails to comply with the terms provided in Exhibit "C", or in the reasonable discretion of the City Council

ceases to be meaningful for use in the Marina Index. In that event, the City Council shall strive to select a new marina whose operating characteristics, revenue, and Tidelands square footage is similar to the marina to be replaced.

- (b) Fair Market Adjustment of Rent and Other Fees and Charges: In Lessor's sole and absolute discretion, at the Market Adjustment Date, the Rent and the Security Deposit may be adjusted to reflect then-current fair market value, as such value shall be determined by appraisal. The appraisal shall be conducted under a similar process used by the City of Newport Beach to appraise the Tidelands within Newport Harbor in 2012. Specifically, the Lessor shall retain two (2) independent appraisers to conduct a harbor-wide appraisal of commercial uses. If the two (2) appraisals return with a fair market value that is within ten percent (10%) of each other the two (2) appraisal fair market values shall be averaged to produce the then-current fair market value. If the two (2) appraisals return with a fair market value difference of greater than ten percent (10%) Lessor shall retain a third independent appraiser to conduct a harbor-wide appraisal. The fair market value determined by the third appraisal shall be averaged with the other two (2) appraisals to produce the then-current fair market value. The then-current fair market value determined under this section shall be used in the Marina Index to determine Rent for all commercial marinas for a twenty-five (25) year period beginning on the date the then-current fair market value is first used. Lessor shall pay the cost of all appraisals required under this section.
- (c) Periodic Payment of Rent: Twenty-Five percent (25%) of annual Rent for a particular Lease Term Year shall be payable on the first (1st) day of each Accounting Period during the Term.
- (d) Place for Payment of Rent: All payments of Rent shall be made in lawful money of the United States of America and shall be paid to Lessor in person or by United States' mail, or overnight mail service, at the Cashier's Office located at 3300 Newport Boulevard, Newport Beach, CA 92658, or to such other address as Lessor may from time to time designate in writing to Lessee. If requested by Lessor, Lessee shall make payments electronically (at www.newportbeachca.gov) or by wire transfer (at Lessee's cost). Lessee assumes all risk of loss and responsibility for late charges and delinquency rates if payments are not timely received by Lessor regardless of the method of transmittal.
 - (i) Additional Rent: Lessee shall pay as "Additional Rent" for the Premises, within ten (10) calendar days of Lessor's demand therefore (unless a different time for payment is expressly provided in this Agreement), all other amounts required by this Agreement, in addition to Rent. Additional Rent does not reduce or offset Lessee's obligations to pay Rent.
- (e) No Abatement or Reduction in Rent: Lessee has no right to any abatement, set-off or reduction in Rent or Additional Rent. No endorsement or statement on any check or any letter accompanying any check or payment will 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.

- (f) Net Lease: Rent, as defined in this Agreement, is based upon Lessee's material representation and covenant that it will pay all expenses, costs, taxes, assessments, fees or charges, and incur all liabilities, of every kind in any way relating to, or in connection with, the Premises and the Improvements during the Term. Accordingly, Lessee will promptly pay all expenses, costs, taxes, assessments, fees or charges, and incur all liabilities, of every kind and description relating to, or in connection with, the Premises and the Improvements during the Term.

5. Utilities, Taxes and Assessments

- (a) Lessee is solely responsible for obtaining all utilities and paying all taxes, fees and assessments for the Premises or Improvements located thereon. Lessee shall promptly pay, and discharge prior to delinquency, any and all charges for services or utilities and all taxes, fees and assessments furnished to or due on the Premises or Improvements located thereon, or occupants thereof.
- (b) Lessor hereby gives notice to Lessee, pursuant to Revenue and Tax Code Section 107.6 that this Agreement may create a possessory interest that is the subject of property taxes levied on such interest, the payment of which taxes shall be the sole obligation of Lessee. Lessee shall advise in writing any sublessee, licensee, concessionaire or third party using the Premises of the requirements of Section 107.6.
- (c) Any payments under this Section shall not reduce or offset Rent payments. Lessor has no liability for such payments.

6. Use of the Premises

- (a) During the term of this Agreement, Lessee will use and occupy the Premises solely and exclusively for the operation of an approximately ___ slip marina and associated ancillary uses.
- (b) Reserved.
- (c) Lessee will not use or permit the Premises to be used, directly or indirectly, for any other uses or purposes whatsoever without the prior written approval of Lessor, which approval may be granted or denied in Lessor's sole and absolute discretion.
- (d) Reserved.
- (e) Reserved.
- (f) The State of California has reserved to itself in the Tidelands Grant the right to use, without charge, any transportation, landing, or storage improvements, betterments or structures constructed upon the Tidelands for any vessel or other watercraft or railroad owned or operated by the state. Lessee understands and agrees that this provision in the Tidelands Grant may limit Lessee's use of the Premises and Lessee shall not deny the State any rights afforded by this provision in the Tidelands Grant.

- (g) Lessee shall not undertake any activity, including dredging of the Premises, that causes water intrusion or damage to bulkheads and Lessee will be liable for any damage to bulkheads resulting from such activity.

7. Security Deposit

- (a) Amount: A security deposit of _____ Dollars (\$_____) will be provided to Lessor by Lessee, on or before the Commencement Date. The security deposit shall be held by Lessor and used for the purpose of guarantying Lessee's faithful performance of its obligations in this Agreement, including, without limitation, the payment of Rent and any other payments in this Agreement. If Lessor uses or draws any portion of the security deposit then Lessee shall, within ten (10) calendar days after Lessor's written demand, restore the security deposit to its original amount or, as to letters of credit, provide Lessor with additional letter(s) of credit in an amount equal to the deficiency. Such additional letter(s) of credit shall comply with the provisions of subsection (b).
- (b) Type of Security Deposit: The security deposit may be in the form of an irrevocable stand-by letter of credit, cash, or other security agreed upon by the parties. The principal sum shall be made payable to Lessor or order. Each letter of credit provided during the term of this Agreement shall be valid for a minimum of twelve (12) months from date of issuance, except that in the final Lease Term Year the letter of credit shall be valid for three (3) months past the termination date. Any cash security deposit will be held by Lessor and any interest thereon shall be Lessor's property and Lessee is not entitled to interest.

8. Acceptance of Condition of Premises - "As-Is" / Waiver / Release

- (a) Lessee's Acknowledgment: Lessee acknowledges that Lessee, Lessor or unrelated third parties may have constructed improvements (some or all of which may be Improvements as specified on Exhibit "D") on and adjacent to the Premises (including, without limit, bulkheads in the surrounding area adjacent to and/or abutting the Premises). Lessee agrees and acknowledges that it is relying solely on its own inspections and investigations regarding the Premises, the condition of the Premises, the surrounding area and all other matters related thereto. Lessee represents and warrants that it has obtained the advice of such independent professional consultants as it deems necessary in connection with its investigation and study of the Premises and surrounding area, including, without limitation, water quality, Improvement quality, soils, hydrology, seismology, archaeology, Applicable Laws (including, without limitation, the laws relating to the construction, maintenance, use and operation of the Premises and Improvements), and all environmental, zoning and other land use entitlement requirements and procedures, height restrictions, floor area coverage limitations and similar matters.
- (b) Only Lessor's Express Written Agreements Binding: Lessee acknowledges and agrees that no person acting on behalf of Lessor is authorized to make, and that except as expressly set forth in this Agreement, neither Lessor nor anyone acting for or on behalf of Lessor has made, any representation, warranty, statement, guaranty or promise to Lessee, or to anyone acting for or on behalf of Lessee, concerning the condition of the Premises, any other aspect of the Premises or the surrounding area. Lessee further acknowledges and agrees that no

representation, warranty, agreement, statement, guaranty or promise, if any, made by any person acting on behalf of Lessor which is not expressly set forth in this Agreement will be valid or binding on Lessor.

- (c) Verification of Acceptance: Lessee further acknowledges and agrees that Lessee's execution of this Agreement constitutes Lessee's representation, warranty and covenant that the condition of the Premises and the surrounding area has been independently verified by Lessee to its full satisfaction, and that, except to the extent of the express covenants of Lessor set forth in this Agreement, Lessee will be leasing the Premises based solely upon and in reliance on its own inspections, evaluations, analyses and conclusions, or those of Lessee's representatives. As material inducement to Lessor's entering this Agreement, Lessee represents, warrants and covenants that LESSEE ACCEPTS AND IS LEASING THE PREMISES, AND IS AWARE OF THE SURROUNDING AREA, IN ITS "AS-IS, WITH ALL FAULTS" CONDITION AND STATE OF REPAIR INCLUSIVE OF ALL FAULTS AND DEFECTS, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE LESSEE'S EXECUTION OF THIS AGREEMENT, AND WITH NO WARRANTY EXPRESS OR IMPLIED FROM LESSOR AS TO ANY LATENT, PATENT, FORESEEABLE AND UNFORESEEABLE CONDITIONS. Without limiting the scope or generality of the foregoing, Lessee expressly assumes the risk that the Premises do not or will not comply with any Applicable Laws now or hereafter in effect.
- (d) Waivers, Disclaimers and Release:
- (i) Waiver and Disclaimer: Lessee hereby fully and forever waives, and Lessor hereby fully and forever disclaims, all warranties of whatever type or kind with respect to the Premises and Improvements, whether expressed, implied or otherwise including, without limitation, those of fitness for a particular purpose, tenant ability, habitability or use.
 - (ii) Lessor's Materials: Lessee further acknowledges that any information and reports including, without limitation, any engineering reports, architectural reports, feasibility reports, marketing reports, soils reports, environmental reports, analyses or data, or other similar reports, analyses, data or information of whatever type or kind which Lessee has received or may hereafter receive from Lessor or its agents or consultants have been furnished without warranty of any kind and on the express condition that Lessee will make its own independent verification of the accuracy, reliability and completeness of such information and that Lessee will not rely thereon. Accordingly, subject to terms of Section 8(e) below, Lessee agrees that under no circumstances will it make any claim against, bring any action, cause of action or proceeding against, or assert any liability upon, Lessor or any of the persons or entities who prepared or furnished any of the above information or materials as a result of the inaccuracy, unreliability or incompleteness of, or any defect or mistake in, any such information or materials. Lessee hereby fully and forever releases, acquits and discharges Lessor and each person furnishing such information or materials of and from, any such claims, actions, causes of action, proceedings or liability, whether known or unknown.

(e) Release and Waiver:

- (i) Release: Except to the extent of Lessor's negligence or willful misconduct, or any breach by Lessor of express covenants and obligations in this Agreement, Lessee, on behalf of Lessee, its successors and assigns, hereby fully and forever releases, acquits and discharges Lessor of and from, and hereby fully forever waives:

Any and all claims, actions, causes of action, suits, liabilities, obligations, proceedings, demands, rights, damages, costs, expenses, losses, judgments, provisional relief, fines, penalties, fees, and costs and expenses (including, without limitation, attorneys' fees, disbursements and court costs), including, without limitation, any and all claims for compensation, reimbursement, or contribution whatsoever, whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent, that Lessee or any of Lessee's successors or assigns now has or may have or which may arise or be asserted in the future arising out of, directly or indirectly, or in any way connected with: (1) any act or omission of Lessor (or any person acting for or on behalf of Lessor or for whose conduct Lessor may be liable), in connection with prior ownership, maintenance, operation or use of the Premises or the bulkheads in the surrounding area adjacent to and/or abutting the Premises; (2) any condition of environmental contamination or pollution at the Premises (including, without limitation, the contamination or pollution of any soils, subsoil media, surface waters or groundwaters at the Premises); (3) to the extent not already included in clause "(2)" above, the prior, present or future existence, release or discharge, or threatened release, of any Hazardous Substances at the Premises, (including, without limitation, the release or discharge, or threatened release, of any Hazardous Substances into the air at the Premises or into any soils, subsoils, surface waters or groundwaters at the Premises); (4) violation of, or noncompliance with, any Applicable Law now or hereafter in effect, however and whenever occurring; (5) the condition of the soil at the Premises; (6) the condition of any improvements located on the Premises or surrounding area including, without limitation, the structural integrity and seismic compliance of such improvements; (7) any matters which would be shown on an accurate ALTA land survey of the Premises (including, without limitation, all existing easements and encroachments, if any); (8) matters which would be apparent from a visual inspection of the Premises or surrounding area; or (9) Lessor's and the City of Newport Beach's exercise of discretion to approve, deny, modify or condition, CEQA documents, the Improvements, or any other permits, license or regulatory approvals from the City of Newport Beach in relation to this Agreement including, without limit, any matters contained in Section 41; or (10) to the extent not already covered by any of the foregoing clauses above, the use, maintenance, development, construction, ownership or operation of the Premises by Lessor or any predecessor(s)-in-interest in the Premises of Lessor.

- (ii) Release: Except to the extent of Lessee's negligence or willful misconduct, or except for any of Lessee's covenants and obligations in

this Agreement to the contrary including, without limitation, any of Lessee's indemnification obligations in this Agreement, Lessor hereby fully and forever releases, acquits and discharges Lessee of and from, and hereby fully forever waives:

Any and all claims, actions, causes of action, suits, liabilities, obligations, proceedings, demands, rights, damages, costs, expenses, losses, judgments, provisional relief, fines, penalties, fees, and costs and expenses (including, without limitation, attorneys' fees, disbursements and court costs), including, without limitation, any and all claims for compensation, reimbursement, or contribution whatsoever, whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent, that Lessor now has or which may arise or be asserted in the future, to the extent caused by Lessor's sole negligence or willful misconduct in its capacity as a landlord under this Agreement (and not in any other capacity) or Lessor's failure to comply with Lessor's express obligations in this Agreement.

(iii) Waiver of Civil Code Section 1542: With respect to all releases made by Lessee or Lessor under or pursuant to this Section 8, Lessee or Lessor hereby waives the application and benefits of California Civil Code Section 1542 and hereby verifies that it has read and understands the following provision of California Civil Code Section 1542:

"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."

Lessee: _____ Lessor: _____

9. Reserved.

10. Reconstruction

Lessee will promptly cause the Improvements or any part thereof, which are (a) damaged or destroyed or (b) declared unsafe or unfit for occupancy or use by a public entity with the appropriate authority, to be restored or reconstructed to their original design and layout, whether or not required to be insured against, at Lessee's sole cost and expense. Restoration or reconstruction shall commence within sixty (60) calendar days from the date of the damage, and Lessee shall diligently pursue reconstruction to completion. Lessee shall not be entitled to any abatement in Rent or other form of compensation from Lessor for loss of use of the Premises or Improvements in the event of damage or destruction of the Premises or Improvements. Damage to or destruction of the Premises or the Improvements shall not permit Lessee to terminate this Agreement. Alternatively, in the event of damage or destruction, Lessee may remove all Improvements from the Premises and restore the Premises to a condition acceptable to Lessor, and any other applicable public entity, and terminate this Lease. Unless Lessee elects to terminate this Lease and remove all Improvements, Lessee shall be in default if it does not restore or reconstruct as required in this Section. The force majeure provisions in this Agreement shall apply to reconstruction.

11. Maintenance and Repair

- (a) Maintenance by Lessee: Lessee assumes full responsibility for operation and maintenance and repair of the Premises throughout the Term at its sole cost, and without expense to Lessor.
- (i) Without limiting Lessee's obligations to maintain the Premises, Lessee shall keep and maintain all Improvements in first-class order, condition and repair consistent with similar marinas in Newport Harbor.
 - (ii) Maintenance dredging bayward of the property line, between the bulkhead line and the pierhead line, shall be the responsibility of Lessee; provided that with respect to this obligation Lessee shall not violate Section 6(g). Lessee shall perform all maintenance in compliance with all Applicable Laws.
 - (iii) Reserved.
 - (iv) Reserved.
 - (v) Lessee expressly waives (a) the right to require Lessor to make repairs; (b) any right to make repairs at the expense of Lessor; (c) the right to reduce or offset Rent as a consequence of the condition of the Premises or the Improvements; and (d) the benefits of California Civil Code Sections 1932, 1941 and 1942, as amended from time to time; and (e) any law, judicial pronouncement, or common law principle similar thereto, which is now or hereafter in effect or is otherwise inconsistent with the provisions of this Agreement.
- (b) Reserved.
- (c) Reserved.
- (d) Maintenance Prior to Renewal Term: In addition to any other conditions to Lessee's exercise of the option to extend the Term (or Renewal Term) of this Agreement, no less than sixty (60) calendar days prior to the end of a Term that may be renewed, Lessee shall submit a maintenance report stating the condition of the Improvements on the Premises. Improvements shall be inspected, and the maintenance report shall be written, by a qualified marine engineer that is retained and paid for by Lessee but approved by Lessor.

The maintenance report shall make repair and maintenance recommendations to ensure that the maintenance standards in this Agreement are met and will be maintained and the useful life of the Improvements will extend throughout the Renewal Term(s). At the time of providing the maintenance report to Lessor, Lessee shall sign a certification under penalty of perjury that Lessee shall, at its sole cost, make all repairs and perform all maintenance identified in the maintenance report to the satisfaction of, and on a schedule satisfactory to, Lessor. Any costs incurred by Lessee to make repair and maintenance recommendations is a qualification for the Term of this Agreement and is not Rent. The cost of repair and maintenance recommendations shall not be considered by the parties or

appraiser in determining any Rent or Rent adjustment during the term of this Agreement.

(e) Maintenance by Lessor

- (i) Nothing in this Agreement requires Lessor to perform any maintenance or repair to the Premises or to any adjacent property or bulkheads; or to make any improvements whatsoever on or for the benefit of the Premises. However, with no less than twenty-four (24) hours notice from Lessor to Lessee, Lessor shall have the right, but not the obligation, to maintain or make any necessary repairs related to safety or hazard concerns to or on the Premises. Lessee shall reasonably cooperate with Lessor in any activity undertaken by Lessor on the Premises. Lessor may collect its cost for maintenance or repairs from the Lessee in the manner provided in Section 44.

12. Liens

- (a) Liens Prohibited: Lessee shall not permit to be imposed, recorded or enforced against the Premises, any portion thereof or any structure or Improvement thereon, any mechanics, materialmen's, contractors or other liens arising from, or any claims for damages growing out of, any work or repair, construction or alteration of improvements on the Premises. Lessee shall give Lessor at least fifteen (15) calendar days prior written notice before commencing construction of any kind on the Premises so that Lessor may post appropriate notice of non-responsibility.
- (b) Release/Removal of Liens: In the event any lien or stop notice is imposed or recorded on the Premises during the Term, Lessee shall pay or cause to be paid all such liens, claims or demands before any action is brought to enforce the same against the Premises. Notwithstanding the foregoing, if Lessee legitimately contests the validity of such lien, claim or demand, then Lessee shall, at its expense, defend against such lien, claim or demand provided that it provide Lessor the indemnity in Section 22 and provided Lessee shall pay and satisfy any adverse judgment that may be rendered before any enforcement against Lessor or the Premises.
- (c) Bond: If a lien, or any other claim(s), lien(s) or levy(ies) of any nature caused by Lessee or Lessee's sublessees, licensees, concessionaires, contractors, subcontractors, or agents, is filed against the Premises, then Lessee shall, upon written request of Lessor, deposit with Lessor a bond conditioned for the payment in full of all claims upon which said claim(s), lien(s) or levy(ies) have been filed. Such bond shall be in form and content provided in Section 46 and shall be deposited with Lessor within ten (10) calendar days after Lessor's written request.
- (d) Exceptions: Section 12 shall not apply to a foreclosure of a Leasehold Mortgage encumbering the Leasehold Estate if the Leasehold Mortgage has previously received Lessor consent in accordance with Section 16(c) of this Agreement.

13. Reserved.

14. Quitclaim Deed

Upon expiration or the earlier termination of this Agreement for any reason, including but not limited to termination because of default by Lessee, Lessee shall, at Lessee's sole expense, remove all fixtures, equipment, and Improvements installed by Lessee from the Premises. Unless another time line is agreed upon by Lessor, all fixtures, equipment and Improvements shall be removed by Lessee within thirty (30) calendar days following the expiration or termination of this Agreement. Alternatively, Lessee, with Lessor's written consent, may quitclaim all fixtures, equipment, and Improvements on the Premises to Lessor. Notwithstanding any other provision of this Agreement, as permitted by California Public Resources Code Section 6312, or any successor statute, the parties agree that upon expiration or earlier termination of this Agreement Lessor shall have no liability or obligation to pay compensation for any improvements made to the Premises.

15. Right to Enter the Premises for Inspection

Lessor expressly reserves the right and shall be entitled to enter the Premises, and all Improvements, including a right of reasonable access to the Premises across Lessee owned or occupied lands adjacent to the Premises, to inspect the Premises for compliance with the terms of this Agreement. Unless otherwise provided in this Agreement, Lessee shall provide Lessor access to the Premises for such purposes, upon not less than seventy-two (72) hours written notice.

16. Transfers / Hypothecation for Financing

(a) Transfers: Except as expressly provided herein, Lessee and its successors shall not either voluntarily, or by operation of law, engage in a Transfer without first providing written request to Lessor and obtaining Lessor's prior written consent. Lessee agrees that Lessor's discretion to provide, withhold or condition consent to any Transfer includes, without limitation, Lessor's discretion in administering the Tidelands, which are a valuable public resource held by Lessor in trust for the people of the State of California; therefore, in the absence of fraud or arbitrary action in deciding to provide or withhold consent, Lessor's decision to grant, withhold or condition consent shall be final and shall be deemed reasonable. A Transfer made in violation of this Section 16, including without limitation the obligation to receive Lessor's prior consent, is a default subject to the cure right in Section 18(b).

(i) Lessee shall comply with the following requirements for any Transfer. Lessee agrees that failure to satisfy these requirements are reasonable bases for Lessor to deny consent (but is not exhaustive bases to deny consent):

(1) Lessee shall give Lessor at least thirty (30) calendar days written notice of its proposed Transfer and provide appropriate documentation demonstrating to Lessor's satisfaction the financial and operational responsibility and appropriateness of the proposed transferee. Lessee shall provide Lessor within five (5)

calendar days such other or additional information and/or documentation as may be reasonably requested by Lessor.

- (2) Lessee shall provide the terms and provisions of the proposed Transfer.
- (3) Except as otherwise provided in this Agreement for a permitted Leasehold Mortgagee, the proposed transferee shall, in recordable form, expressly assume this Agreement.
- (4) In the event the proposed transferee is acquiring only a portion of the adjoining Other Real Property, the rights and obligations of Lessee and the proposed assignee shall be proportionately adjusted in the manner deemed appropriate by Lessor in light of its obligations under the Tidelands Grants; and
- (5) Lessee shall pay all Lessor's costs associated with Lessor's consideration of the Transfer, regardless of whether such transfer is consummated, or in connection with any other actions taken by Lessor pursuant to this Section 16 in the manner provided in Section 44.

(b) Transfer if Appurtenant to Other Real Property

- (i) The Premises is appurtenant to the adjoining littoral or riparian land and/or uplands with uplands support (e.g., parking, restrooms, etc.) more particularly described on Exhibit "E" as the "Other Real Property" and Lessee is the [fee title owner] [lessee of the Other Real Property pursuant to that certain _____, dated _____, by and between Lessee as "_____" and _____ as "_____."]
_____ of the Other Real Property.
- (ii) Lessee shall not Transfer its interest or rights to use such Other Real Property adjoining the Premises separately from the Premises or Lessee's interest in this Agreement.

In connection with any transaction described in the immediately preceding sentence, Lessee shall have the right to Transfer the Premises or Lessee's interest in this Agreement to any successor of Lessee's interest (or portion thereof) in the Other Real Property, provided that Lessor's prior written consent has been obtained, which consent shall not be unreasonably withheld, conditioned or delayed.

(c) Subletting Permitted to Boat Slip Renters

- (i) Notwithstanding other provisions of this Section 16, Lessee shall have the right to sublease the slips to Boat Slip Renters and to extend or renew any subleases with Boat Slip Renters.

(d) Hypothecation for Financing: For the purpose of financing or refinancing the acquisition of the Premises, the Improvements, the fixtures and equipment located

on the Premises, the alteration, construction or reconstruction of Improvements, Lessee may engage in a Transfer to a Leasehold Mortgagee only if, in addition to such other applicable provisions in this Agreement, the provisions in this Section 16(d) are satisfied. In no event shall Leasehold Mortgages either individually or collectively exceed a loan-to-value ratio of seventy-five percent (75%) of the Premises.

- (i) Notice to Lessor. Lessee shall provide Lessor with a fully executed complete copy of each Leasehold Mortgage, and all related loan documents (including copies of all appraisals), any and all amendments thereto, and the name and address of each Leasehold Mortgagee. In the event of any assignment of a Leasehold Mortgage or in the event of a change of address of a Leasehold Mortgagee, Lessee shall provide the new name and address of the assignee or Leasehold Mortgagee to Lessor. Notices of default and notices of foreclosure shall be given to Lessor contemporaneously with service on Lessee.
- (ii) Notices to Leasehold Mortgagees. A Leasehold Mortgagee shall not be entitled to notice or a copy of any notice from Lessor unless Lessee provides Lessor with Leasehold Mortgagee's name and address and requests that such Leasehold Mortgagee receive notices.
- (iii) Leasehold Mortgagee Opportunity to Remedy Default. Any Leasehold Mortgagee who is entitled to notice as provided in Section 16(d)(ii) shall have the right, but not the obligation, to remedy the default or acts or omissions of Lessee within the period and in the manner specified in this provision. Upon Lessee's default and subsequent expiration of the applicable cure period in Section 18, a Leasehold Mortgagee shall be permitted to remedy such default(s) at any time within fifteen (15) calendar days (for nonmonetary defaults) and five (5) calendar days (for monetary defaults) following the expiration of the Lessee's cure period; provided, however, Lessor shall not be required to furnish any further notice(s) of default(s) to said Leasehold Mortgagee.
- (iv) Leasehold Mortgagee Procedure on Lessee's Default.
 - (1) Upon Leasehold Mortgagee's remedy of Lessee's default to the reasonable satisfaction of Lessor, this Agreement shall continue provided that a Leasehold Mortgagee:
 - a. Pays all Rent, and other monetary obligations of Lessee under this Agreement as the same becomes due, and perform all of Lessee's other obligations under this Agreement; and
 - b. If not enjoined or stayed, takes steps to acquire or sell Lessee's interest in this Agreement and in the Premises to an assignee, future transferee or purchaser by foreclosure of the Leasehold Mortgage or other appropriate means, and prosecutes the same to completion with reasonable diligence.

- (2) Nothing in this Section 16(d) shall extend this Agreement beyond the Term; nor to require a Leasehold Mortgagee to continue such foreclosure proceedings after a breach or default has been remedied. If Lessee's breach or default is remedied and the Leasehold Mortgagee discontinues such foreclosure proceedings, this Agreement, at Lessor's option and in its sole and absolute discretion, may continue as if no breach or default under this Agreement occurred.
 - (3) Before a Leasehold Mortgagee, or any other assignee, future transferee or purchaser by foreclosure of the Leasehold Mortgage, acquires the Leasehold Estate, it shall, as an express condition precedent, agree in writing to assume each and every obligation under the Agreement. Regardless, with the exception of said Leasehold Mortgagee, no Transfer to an assignee, future transferee or purchaser by foreclosure of a Leasehold Mortgage shall be effective without Lessor's prior written consent, which shall not be unreasonably withheld.
 - (4) The assignee, purchaser or future transferee at any sale of this Agreement or of the Leasehold Estate in any proceedings for the foreclosure of or trustee's sale under any Leasehold Mortgage, or pursuant to any deed in lieu of foreclosure, shall be deemed an assignee or transferee of this Agreement, and shall be deemed to have agreed to perform all of the terms, covenants and conditions on the part of Lessee to be performed in this Agreement but only from and after the date of such purchase and assignment, and only for so long as such purchaser, future transferee or assignee is the owner of the Leasehold Estate.
 - (5) If Lessor denies consent to (a) the successful bidder or purchaser upon foreclosure or (b) a proposed future transferee, assignee or sublessee of the Leasehold Mortgagee, the sole and exclusive remedy shall be for such party or the Leasehold Mortgagee to seek relief in the nature of specific performance.
 - (6) A Leasehold Mortgagee shall include a statement in any Notice of Foreclosure Sale that provides the requirements for Lessor's consent.
- (v) Casualty Loss. A standard lender's loss payable endorsement naming each Leasehold Mortgagee may be added to any and all insurance policies required to be carried by Lessee hereunder. Nevertheless, the provisions in any Leasehold Mortgage for the application of insurance proceeds shall be subject to the provisions of this Agreement and, in the event of any conflict between the provisions of this Agreement and the provisions of any Leasehold Mortgage with respect thereto, the provisions of this Agreement shall control.
- (vi) Limitation on Lessee's Right to Encumber. Any Leasehold Mortgage now or hereafter placed on Lessee's interest in the Premises shall be subject

and subordinate to any limitations in the Tidelands Grants, Lessor's interest in the Tidelands, this Agreement, and any mortgage now in existence on the Leasehold Estate. Lessee shall not use, encumber or Transfer this Agreement or the Premises as security or collateral for any action unless directly related to the Tidelands and the permitted uses allowed by this Agreement.

- (vii) No Rights to Encumber Interest of Lessor. The provisions of Section 16 do not give any entity the right to mortgage, hypothecate, cause a Transfer of, or otherwise encumber or cause any liens to be placed against the Lessor's interest in the Premises as trustee of the Tidelands, nor shall anything in this Agreement be construed as resulting in a subordination in whole or in part of Lessor's interests.
- (viii) Estoppel Certificate. Lessor shall, within ten (10) business days after written request from Lessee or any Leasehold Mortgagee, certify by written instrument to any Leasehold Mortgagee or proposed Leasehold Mortgagee: (a) as to whether this Agreement has been modified, supplemented, amended, extended or renewed; (b) as to the existence of any breach or default of this Agreement; and (c) as to the commencement and expiration dates of the term of this Agreement.

17. Bankruptcy

Lessee agrees that if all, or substantially all, of Lessee's assets are placed in the hands of a receiver or trustee and remain so for a period of thirty (30) calendar days; or if Lessee makes an assignment for the benefit of creditors or be adjudicated bankrupt; or if Lessee institutes any proceedings under the Bankruptcy Act or similar law wherein Lessee seeks to be adjudicated bankrupt or to be discharged of its debts or seeks to effect a plan of liquidation or reorganization; or if any involuntary proceedings be filed against Lessee and not dismissed or stayed within sixty (60) calendar days, then this Agreement or any interest in and to the Premises shall not become an asset in any such proceeding and, to the extent permitted by law (and in addition to the provisions of Section 18) Lessor may declare this Agreement terminated and take possession of the Premises.

18. Defaults

The occurrence of any of the following constitutes a default of this Agreement by Lessee:

- (a) Continued failure to operate, vacation or abandonment of the Premises for one hundred twenty (120) consecutive calendar days after the date of Lessor's written notice to Lessee.
- (b) Failure to make any payment required by this Agreement when such failure continues for a period of ten (10) calendar days after the date of Lessor's written notice that payment is due (unless another time period within which to make payment is specifically provided); provided that any such notice provided in this Section 18(b) or in Section 18(c) shall be in lieu of, and not in addition to, any

notice required under Section 1161 of the California Code of Civil Procedure, as may be amended.

- (c) Failure of Lessee to observe or perform any of the covenants, conditions, or provisions in this Agreement, except for a monetary default specified in Section 18(b)18(a) above, where such failure continues for a period of twenty (20) calendar days after the date of Lessor's written notice of the default (unless another time period within which to perform is specifically provided in this Agreement); provided, however, that if the nature of Lessee's default is such that more than twenty (20) calendar days are reasonably required to complete its cure, then Lessee shall not be in default if Lessee commences to cure the default within twenty (20) calendar days after written notice and thereafter diligently and continuously pursues the cure to completion.
- (d) Any of the events in Section 17 occur; provided that this provision is not applicable or binding on a Leasehold Mortgagee which is of record and has been consented to by Lessor, or to said Leasehold Mortgagee's successors in interest consented to by Lessor, as long as (i) there remains any monies to be paid by Lessee to such Leasehold Mortgagee under the terms of such Leasehold Mortgage, (ii) that such Leasehold Mortgagee or its successors in interest, continuously and timely pays to Lessor all Rent due or coming due under the provisions of this Agreement and the Premises are continuously and actively used and (iii) that said Leasehold Mortgagee agrees in writing to assume and perform each and every obligation under the Agreement.

19. Remedies

- (a) Cumulative Nature of Remedies. If any default by Lessee continues without being cured in the time period specified in Section 18, then Lessor shall have the remedies described in this Section 19, which are in addition to all other rights and remedies provided by law, equity or elsewhere in this Agreement. Lessor shall have the right to elect its remedies and may resort to any such remedies cumulatively, or in the alternative.
 - (i) Reentry without Termination / Assignment of Gross Receipts. Lessor may reenter the Premises, and, without terminating this Agreement, re-let all or a portion of the Premises. Lessor may execute any agreement made under this provision in Lessor's name and shall be entitled to all rents from the use, operation, or occupancy of the Premises. Lessee shall nevertheless pay to Lessor on the dates specified in this Agreement the equivalent of all sums required of Lessee under this Agreement, plus Lessor's expenses in conjunction with re-letting, less the proceeds of any re-letting or atonement. No act by or on behalf of Lessor under this provision shall constitute a termination of this Agreement unless Lessor gives Lessee specific written notice of termination.
 - (ii) Maintain Agreement. Lessor may maintain this Agreement in full force and effect and recover Rent, Additional Rent, payment or other charges or consideration as they become due, without terminating Lessee's right of possession, regardless of whether Lessee has abandoned the Premises.

(iii) Termination. Lessor may terminate this Agreement by giving Lessee five (5) calendar days written notice. If Lessor terminates this Agreement, Lessor may recover possession (which Lessee shall surrender and vacate upon demand) and remove all persons, property and Improvements. Lessor shall be entitled to recover the following as damages:

- (1) The Worth at the Time of Award of the unpaid Rent, Additional Rent or other charges which had been earned at the time of termination;
- (2) The Worth at the Time of Award of the amount by which the unpaid Rent, Additional Rent or other charges 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;
- (3) The Worth at the Time of Award of the amount by which the unpaid Rent, Additional Rent or other charges for the balance of the Term of this Agreement after the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided;
- (4) Any other amount necessary to reasonably compensate Lessor for the detriment proximately caused by Lessee's failure to perform its obligations under this Agreement;
- (5) At Lessor's election, such other amounts in addition to or in lieu of the foregoing as may be permitted from time-to-time by applicable California law; and
- (6) Lessor shall also be entitled to an award of the costs and expenses (including, without limitation, actual attorneys' fees and costs) incurred by Lessor in maintaining or preserving the Premises after default, preparing the Premises for re-letting, or repairing any damage caused by the act or omission of Lessee.

The "Worth at the Time of Award" of the amounts referred to in "(1)" and "(2)" above shall be computed by charging interest at ten percent (10%) per annum from the dates such amounts accrued to Lessor. The "Worth at the Time of Award" of the amount referred to in "(3)" above shall be computed by discounting such amount at ten percent (10%) per annum.

(b) Lessor's Right to Cure Lessee's Default. Upon continuance of any default beyond applicable notice and cure periods, Lessor may, but is not obligated to, cure the default at Lessee's cost. If Lessor pays any money or performs any act required of but not paid or performed by Lessee after notice, the payment and/or the reasonable cost (including, without limitation, actual attorneys' fees and costs) of performance shall be paid by Lessee as Additional Rent. No such payment by Lessor or act shall constitute a waiver of default, or of any remedy for default, or render Lessor liable for any loss or damage resulting from performance.

- (c) Waiver of Rights. Lessee waives any right of redemption or relief from forfeiture under California Code of Civil Procedure Sections 1174 or 1179, or under any other present or future law, if Lessee is evicted or Lessor takes possession of the Premises by reason of any default by Lessee.

20. Surrender of Premises

- (a) Upon expiration or earlier termination, of this Agreement Lessee shall peaceably surrender the Premises to Lessor. At surrender, the Premises shall be in as good condition as they were at the Commencement Date, except as the Premises were repaired, rebuilt, restored, altered, or added to as permitted or required by the provisions of this Agreement, ordinary wear and tear excepted, and subject to those provisions below.
- (b) If Lessee elects to remove any fixtures, improvements (including all Improvements to which Lessee has title), or if Lessor declines Lessee's offer to accept ownership of the same, then Lessee shall restore the Premises to its natural state as deemed acceptable by Lessor. All plans for Lessee's subsequent removal and restoration shall be to the satisfaction of Lessor and shall be completed no later than thirty (30) calendar days after the expiration or sooner termination of this Agreement, or other time line agreed upon by the Lessor. During any period of time employed by Lessee to remove fixtures, improvements (including all Improvements to which Lessee has title) Lessee shall continue to pay Rent to Lessor in accordance with this Agreement, which said Rent shall be prorated daily.
- (c) Any holding over by Lessee after either expiration or earlier 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 Agreement expiration or earlier termination (including for the purpose of Lessee's removal of Improvements), such possession shall be deemed a month-to-month tenancy terminable upon thirty (30) calendar days' notice furnished at any time by either party to the other. In addition, all provisions of this Agreement, except those pertaining to Term, shall apply to the month-to-month tenancy, and Lessee shall continue to pay all Rent required by this Agreement. Provided, however, Rent shall be paid monthly on the first (1st) day of the month.

21. Condemnation

- (a) Lessor shall notify Lessee of any Condemnation by providing written notice thereof no later than thirty (30) calendar days after the later of (i) the filing of a complaint in eminent domain by Condemnor or (ii) any voluntary final agreement by Lessor and Condemnor of the extent of the scope and extent of property interests in the Premises to be included within the Condemnation.
- (b) If the Premises are totally taken by Condemnation, this Agreement shall terminate as of the date on which Condemnor actually takes physical possession of the Premises, which date is referred to in this Section 21 as the "Termination Date." If less than all but more than fifty percent (50%) of total area of the Premises are taken through Condemnation, Lessee shall have the option to terminate this Agreement by providing written notice to Lessor. Lessee's notice must be given within thirty (30) calendar days after Lessee's receipt of Lessor's notice provided

pursuant to subparagraph (a) above, and if Lessee's notice of termination is not timely given, then Lessee shall conclusively be deemed to have elected not to terminate this Agreement. If this Agreement is terminated under this Section, the termination shall be effective on the Termination Date, and Lessor shall prorate Rent to that date. Lessee must pay Rent for the period up to, but not including, the Termination Date, as prorated by Lessor. Lessor shall return to Lessee any prepaid Rent allocable to any period on or after the Termination Date.

- (c) If any part of the Premises is taken by Condemnation and this Agreement is not terminated, Rent shall be proportionately reduced based on the value of the actual portion of the Premises taken as a percentage of the value of the entire Premises, in its "before" condition and without regard to any injury to the remainder, or benefit to the remainder, resulting from the taking or the construction of the project for which the taking occurs. Lessor shall make such determination of the amount of reduction in Rent in its reasonable discretion, based upon either the appraisal for the Condemnation provided by the Condemnor, or pursuant to an appraisal prepared in the manner provided in Section 43, as Lessor shall determine. Lessor and Lessee agree to execute an amendment or other appropriate instrument modifying this Agreement within thirty (30) calendar days after a partial taking, confirming the reduction in Premises and reduction in Rent.
- (d) If a temporary taking of part of the Premises occurs through (i) the exercise of any government power by Condemnor or (ii) a voluntary sale or transfer by Lessor to any Condemnor, either under threat of exercise of eminent domain by a Condemnor or while legal proceedings for condemnation are pending, Rent shall abate during the time of such taking but only with respect to that physical portion of the Premises actually temporarily taken, and all Rent or other compensation paid by the Condemnor shall be the sole and exclusive property of Lessor.
- (e) All damages awarded for any Condemnation or a temporary taking shall belong to and be the property of Lessor, whether such damages shall be awarded as compensation for the value of the property taken, severance or other damages to the remainder, improvements pertaining to the Premises, damages for loss of use or access, loss of abutter's rights, diminution in value to the leasehold or loss of bonus value, or reimbursement for any costs of any appraisal or litigation expenses or recoverable costs. Notwithstanding the foregoing, however, Lessor shall not be entitled to any separate award made to Lessee for the taking of any moveable inventory or tangible personal property of Lessee, any relocation benefits or moving expense reimbursements paid to Lessee, and any award to Lessee for loss of Lessee's business goodwill.

22. Indemnification

In addition to any other indemnity provided for in this Agreement, and notwithstanding any other provisions of this Agreement to the contrary, Lessee indemnifies, defends (with counsel selected by Lessor) and holds harmless Lessor, its elected officials, officers, employees, agents, attorneys, volunteers and representatives from and against all claims, demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including, without limitation, attorney's fees, disbursements and court costs) of every kind that may arise from or in any manner relate to (directly or indirectly): (i) Lessee's rights, obligations, acts or

omissions under this Agreement, (ii) Lessee's occupancy and use, or Lessee's guests, invitees, sublessees, or licensees occupancy and use, of the Premises, or Improvements or (iii) Lessor's consent, approval, conditioning, denial or modification, in its capacity as a lessor or as the City of Newport Beach, of this Agreement, Lessee's occupation and use of the Premises, the Improvements, CEQA documents, or any and all plans, permits, licenses, or regulatory approvals relating to the Premises (individually, each a "Claim" and, collectively, "Claims"). The indemnification in this Section 22 specifically includes, without limitation, all Claims arising by reason of:

- (a) The death or injury of any person or damage to real or personal property caused or allegedly caused by the condition of the Premises, Improvements, or an act or omission of Lessee or an agent, contractor, subcontractor, supplier, employee, servant, sublessee or concessionaire of Lessee;
- (b) Any work performed on the Premises, Improvements, or materials furnished to the Premises, Improvements, by or at the request of Lessee or any agent, contractor, subcontractor, supplier, employee, servant, sublessee or concessionaire of Lessee, with the exception of maintenance performed by City; and/or
- (c) Lessee's failure to perform any provision of this Agreement or to comply with any requirement of Applicable Law or any requirement imposed on the Premises or Improvements by any duly authorized governmental agency or political subdivision.

Lessee's obligations in this Section (or any other provision providing indemnity in this Agreement) shall not extend to the degree any Claim is proximately caused by the sole negligence or willful misconduct of Lessor, subject to any immunities which may apply to Lessor with respect to such Claims. This indemnification provision and any other indemnification provided elsewhere in this Agreement shall survive the termination of this Agreement and shall survive for the entire time that any third party can make a Claim.

23. Insurance

Without limiting Lessee's indemnification of Lessor, Lessee will obtain, provide and maintain at its own expense during the Term of this Agreement, a policy or policies of insurance of the type, amounts and form acceptable to Lessor. The policy or policies shall provide, at a minimum, those items described in Exhibit "F."

24. Hazardous Substances

- (a) From the Commencement Date and throughout the Term, Lessee will not use, occupy, or permit any portion of the Premises to be used or occupied in violation of any Hazardous Substance Laws.
- (b) Notwithstanding any contrary provision of this Agreement, and in addition to the indemnification duties of Lessee set forth elsewhere in this Agreement, Lessee indemnifies, defends with counsel reasonably acceptable to Lessor, protects, and holds harmless Lessor, its elected officials, officers, employees, agents, attorneys, volunteers and representatives from and against any and all losses, fines, penalties, claims, demands, obligations, actions, causes of action, suits, costs and expenses (including, without limitation, attorneys' fees, disbursements and court

costs), damages, judgments, or liabilities, including, but not limited to, any repair, cleanup, detoxification, or preparation and implementation of any remedial, response, closure or other plan of any kind or nature which the Lessor, its officials, officers, employees, agents, attorneys, volunteers or assigns may sustain or incur, or which may be imposed upon them, in connection with any breach of Lessee's obligations or representations in this Agreement or the use of the Premises under this Agreement, arising from or attributable to the storage or deposit of Hazardous Substances. This Section is intended to operate as an agreement pursuant to Section 107(e) of CERCLA, 42 USC Section 9607(e), and California Health and Safety Code Section 25364, to insure, protect, hold harmless, and indemnify Lessor for any claim pursuant to the Hazardous Substance Laws or the common law.

- (c) Lessee does not, and will not, authorize any third party to use, generate, manufacture, maintain, permit, store, or dispose of any Hazardous Substances in violation of Applicable Laws on, under, about or within the Premises.
- (d) Upon expiration or earlier termination of this Agreement, Lessee shall deliver possession of the Premises in compliance with Hazardous Substance Laws.
- (e) If during the Term of this Agreement, Lessee becomes aware of (i) any actual or threatened release of any Hazardous Substances on, in, under, from, or about the Premises in violation of Hazardous Substance Laws; or (ii) any inquiry, investigation, proceeding, or claim by any government agency or other person regarding the presence of any Hazardous Substances in violation of Hazardous Substance Laws on, in, under, from or about the Premises, Lessee shall give Lessor written notice of the release or inquiry within five (5) calendar days after Lessee becomes aware or first has reason to believe there has been a release or inquiry and shall simultaneously furnish to Lessor copies of any claims, notices of violation, reports, warning or other writings received by Lessee that concern the release or inquiry.
- (f) If the presence of any Hazardous Substances brought onto the Premises by Lessee or Lessee's employees, agents, sublessees, licensees, concessionaires, contractors, or invitees, or generated by same during the Term of this Agreement, results in contamination of the Premises or adjacent properties or the Newport Harbor in violation of Hazardous Substance Laws, Lessee shall promptly take all necessary actions, at Lessee's sole expense, to remove or remediate such Hazardous Substances in full compliance with Applicable Laws. Lessee shall provide notice to Lessor prior to performing any removal or remedial action. Lessee shall not propose nor agree to any covenant of use restriction as part of any removal or remediation required as a result of this provision without Lessor's written consent. Lessee shall pay, in the manner provided in Section 44, any costs Lessor incurs in performing Lessee's obligation to clean-up contamination resulting from Lessee's operations or use of the Premises. Any amounts not paid when due shall be subject to late charges and delinquency rates as provided in Section 45.
 - (i) Should any clean-up of Hazardous Substances for which Lessee is responsible not be completed prior to the expiration or sooner termination of the Agreement, including any extensions thereof, then Lessor shall transfer the amounts deposited by Lessee pursuant to Section 44 into an

escrow account, together with Lessor-approved instructions for the disbursement of such amount in payment of the costs of any remaining clean-up as it is completed, and (ii) if the nature of the contamination or clean-up required of Lessee is of such a nature as to make the Premises untenable or unleaseable, then Lessee shall be liable to Lessor as a holdover lessee until the clean-up has been sufficiently completed to make the Premises suitable for lease to third parties. The estimated cost of the clean-up shall require approval of the Lessor.

(ii) If Lessor determines, in its reasonable discretion, that Lessee does not have insurance or other financial resources sufficient to enable Lessee to fulfill its obligations under this provision, whether or not accrued, liquidated, conditional, or contingent, then Lessee shall, at the request of Lessor, procure and thereafter maintain in full force and effect such environmental impairment liability and/or pollution liability insurance policies and endorsements, or shall otherwise provide such collateral or security reasonably acceptable to Lessor as is appropriate to assure that Lessee will be able to perform its duties and obligations hereunder.

(g) Lessee's obligations in this Section 24 shall survive the expiration or earlier termination of this Agreement.

25. Quiet Possession

(a) So long as no default by Lessee has occurred and is continuing uncured under this Agreement, and subject to the Tidelands Grant or any amendment to that grant, Lessee shall peaceably and quietly use and enjoy the Premises for the Term, without hindrance or interruption by Lessor.

(b) Lessor shall in no event be liable in damages or otherwise, nor shall Lessee be released from any obligations hereunder, because of the interruption or termination of any service provided by Lessor (such as water or sewer service), or a termination, interruption or disturbance of any service attributable to any act or neglect (other than gross negligence or willful misconduct) of Lessor or its servants, agents, employees, licensees, business invitees, or any person claiming by, through or under Lessee.

26. Compliance with Applicable Laws

Lessee agrees that, in all activities on or in connection with the Premises, and in all uses thereof, it will comply with and conform, at its sole cost, to all Applicable Laws. Lessee is solely responsible for compliance with Applicable Laws.

27. Not Agent of Lessor

Neither anything in this Agreement nor any acts of Lessee shall authorize Lessee or any of its employees, agents or contractors to act as agent, contractor, joint venturer or employee of Lessor for any purpose. The parties' relationship under this Agreement is exclusively that of a lessor and lessee.

28. No Third Party Beneficiaries

Lessor (both as a lessor and as the City of Newport Beach) and Lessee do not intend, by any provision of this Agreement, to create in any third party, any benefit or right owed by one party, under the terms and conditions of this Agreement, to the other party.

29. Limitation of Leasehold / Easements

This Agreement and the rights and privileges granted Lessee in and to the Premises and Improvements are subject to all covenants, conditions, restrictions, and exceptions of record, including those which are set out in the Tidelands Grant by the State of California to Lessor. Nothing contained in this Agreement or in any related document shall be construed to imply the conveyance to Lessee of rights in the Premises or Improvements that exceed those owned by Lessor. This Agreement and the rights and privileges granted Lessee in and to the Premises shall be further subject to future easements and rights-of-way for access, gas, electricity, water, sewer, drainage, telephone, telegraph, television transmission, and such other utilities as Lessor may determine from time to time to be in the best interests of the development of the lands within Lessor's jurisdiction, provided, however, that no easements, rights-of-way, or the installation of such facilities by Lessor, shall materially interfere with Lessee's business. Lessee is not entitled to any monetary payment or other remuneration for any such future easements and rights-of-way.

30. Notices

All notices and other communications required or permitted to be given under this Agreement, including any notice of change of address, shall be in writing and given by personal delivery, or deposited with the United States Postal Service, certified and postage prepaid, or by national overnight mail service addressed to the parties intended to be notified. Notice shall be deemed given as of the date of personal delivery, or if mailed, two (2) calendar days following the date of deposit with the United States Postal Service. Notice shall be given as follows:

To Lessor: City of Newport Beach
Attn: City Manager
PO Box 1768
3300 Newport Boulevard
Newport Beach, CA, 92658
949-644-3153

With Copy To: City Attorney (at same address)

To Lessee: _____

31. Entire Agreement/Amendments

(a) The terms and conditions of this Agreement, all exhibits attached hereto are incorporated by reference into this Agreement, and all documents expressly

incorporated by reference, represent the entire Agreement of the parties with respect to the subject matter of this Agreement.

- (b) This Agreement may be executed in counterparts, including electronic counterparts, each of which, after all the parties have signed this Agreement, shall be deemed to be an original, and such counterparts shall constitute one Agreement binding on the parties.
- (c) This written Agreement shall supersede any and all prior agreements, oral or written, regarding the subject matter. Notwithstanding the foregoing sentence, with respect to City Pier Permit No. _____, nothing herein is a release of any violation of Lessee's duties or obligations with respect to City Pier Permit No. _____, whether known or unknown at this time or upon the effective date of this Agreement.
- (d) Except as permitted by Section 33 below, no other agreement, promise or statement, written or oral, relating to the subject matter of this Agreement, shall be valid or binding, except by way of a written amendment to this Agreement.
- (e) The terms and conditions of this Agreement shall not be altered or modified except by a written amendment to this Agreement signed by Lessee and Lessor.
- (f) If any conflicts arise between the terms and conditions of this Agreement, and the terms and conditions of the attached exhibits or the documents expressly incorporated by reference, the terms and conditions of this Agreement shall control.
- (g) Any obligation of the parties relating to monies owed, as well as those provisions relating to limitations on liability and actions, shall survive termination or expiration of this Agreement.

32. Waivers

The waiver by either party of any breach, default or violation of any term, covenant or condition of this Agreement, or of any Applicable Law, shall not be deemed a waiver of any other term, covenant, condition, or Applicable Law, or of any subsequent breach or violation of the same or other term, covenant, condition, or Applicable Law. The subsequent acceptance by either party of any fee, performance, or other consideration which may become due or owing under this Agreement, shall not be deemed to be a waiver of any preceding breach or violation by the other party of any term, condition, covenant of this Agreement or any Applicable Law.

33. Lessor's Authorized Representative

Unless otherwise specified in this Agreement or unless Applicable Law requires action of the City Council or some other person or body of Lessor (in its capacity as the City of Newport Beach), Lessor shall maintain the authority to implement this Agreement on its behalf through the City Manager of the City of Newport Beach (or his or her designee). The City Manager (or his or her designee) shall have authority (but not the obligation) to issue interpretations, waive provisions (including, without limitation, imposition of late

charges and delinquency rates, Lessee's payment of costs and times of performance), and/or enter into amendments of this Agreement on behalf of the Lessor.

34. City Business License

Lessee shall obtain and maintain during the duration of this Agreement a City business license as required by the Newport Beach Municipal Code.

35. Governing Law & Non-Binding Arbitration

- (a) Prior to instituting any legal action in a court, in the event the Lessor and Lessee shall be unable to agree as to any matter provided for in this Agreement such dispute shall be submitted to three (3) disinterested arbitrators (unless the parties can agree on one (1) arbitrator). Such arbitration shall be conducted upon request of either the Lessor or the Lessee, before three (3) arbitrators (unless the Lessor or the Lessee agree to one (1) arbitrator) designated by the American Arbitration Association and in accordance with the rules of such Association. The decision(s) of the arbitrator(s) designated and acting under this Agreement shall be non-binding and the arbitrator(s) have no power to depart from or change any of the provisions thereof. The expense of arbitration proceedings conducted hereunder shall be borne equally by the parties.
- (b) This Agreement shall be construed in accordance with the laws of the State of California. Any action brought relating to this Agreement shall be adjudicated in a court of competent jurisdiction in the County of Orange. Lessee is advised that Public Resources Code Section 6308 may require that the State of California be joined to any action against the City involving title to or boundaries of the Tidelands.
- (c) The prevailing party in any non-binding arbitration or legal action authorized under this section shall not be entitled to attorneys' fees.

36. Interpretation

The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of the Agreement or any other rule of construction which might otherwise apply.

37. Time is of the Essence

Time is of the essence to the performance of each and every act required to be performed by this Agreement.

38. California Labor Laws

It shall be the obligation of Lessee or any subcontractor under Lessee to comply with all State of California labor laws, rules and regulations and the parties agree that the Lessor shall not be liable for any violation thereof.

39. Joint and Several Liability

If Lessee, as a party to this Agreement, is a partnership, joint venture, or is comprised of more than one (1) party or entity, or a combination thereof; the obligations imposed on Lessee under this Agreement shall be joint and several, and each general partner, joint venturer, party or entity of Lessee shall be jointly and severally liable for said obligations.

40. Memorandum of Lease Agreement

A Memorandum of Lease Agreement, in a form and content similar to that contained in Exhibit "G" shall be recorded by the parties promptly upon execution of this Agreement. Upon execution by both parties, the Memorandum of Lease Agreement shall be recorded in the office of the Orange County Clerk-Recorder, as required by Government Code Section 37393.

41. No Pre-commitment / Retention of Discretion / Assumption of Risk and Waiver

- (a) By its execution of this Agreement, Lessor is not committing itself or agreeing to undertake any activity requiring the subsequent exercise of discretion by the City of Newport Beach, or any department thereof, including but not limited to the approval of any CEQA documents, the approval of any development proposal or land use regulation governing the Premises, or any other act or approval.
- (b) Lessee understands and agrees that Lessor in its capacity as the City of Newport Beach reserves the right to exercise its discretion as to all matters which it is, by law, entitled or required to exercise its discretion, including, but not limited to, the consideration of CEQA documents the consideration of a final development, the consideration of any and all plans, permits, licenses or regulatory approvals, or any other acts or activities requiring the subsequent independent exercise of discretion by the City of Newport Beach or any agency or department thereof. Lessee understands and agrees that the City of Newport Beach may, in its sole and absolute discretion, certify or not certify a CEQA document and approve, approve with modifications, or not approve or may consider other alternatives, including those presented in the CEQA documents.
- (c) Lessee acknowledges and agrees that the City of Newport Beach or other governmental agencies (including without limitation the Coastal Commission) may, at their sole and absolute discretion, approve any and all plans, permits, licenses or regulatory approvals, the only upon the imposition and performance of additional conditions or mitigation measures.
- (d) Nothing in this Agreement shall obligate the Lessor in its capacity as the City of Newport Beach to exercise its discretion in any particular manner, and notwithstanding any provision of this Agreement to the contrary any exercise of discretion required by law or permitted by this Agreement shall not be deemed to constitute a breach of Lessor's duties under this Agreement.
- (e) Lessee accepts and assumes the risk that the City of Newport Beach or other governmental agencies (including without limitation the Coastal Commission) will not approve or certify the CEQA documents or any and all plans, permits, licenses or regulatory approvals sought, that the City of Newport Beach may consider or

approve other alternatives to the CEQA documents, any and all plans, permits, licenses or regulatory approvals, or CEQA documents might be approved or certified subject to modifications or the performance of certain additional conditions or mitigation measures imposed by the City of Newport Beach or other governmental agencies (including without limitation the Coastal Commission) in their sole and absolute discretion, or that third parties may file litigation against or otherwise delay any and all plans, permits, licenses or regulatory approvals sought, or CEQA documents. Lessee agrees it has no claim, cause of action, or right to damages, compensation or reimbursement from Lessor or the City of Newport Beach if (i) CEQA documents or any and all plans, permits, licenses or regulatory approvals sought are not approved by the City of Newport Beach or other governmental agencies (including without limitation the Coastal Commission) for any reason, (ii) other alternatives to the CEQA documents or any and all plans, permits, licenses or regulatory approvals sought are approved, and (iii) CEQA documents are approved or certified subject to modification or the performance of certain additional conditions or mitigation measures, or (iv) third parties file litigation against or otherwise delay the CEQA documents.

42. No Damages

Lessee acknowledges that Lessor would not enter into this Agreement if it were to be liable for damages (including, but not limited to, actual damages, economic damages, consequential damages, lost profits, loss of rents or other revenues, loss of business opportunity, loss of goodwill or loss of use) under, or relating to, this Agreement or any of the matters referred to in this Agreement, including, without limitation, any and all plans, permits, licenses or regulatory approvals, CEQA documents, and Transfers. Accordingly, Lessee covenants and agrees on behalf of itself and its successors and assigns, not to sue Lessor (either in its capacity as lessor in this Agreement or in its capacity as the City of Newport Beach) for damages (including, but not limited to, actual damages, economic damages, consequential damages, lost profits, loss of rents or other revenues, loss of business opportunity, loss of goodwill or loss of use) or monetary relief for any breach of this Agreement by Lessor or for any dispute, controversy, or issue between Lessor and Lessee arising out of or connected with this Agreement or any of the matters referred to in this Agreement, including, without limitation, any and all plans, permits, licenses or regulatory approvals, CEQA documents, Transfers or any future amendments or enactments thereto, the parties agreeing that declaratory relief, injunctive relief, mandate and specific performance shall be Lessee's sole and exclusive judicial remedies.

43. Appraisals

- (a) Appraisal: Unless otherwise provided in this Agreement, this Section governs the process for all appraisals required or permitted in this Agreement. Any time an appraisal is required or permitted by this Agreement, Lessor and Lessee shall each select an independent appraiser with qualifications to appraise Tideland properties. If the two (2) appraisals return with a fair market value that is within ten percent (10%) of each other the two (2) appraisal fair market values shall be averaged to produce the fair market value. If the two (2) appraisals return with a fair market value difference of greater than ten percent (10%) the two (2) appraisers shall retain a third independent appraiser to conduct an appraisal. The fair market value determined by the third appraisal shall be averaged with the other

two (2) appraisals to produce the fair market value. Lessor and Lessee shall pay the costs of their own appraiser, and, if necessary, shall equally split the costs of the third appraiser.

44. Payment of Lessor's Costs; Lessee's Deposit Account

This section governs any provision that requires Lessee to pay Lessor's costs to perform certain actions identified in this Agreement. Any time this Agreement uses the term "Lessor's cost" (or similar term), such costs shall include all third-party actual costs and expenses relating to Lessor's performance and any actions taken by Lessor in its capacity as the City of Newport Beach, including, without limit, costs of materials, and costs of outside consultants, vendors, and attorneys. Upon Lessor's demand and in connection with commencing actions that require Lessee to pay Lessor's cost, Lessee shall deposit into an account with Lessor ("Lessee's Deposit Account") an initial amount reasonably determined by Lessor to be not less than Lessor's costs. Lessee shall make this initial deposit within three (3) calendar days of demand. Lessor has the right to draw from Lessee's Deposit Account at any time to pay for Lessor's costs as such costs incur. If funds in the Lessee's Deposit Account are insufficient at any time to pay Lessor's costs then within three (3) calendar days of Lessor's demand, Lessee shall deposit additional funds into Lessee's Deposit Account. Lessee's failure to deposit funds in Lessee's Deposit Account shall be a default and, without limiting any remedies available to Lessor for such defaults, shall subject Lessee to late charges and delinquency rates on the demanded amount in the manner provided in Section 45. Any funds remaining in Lessee's Deposit Account after payment of all Lessor's costs shall be returned to Lessee. Lessee shall be entitled to interest on funds deposited in Lessee's Deposit Account in excess of ten percent (10%) of Lessor's actual costs at a rate of one and a half percent (1 ½ %) per month.

45. Late Charges and Delinquency Rates

A ten percent (10%) late charge shall be added to all payments due but not received by Lessor with five (5) calendar days following the due date, unless another due date is specified in this Agreement. In addition, all unpaid amounts shall accrue at a delinquency rate of one and a half percent (1 ½ %) per month or any portion of a month until paid in full. Lessor and Lessee hereby agree that such late charges and delinquency rates represent a fair and reasonable estimate of the costs Lessor will incur by Lessee's late payment, including, without limitation, lost opportunities and the cost of servicing the delinquent account. Lessee agrees that such late charges and delinquency rates are Additional Rent and are not interest. Acceptance of such late charges and delinquency rates (and/or any portion of the overdue payment) by Lessor does not constitute a waiver of Lessee's default with respect to such overdue payment, or prevent Lessor from exercising any of the other rights and remedies granted in this Agreement.

46. Bonding

- (a) Payment and Performance Bonds: This section governs any provision that requires Lessor to obtain payment and/or performance bonds. Lessee shall obtain, provide and maintain at its own expense when required by this Agreement: (1) a labor and materials payment bond in the amount of one hundred percent (100%) of the total amount to be paid for the action requiring such bond and in a form and content

acceptable to Lessor; and (2) a faithful performance bond in the amount of one hundred percent (100%) of the total amount to be paid for the action requiring such bond in a form and content acceptable to Lessor.

- (b) Surety Qualifications: The labor and materials payment bond and faithful performance bond referenced above shall be issued by an insurance organization or surety (1) currently authorized by the Insurance Commissioner to transact business of insurance in the State of California; (2) listed as an acceptable surety in the latest revision of the Federal Register Circular 570; and (3) assigned a Policyholders' Rating A- (or higher) and Financial Size Category Class VII (or larger) in accordance with the latest edition of Best's Key Rating Guide: Property-Casualty.
- (c) Certificate of Authority: The Contractor shall deliver, concurrently with execution of the labor and materials payment bond and faithful performance bond a certified copy of the "Certificate of Authority" of the Insurer or Surety issued by the California Insurance Commissioner, which authorizes the insurer or surety to transact surety insurance in the State of California.

47. Government Claims Act

Lessee and Lessor agree that in addition to any claims filing or notice requirements in this Agreement, Lessee shall file any claim that Lessee may have against Lessor in strict conformance with the Government Claims Act (Government Code sections 900 *et seq.*).

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate on the date and year first written herein.

LESSOR

LESSEE

**City of Newport Beach
A Municipal Corporation**

_____,
a _____

Mayor

By:

Name:

ATTEST:

Leilani Brown
City Clerk

APPROVED AS TO FORM:

Aaron C. Harp
City Attorney

EXHIBIT "A"

DEFINITIONS

Accounting Period means each period as follows: Commencement Date (or any anniversary thereof) to _____, _____ to _____, _____ to _____ and _____ to _____ [day immediately prior to the anniversary of the Commencement Date]. [Note: Complete once Commencement Date is known. There are 4 three-month Accounting Periods in each Lease Term Year.]

Additional Rent is defined in Section 4.

Adjustment Date means the fifth anniversary of the Commencement Date (_____, ___, 20__), and every subsequent fifth anniversary thereafter (_____, ___, 20__, _____, ___, 20__) [including, any fifth anniversary during a Renewal Term].

Aggregate 20% Equivalent Rent is defined in Section 4(a)(i).

Agreement is defined in the Preamble.

Applicable Law(s) mean and include, but are not limited to, those prescribed by Title 17 of the Newport Beach Municipal Code; any ordinances of the City of Newport Beach, including the Building Code thereof; the City Charter of Newport Beach; any regulations, policies and general rules of the City of Newport Beach; the Tidelands Grant; Hazardous Substances Laws; CEQA; and any other Federal, State or local statute, law, ordinance, resolution, code, rule, regulation, order or decree as any of the same now exist or may hereafter be adopted or amended.

Boat Slip Renters is defined in Section **Error! Reference source not found.**

Books and Records means full, complete, accurate and proper books, records and accounts of all business, use or occupation, or any combination thereof, transacted, arranged or performed, in whole or in part, on, from or for goods, services or events from or related to the Premises, whether by the Lessee or by a sublessee, licensee, concessionaire or other party, in accordance with generally accepted accounting principles consistently applied, which shall include equipment to record all sales at the time of transactions and shall also include, without limit, income, sales and property tax returns and information.

CDP means a Coastal Development Permit.

CEQA means the California Environmental Quality Act, codified at California Public Resources Code Sections 21000 et seq. as may be amended from time-to-time.

Claim(s) is defined in Section 22.

Commencement Date is defined in Section 3(a).

Condemnation means a permanent taking of the Premises through (i) the exercise of any government power, by any public or quasi-public authority or by any other party having the right of eminent domain (Condemnor) or (ii) a voluntary sale or transfer by Lessor to any Condemnor,

either under threat of exercise of eminent domain by a Condemnor or while legal proceedings for condemnation are pending.

Fiscal Year means the period of July 1 through June 30 of each year of the term.

Gross Revenue for Slip Rentals means all receipts of every kind and nature, whether for cash, credit or barter, received/due for the rental or use of a slip, dock, or pier on the Premises. Without limiting the breadth of the prior sentence, Gross Revenue for Slip Rentals shall include, without limitation, receipts of every kind and nature derived from any promotion, package deal, service, or other item that is associated in any way with the rental or use of a slip, dock, or pier on the Premises. For purposes of determining Gross Revenue for Slip Rentals any fixed, annual, monthly and/or recurring charge that a person or entity is required to pay shall be counted as part of the Gross Revenue for Slip Rentals. Gross Revenue for Slip Rentals shall not be offset or reduced for any reason, including, but not limited to, the payment of taxes, fees, repairs, maintenance, construction, or inability or failure to collect any cash, credit, or barter due for the use of a slip, dock, or pier on the Premises.

Hazardous Substance means: (i) any substance, product, waste or other material of any nature whatsoever which is or becomes listed, regulated, or addressed pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 *et seq.* (CERCLA); the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 *et seq.* "RCRA"); the Toxic Substances Control Act, 15 U.S.C. Section 2601 *et seq.*; the Clean Water Act, 33 U.S.C. Section 1251 *et seq.*; the California Hazardous Waste Control Act, Health and Safety Code Section 25100 *et seq.*; the California Hazardous Substance Account Act, Health and Safety Code Sections 25330 *et seq.*; the California Safe Drinking Water and Toxic Enforcement Act, Health and Safety Code Sections 25249.5 *et seq.*; California Health and Safety Code Sections 25280 *et seq.* (Underground Storage of Hazardous Substances); the California Hazardous Waste Management Act, Health and Safety Code Sections 25170.1 *et seq.*; California Health and Safety Code Sections 25501 *et seq.* (Hazardous Materials Response Plans and Inventory); or the Porter-Cologne Water Quality Control Act, Water Code Sections 13000 *et seq.*, all as they, from time-to-time may be amended or re-codified, (the above-cited statutes are here collectively referred to as "the Hazardous Substances Laws") or any other Federal, State or local statute, law, ordinance, resolution, code, rule, regulation, order or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereafter in effect; (ii) any substance, product, waste or other material of any nature whatsoever which may give rise to liability under any of the above statutes or under any statutory or common law theory, including but not limited to negligence, trespass, intentional tort, nuisance, waste or strict liability or under any reported decisions of a state or federal court; (iii) petroleum or crude oil; and (iv) asbestos.

Improvements means those items described on Exhibit D as they may be modified, altered, restored, or rebuilt pursuant to this Agreement.

Leasehold Estate means Lessee's interest in the Premises and Improvements created by this Agreement.

Leasehold Mortgage means a Transfer or security instrument by which the Leasehold Estate is used to secure a debt or other obligation arising from or related to Lessee's use or operation of the Premises.

Leasehold Mortgagee means a holder or holders of the Leasehold Mortgage.

Lease Term Year means each twelve (12) month period beginning on the Commencement Date (or anniversary thereof) and ending on the day prior to the next anniversary of the Commencement Date.

Lessee is defined in the Preamble.

Lessee's Deposit Account is defined in Section 44.

Lessor is defined in the Preamble.

Marina Index is comprised of the marinas listed in Section 4(a)(ii).

Market Adjustment Date means the twenty-fifth (25th) [or other year that is mid-point through the lease Term] anniversary of the Commencement Date, _____, 2____ (including during any Renewal Term).

Option Notice is defined in Section 3(b)(i).

Other Real Property is defined in Section 16(b).

Premises means those Tidelands consisting of approximately [_____ square feet of land area and approximately] _____ square feet of water area located generally at _____ in the City of Newport Beach, California, more particularly described in Exhibit "H" and depicted on the map set forth in Exhibit "I" along with all Improvements existing as of the Commencement Date on, above or under said Tidelands that are identified in Exhibit "D" to the extent that the City has title or right to such Improvements]. [Notwithstanding the previous sentence, Lessor makes no representation or warranty as to whether Lessor or any other third parties have an interest or title to the Improvements and Lessee agrees that no such representation or warranty has been made.]

Renewal Term(s) is defined in Section 3(b).

Rent is defined in Section 4(a)

Target Indexed Rate is defined in Section 4(a)(i).

Term is defined in Section 3(a).

Tidelands means certain tidelands and submerged land (whether filled or unfilled), located in the City of Newport Beach, County of Orange, State of California granted to the City of Newport Beach, as trustee, by the State of California pursuant to the Tidelands Grant.

Tidelands Grant means uncodified legislation related to the State of California's grant of certain rights in the Tidelands to the City of Newport Beach, including, without limitation, the Beacon Bay Bill (Chapter 74 of the Statutes of 1978, as amended [citations omitted]).

Transfer(s) means any attempt to sell, convey, assign, transfer, mortgage, pledge, grant, hypothecate or encumber this Agreement or any interest in this Agreement, or the Premises or any portion of the Premises, and any attempt to sublet (which shall also include management and/or operating agreements covering the Premises), license or grant any concession to the Premises, in whole or in part, or allow any person other than Lessee's employees, members, agents, servants and invitees to occupy or use all or any portion of the Premises.

Work is defined in Section 38.

EXHIBIT "B"

SAMPLE RENT CALCULATION

TABLE #1

Example of How Indexed Rate Changes Work											
Proposal	Rent Based on...	3/1 2012	3/1 2013	3/1 2014	3/1 2015	3/1 2016	3/1 2017	3/1 2018	3/1 2019	3/1 2020	3/1 2021
September 12, 2012 City Council Recommendation	Conversion of 20% of Gross to SF rate - phased-in to 2020 starting in 2014	\$ 0.36	\$ 0.36	\$ 0.67	\$ 0.98	\$ 1.28	\$ 1.61	\$ 1.94	\$ 2.27	\$ 2.62	\$ 2.65
	Assumed Target Index Rate		N/A	\$ 2.52	\$ 2.54	\$ 2.50	\$ 2.57	\$ 2.60	\$ 2.60	\$ 2.62	\$ 2.65
	Previous Year's Tidelands Rental Rate		N/A	\$ 0.36	\$ 0.67	\$ 0.98	\$ 1.28	\$ 1.61	\$ 1.94	\$ 2.27	N/A - At Full Index Rate
	Difference (A)		N/A	\$ 2.16	\$ 1.87	\$ 1.52	\$ 1.29	\$ 0.99	\$ 0.66	\$ 0.35	
	Years Left to Fully-Indexed Rate (B)		N/A	7	6	5	4	3	2	1	
	Increase for that Year (A/B)		N/A	\$ 0.31	\$ 0.31	\$ 0.30	\$ 0.32	\$ 0.33	\$ 0.33	\$ 0.35	

In Table #1, the example assumes that the Targeted Index Rate is two dollars and fifty-two cents (\$2.52) per square foot in 2014 and two-dollars and fifty-four cents (\$2.54) per square foot in 2015. In the actual calculation in 2014 and subsequent years, the Targeted Index Rate will be adjusted annually, as set forth above, and may increase or decrease from two dollars and fifty-two cents (\$2.52) or two-dollars and fifty-four cents (\$2.54)/square foot used for illustrative purposes above. This increase or decrease shall be reflected in the subsequent calculations using the same methodology as shown in the paragraph above.

EXHIBIT "C"

MARINA INDEX TERMS

To be included within the Marina Index, a Lessee must agree to be bound by the following terms:

- (1) Slip Rental Documentation: A marina included in the Marina Index agrees to provide by February 1st every year, Gross Revenue for Slip Rentals for the Premises certified by Lessee's external auditor to be true and accurate, to the Lessor for purposes of calculation of the Marina Index. At the Lessee's option, the Gross Revenue for Slip Rentals may be provided directly to the Lessor or to the Lessor's designated certified public accountant ("CPA") for such purposes. The Lessor shall use its best efforts to maintain such Gross Revenue for Slip Rentals information confidential.
- (2) Maximization of Slip Revenue: Lessor may, in its sole and absolute discretion, require, and Lessee agrees to establish, slip rental rates based on comparison of similarly situated slip rentals, or by the analysis of a third-party appraiser.
- (3) Audit: Lessor may, in its sole and absolute discretion, at any and all reasonable times, examine and audit Books and Records, financial statements, and documentation, without restriction, for the purpose of determining the accuracy of the Gross Revenue for Slip Rentals for this Premises reported to the Lessor or the Lessor's designated CPA for the prior year, and the accuracy of the Rent paid to Lessor. If the Lessee's business operations conducted within or from the Premises are part of a larger business operation of the Lessee, and any part of the Books and Records, financial statements and documentation is prepared only for the larger operation, and not solely for the business operations of the Premises, then the Lessor shall also have the right to examine and audit that part of the Books and Records, financial statements, and documentation of the larger business operation. In the event the Lessee does not make available the original Books and Records, financial statements, and documentation at the Premises or within the limits of Orange County, Lessee shall pay all necessary travel expenses incurred by Lessor (including, without limit, the cost of Lessor's agent's time) in conducting an audit at the location where Books and Records are maintained. If the audit reveals a discrepancy in the Gross Revenue for Slip Rentals reported to Lessor of ten percent (10%) or less, Lessor shall pay the cost of the audit. If the audit reveals a discrepancy in the Gross Revenue for Slip Rentals reported to Lessor of greater than ten percent (10%), Lessee shall pay the cost of the audit.

EXHIBIT "D"
IMPROVEMENTS

EXHIBIT "E"
OTHER REAL PROPERT

EXHIBIT "F"

INSURANCE

EXHIBIT "G"

**RECORDING REQUESTED AND
WHEN RECORDED RETURN TO:**

**Office of the City Clerk
City of Newport Beach
3300 Newport Boulevard
Newport Beach, CA, 92658**

[Exempt from Recordation Fee - Govt. Code Sec. 6103]

**MEMORANDUM OF LEASE AGREEMENT
[(WITH OPTIONS FOR RENEWAL)]**

This Memorandum of Lease Agreement [(With Options for Renewal)] ("Memorandum") is dated _____, 20__, and is made between City of Newport Beach, a California municipal corporation and charter city ("Lessor" or "City") and _____ ("Lessee"), concerning the Premises described in Exhibits "A" and "B," attached hereto and by this reference made a part hereof.

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

The term is _____ (__) years, beginning _____, 20__, and ending _____, 20__. [If needed, insert recitation of Options and Renewal Terms(s).]

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

[Signatures on the next page]

LESSOR

**City of Newport Beach
A Municipal Corporation**

Mayor

LESSEE

_____,
a _____

By:

Name:

ATTEST:

Leilani Brown
City Clerk

APPROVED AS TO FORM:

Aaron Harp
City Attorney

[NOTE: Attach Exhibits A and B from Agreement as Exhibits to this Memorandum behind attached Notary form]

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA



ss:

COUNTY OF ORANGE

On this ___ day of _____, 2011, before me, the undersigned notary public, personally appeared

NAME(S) OF SIGNER(S)

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

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

WITNESS my hand and official seal.

SIGNATURE OF NOTARY

**--OPTIONAL SECTION--
CAPACITY CLAIMED BY SIGNER**

Though statute does not require the Notary to fill in the data below, doing so may prove invaluable to persons relying on the document.

- INDIVIDUAL
- CORPORATE OFFICER(S)

TITLE(S)

- PARTNER(S)
 - LIMITED
 - GENERAL
- ATTORNEY-IN-FACT
- TRUSTEE(S)
- GUARDIAN/CONSERVATOR
- OTHER:

SIGNER IS REPRESENTING:
NAME OF PERSON(S) OR ENTITY(IES)

OPTIONAL SECTION

THIS CERTIFICATE MUST BE ATTACHED TO THE DOCUMENT DESCRIBED AT RIGHT:

Though the data requested here is not required by law, it could prevent fraudulent reattachment of this form.

TITLE OR TYPE OF DOCUMENT:

NUMBER OF PAGES: _____

DATE OF DOCUMENT: _____

OTHER SIGNER(S) THAN NAMED ABOVE:

EXHIBIT "H"

DESCRIPTION OF PREMISES

EXHIBIT "I"

DEPICTION OF PREMISES