



**CITY OF MARTINEZ**

**CITY COUNCIL AGENDA  
February 20, 2013**

**TO:** Mayor and City Council

**FROM:** Dina Tasini, Contract Project Manager

**SUBJECT:** Option to Sublease a Portion of the Martinez Marina for Development of a New Restaurant

**DATE:** February 14, 2013

**RECOMMENDATION:**

- (1) Consider a possible action accepting and approving an Option to Sublease to Delmonico's Inc., a portion of the Martinez Marina for Development of a new restaurant, subject to modifications approved by the City Manager and City Attorney; and
- (2) Adopt resolution authorizing the Mayor to execute same and allocating a transfer of \$40,000 from the General Fund Assigned Fund Balance to the Marina Enterprise Fund and authorizing the expenditure thereof to complete CEQA documents to facilitate development.

**BACKGROUND:**

On January 23, 2013 an application was submitted by Delmonico's Inc. to construct an 8,500 square foot restaurant on Tarrantino Drive. The restaurant is proposed in the same location as the Albatross and Captain Blythers Restaurant, which was demolished over 10 years ago. Prior to beginning construction of the restaurant, an Initial Study will be conducted pursuant to the California Environmental Quality Act and approvals of all necessary entitlements must be completed. The Option to Sublease allows for CEQA and all entitlements to be completed prior to entering into a long term lease. Once the CEQA document is certified and all entitlements have been received then the City and Delmonico's Inc can enter into a long term sublease.

The City Attorney has drafted an Option to Sublease (Attachment A). The Sublease (Attachment B) is still in rough draft form and is not before you for review and approval tonight but provided for context. The Sublease will be brought before the City Council for consideration at a later date.

**FISCAL IMPACT:**

Payment for the CEQA document shall be funded through a transfer of \$40,000 from the General Fund Assigned Fund Balance to the Marina Enterprise Fund and will have no impact on the Unassigned Fund Balance of the General Fund. There is currently \$140,000 remaining in the Assigned Fund Balance where funds have been assigned for marina improvements.

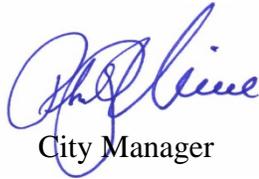
**ACTION:**

Motion to approving an Option to Sublease to Delmonico's Inc., a portion of the Martinez Marina for development of a new restaurant, subject to modifications approved by the City Manager and City Attorney, authorizing the Mayor to execute same; and, (2) adopt a resolution allocating a transfer of \$40,000 from the General Fund Assigned Fund Balance to the Marina Enterprise Fund and authorizing the expenditure thereof to complete CEQA documents to facilitate development.

Attachments

- A. Resolution
- B. Option to Sublease
- C. Marina Restaurant Sublease

**APPROVED BY:**

  
City Manager

RESOLUTION NO. -13

APPROVING OPTION TO SUBLEASE TO DELMONICO'S INC., A PORTION OF THE MARTINEZ MARINA FOR DEVELOPMENT OF A NEW RESTAURANT, SUBJECT TO MODIFICATIONS APPROVED BY THE CITY MANAGER AND CITY ATTORNEY, AUTHORIZING THE MAYOR TO EXECUTE SAME, AND ADOPT RESOLUTION ALLOCATING \$40,000 FROM THE GENERAL FUND ASSIGNED FUND BALANCE TO THE MARINA ENTERPRISE FUND AND AUTHORIZING THE EXPENDITURE THEREOF TO COMPLETE CEQA DOCUMENTS TO FACILITATE DEVELOPMENT

**WHEREAS**, on January 23, 2013, an application was submitted by Delmonico's Inc. to construct an 8,500 square foot restaurant on Tarrantino Drive; and

**WHEREAS**, the restaurant is proposed in the same location as the previous restaurants of the Albatross and Captain Blythers; and

**WHEREAS**, the City has a need to foster economic development at the waterfront area; and

**WHEREAS**, the City leases/subleases portions of the land and buildings comprising the Martinez Marina and Waterfront Park to various individuals from time to time consistent with the laws, rules, regulations, and leases applicable to said property; and

**WHEREAS**, the City and Delmonico's Inc. are entering into this Option to document the terms upon which City will sublease the subject property to Delmonico's Inc. in the event that the conditions precedent to the sublease, as set forth herein, are met and Delmonico's Inc. exercises its option to enter into a long-term sublease of the subject property; and

**WHEREAS**, there is \$140,000 remaining in the General Fund Assigned Fund Balance where funds have been assigned for Marina improvements; and

**WHEREAS**, the City Council authorizes \$40,000 of these funds to be transferred to the Marina Enterprise Fund; and

**NOW, THEREFORE, BE IT RESOLVED** that the City Council of the City of Martinez approves the Option to Sublease to Delmonico's Inc., a portion of the Martinez Marina for development of a new restaurant, subject to modifications approved by the City Manager and City Attorney authorizing the Mayor to execute same, and adopt resolution allocating \$40,000 from the General Fund Assigned Fund Balance to the Marina Enterprise Fund and authorizing the expenditure thereof to complete CEQA documents to facilitate development.

\* \* \* \* \*

**I HEREBY CERTIFY** that the foregoing is a true and correct copy of a resolution duly adopted by the City Council of the City of Martinez at a Regular Meeting of said Council held on the 20<sup>th</sup> day of February, 2013, by the following vote:

AYES:

NOES:

ABSENT:

RICHARD G. HERNANDEZ, CITY CLERK  
CITY OF MARTINEZ

## OPTION TO SUBLEASE

THIS OPTION TO SUBLEASE (this "Option") is entered into as of \_\_\_\_\_, 2013 (the "Effective Date"), by and between the CITY OF MARTINEZ, a municipal corporation ("City") and Del Monico's Inc ("Optionee") and is made with reference to the following facts:

### RECITALS

A. City owns or holds a leasehold interest in certain real property in the City of Martinez commonly known as the Martinez Marina and Waterfront Park area. The City leases from the State of California, acting through the State Lands Commission ("State") that certain real property (hereafter, the "State Lands") as described in the lease between the City and State dated February 1, 2010, a true and correct copy of which is attached hereto as **Exhibit A** and incorporated herein by reference ("State Lands Lease").

B. The City leases/subleases portions of the land and buildings comprising the Martinez Marina and Waterfront Park to various individuals from time to time consistent with the laws, rules, regulations, and leases applicable to said property. Optionee desires to sublease from the City and City desires to sublease to Optionee, a portion of the State Lands, specifically, the real property described in **Exhibit B**, attached hereto and incorporated herein by reference ("Subject Property") for the purposes of re-constructing and operating a restaurant and associated improvements thereon.

C. The terms and conditions of the State Lands Lease require the City to obtain the prior approval of the State prior to the construction of a restaurant upon or entering into a sublease relating to the Subject Property.

D. City and Optionee are entering into this Option to document the terms upon which City will sublease the Subject Property to Optionee in the event that the Conditions Precedent to Sublease, as set forth herein, are met and Optionee exercises its option to enter into a long-term Sublease of the Subject Property.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties hereto, City and Optionee agree as follows:

### AGREEMENT

**1. Option to Sublease:** City grants to Optionee an option to sublease the Subject Property generally on terms and conditions more particularly described in the draft form of Sublease, attached hereto as **Exhibit C** and incorporated herein by reference, as the same may be ultimately agreed upon by the parties hereto prior to the expiration of the Option Term set forth herein.

**2. Consideration:** Pursuant to the terms of this Option, Optionee has agreed to undertake certain actions to determine the viability of reconstructing a restaurant on the Subject Property. Said actions may include, but not necessarily be limited to, site inspections, soils investigation, , architectural and engineering plans and studies, permitting and permit processing, property surveys and any and all other actions necessary to obtain the Discretionary Entitlements (defined below). Obtaining the Discretionary Entitlements shall be at the Sole Cost and Expense of the Optionee. Optionee shall deposit with the City the sum of \_\_\_\_\_, which sum City shall apply to City costs for the processing of the Discretionary Entitlements to be processed by the City and for all legal, engineering and outside consultant costs related thereto, including the costs associated with the drafting and review of the Sublease. All said sums shall constitute the consideration paid by Optionee for the option. No consideration shall be applied to or credited against any amounts due under the Sublease if the option is exercised.

**3. Term:** This Option Agreement shall be effective as of the date first above written and shall expire at 5:00 p.m. on July 31, 2013, unless extended by mutual agreement of the parties (“Option Term”).

**4. Exercise of Option:**

A. Conditions Precedent to the Exercise of the Option.

This option may be exercised by Optionee only after the satisfaction of each of the following conditions precedent to the exercise of the option, prior to the expiration of the Term of this Option:

1. Compliance by Optionee, at Optionee’s Sole Cost and Expense, with the requirements of the California Environmental Quality Act relating to the approval of any and all Discretionary Entitlements necessary for the approval the Sublease and construction and operation of a restaurant on the Subject Property.

2. Application for, processing thereof (at Optionee’s Sole Cost and Expense) and approval of all Discretionary Entitlements necessary for the approval of the Sublease and construction and operation of a restaurant on the Subject Property. Said Discretionary Entitlements may include, but are not necessarily limited to:

- a. Determination of compliance with or amendment of, as may be required, the Marina Land Use Plan.
- b. Approval of the Sublease by:
  - (i) The State Lands Commission (“State Lands”)
  - (ii) The California Department of Boating and Waterways (“DBAW”)
  - (iii) The City Council of the City of Martinez.

- c. Approval of all necessary entitlements by Regulatory Agencies with jurisdiction over the Sublease or construction and operation of a restaurant at the Subject Property. Said Regulatory Agencies may include, but are not necessarily limited to:
  - (i) State Lands
  - (ii) DBAW
  - (iii) the Bay Conservation and Development Commission (“BCDC”);
  - (iv) the U.S. Army Corps of Engineers (“COE”);
  - (v) the Regional Water Quality Control Board (“RWQCB”);
  - (vi) the East Bay Regional Parks District (“EBRPD”);
  - (vii) the U.S Fish and Wildlife Service (“USFWS”);
  - (viii) the California Department of Fish and Game (“CDFG”); and
  - (ix) any other agency or entity which is hereafter identified to have jurisdiction over any of the uses and activities at the Subject Property contemplated in the Sublease.
  
- d. Approval of all necessary land use and zoning entitlements by the City, which may include, but are not necessarily limited to:
  - (i) Determination that the use of the Subject Property for a restaurant as contemplated in the Sublease is in compliance with or amendment to achieve compliance with the Martinez General Plan;
  - (ii) Determination that the use of the Subject Property for a restaurant as contemplated in the Sublease is in compliance with the Martinez Municipal Code or in the alternative, approval of an amendment to the Martinez Municipal Code to achieve compliance therewith or in the alternative approval of a variance, if applicable;
  - (iii) Approval of a Use Permit for the operation of a restaurant and associated activities at the Subject Property;
  - (iv) Design Review Approval for a restaurant and associated improvements at the Subject Property; and
  - (v) Approval of any other necessary land use or zoning entitlement which is hereafter identified to be required for the construction of any structure to be constructed or use to be undertaken at the Subject Property as identified in the Sublease.

Optionee specifically understands, acknowledges and agrees that the Discretionary Entitlements identified in this Section 4.A.2, are not exhaustive and that there may be other entitlements necessary in order to establish the use contemplated for the Subject Property as set forth in the Sublease and that Optionee will conduct all of its own due diligence in identifying any and all necessary entitlements for said use. Optionee further specifically understands, acknowledges and agrees that the City in no way guarantees the issuance of any of the Discretionary Entitlements and that the City and any and all other Regulatory Agencies with jurisdiction shall process said Discretionary

Entitlements in the normal course of business and shall retain all of their respective rights, duties and powers, to review and approve, approve with

conditions, or deny any of the Discretionary Entitlements, in the exercise of their discretion. This Option to Sublease and the Sublease attached hereto in no way guarantee that the City or the Regulatory Agencies, or any of them, will grant or deny the Discretionary Entitlements.

For purposes of this Agreement, “Optionee’s Sole Cost and Expense” shall include, but not be limited to, all costs and expenses incurred by the City and/or Optionee, and/or their agents, subcontractors and/or consultants in designing, performing environmental review of, processing applications for, planning, applying for approvals, permits, authorizations and entitlements for, attending necessary meetings with respect to, consulting with agencies with jurisdiction over and obtaining the Discretionary Entitlements and any and all other approvals, permits, authorizations and entitlements for the works and Improvements specified in Exhibit D of the Marina Sublease (collectively, the “Permits and Entitlements”).

B. Notice of Exercise of the Option: Upon the satisfaction of all of the Conditions Precedent to Exercise of Option, this option may be exercised by Optionee delivering to delivering to City at 525 Henrietta St. Martinez, CA the following items prior to the expiration of the Option Term:

1. a copy of the Sublease, in the final form approved by the City Council of the City of Martinez executed by Optionee dated as of the date of the option’s exercise; and
2. a notice stating that Optionee exercises the option.

**5. Commencement of Sublease Term:** The Sublease shall commence on the date on which City has received all of the items required for the exercise of the option pursuant to Section 4.

**6. Inspection Rights:** At any reasonable time and upon reasonable notice, Optionee and Optionee’s agents may enter upon the Subject Property to inspect the Subject Property. Optionee shall during the Term of the Option, perform any and all due diligence that Optionee determines to be necessary or desirable to a determination of whether to enter into the Sublease, including, but not limited to: investigation of the presence of any hazardous wastes, substances or materials as those terms may be defined by any law, ordinance and/or regulation of any regulatory agency with jurisdiction, at and surrounding the Subject Property; determination of suitability of the Subject Property for the uses contemplated in the Sublease; investigation of conditions, at, of and surrounding the Subject Property, including, but not limited to, geotechnical, soils, drainage, flooding, subsidence, erosion, stormwater, earthquake, fault rupture, ground shaking, liquefaction, seiche, tsunami, unstable soils, expansive soils, effect of tides, (including, but not limited to King Tide conditions), parking, lighting, and utility availability; investigation and determination of the costs and other financial considerations associated with the Sublease and the uses and improvements contemplated therein. All such due diligence shall be conducted at the sole cost and expense of Optionee. To the extent that any such due diligence shall require the Optionee to perform any destructive testing, boring,

trenching or other physical investigation (“Physical Activity”), at or surrounding the Subject Property said Physical Activity shall be subject to the advance written approval of the City Manager of City, which approval may be withheld in the sole discretion of the City. To the fullest extent permitted by law, Optionee, and each of its members, hereby agrees to, and shall defend, indemnify and hold City, its elective and appointive boards, commissions, officers, agents, and employees harmless from and against any and all allegations, claims, damages, disabilities, or expenses, including attorneys’ fees, experts’ fees, and witness costs that may be asserted or incurred, as the case may be, by any person or entity, including liability for damages or claims for damage for personal injury, or death, as well as from claims for real or personal property damage arising out of or in connection with (i) the activities of Optionee, Optionee’s officers, members, agents, employees, contractors and subcontractors in or about the Subject Property and/or any activities undertaken pursuant to the terms of this Option ; (ii) Optionee’s performance or non-performance under this Option, (iii) Optionee’s breaches of this Option, (iv) the City’s approval of this Option (except for any claims Optionee may have against the City for City’s breach of this Option), (v) the City’s compliance or non-compliance with the California Environmental Quality Act or any other law applicable to the approval, processing and implementation of the Option or the approval of any Discretionary Entitlement, (vi) Optionee’s handling, releasing, disposing, transporting or arranging for the handling, releasing, disposing or transporting of any hazardous wastes, substances or materials as those terms may be defined by any law, ordinance and/or regulation of any regulatory agency with jurisdiction; and/or (vii) Optionee’s violation of any law, ordinance or regulation, whether or not there is concurrent, passive negligence on the part of the City, its elective and appointive boards, commissions, officers, agents, and employees, and regardless of the City’s approval of the Option, Sublease or Discretionary Entitlements and notwithstanding any limitation on the amount or type of damages or compensation payable by or for Optionee under Workers’ Compensation, Disability, or other employee benefit acts or limitations of any insurance held by Optionee. Optionee further indemnifies the City for any liability, cost, expense, including attorney’s fees, incurred by the City in enforcing this Section 6. This Section 6 shall survive termination of this Option for any reason.

**7. Time of Essence.** Time is of the essence in this Option Agreement. If the option is not exercised in the manner provided in Section 4 before the expiration of the Option Term, Optionee shall have no interest whatever in the Subject Property and the option may not be revived by any subsequent payment or further action by Optionee.

**8. Notices.** All notices, demands, requests, and exercises under this Option Agreement by either party shall be hand delivered, or sent by United States Mail, registered or certified, postage prepaid, addressed to the other party as follows:

If to City:

City of Martinez  
525 Henrietta St.  
Martinez, CA 94553  
Attn: City Manager

If to Optionee:

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

Notices, demands, requests, and exercises served in this manner shall be considered sufficiently given or served for all purposes under this option at the time the notice, demand, or request is hand-delivered or five (5) business days after the same is deposited into the United States Mail when postmarked to the addresses shown. These addresses may be changed by written notice to the other party; provided, however, that no notice of a change of address shall be effective until actual receipt of this notice. Copies of notices are for informational purposes only, and a failure to give or receive copies of any notice shall not be deemed a failure to give notice.

**9. Assignment:** Optionee shall not assign this Option Agreement or any of Optionee’s rights without first obtaining the prior written consent of City, which City may grant or withhold in City’s sole and unfettered judgment.

**10. Litigation Costs:** If any legal action or any other proceeding, including arbitration or action for declaratory relief, is brought for the enforcement of this Option Agreement, or to cause an alleged dispute, breach, default, or misrepresentation in connection with any of the provisions of this Option Agreement, the prevailing party shall be entitled to recover reasonable attorney’s fees and other costs incurred in that action or proceeding, in addition to any other relief to which it may be entitled. “Prevailing party” shall include without limitation (i) a party who dismisses an action in exchange for sums allegedly due; (ii) the party that receives performance from the other party of an alleged breach of covenant or a desired remedy where this is substantially equal to the relief sought in an action; or (iii) the party determined to be the prevailing party by a court of law.

**11. Extinguishment:** If this Option Agreement is terminated, Optionee agrees, if requested by City, to execute, acknowledge, and deliver a written document extinguishing this option, in a form acceptable to the City within ten (10) days after termination and to execute, acknowledge, and deliver any other documents required by any title company to remove the cloud of this option from the Subject Property.

**12. Survival:** The terms of this Option Agreement shall survive the execution of the Sublease unless there is a contradiction between the Sublease and this Option Agreement, in which event the former shall control.

**13. Successors:** This Option Agreement shall bind and inure to the benefit of the respective heirs, personal representatives, executors, successors, and assignees of the parties.

**14. Waivers:** No waiver of any breach of a provision in this Option Agreement shall be deemed a waiver of any other provision. No waiver shall be valid unless in writing and executed by the waiving party.

**15. Construction:** Headings at the beginning of each section are solely for the convenience of the parties and are not a part of and shall not be used to interpret this Option Agreement. The singular form shall include plural, and vice versa. This Option Agreement shall be construed as if both parties have prepared it. Unless otherwise indicated, all references to sections are to this Option Agreement.

**16. Further Assurances:** Whenever requested to do so by the other party, each party shall execute, acknowledge, and deliver any further conveyances, agreements, confirmations, satisfactions, reSubleases, powers of attorney, instruments of further assurance, approvals, consents, and any further instruments and documents as may be necessary, expedient, or proper, in order to complete any conveyances, transfers, sales, and agreements contemplated by this Option Agreement, and to do any other acts and to execute, acknowledge, and deliver any documents as so requested in order to carry out the intent and purpose of this Option Agreement.

**17. No Third-Party Rights:** Nothing in this Option Agreement, express or implied, is intended to confer upon any person, other than the parties and their respective successors and assigns, any rights or remedies under this Option Agreement.

**18. Integration:** This Option Agreement contains the entire agreement between the parties respecting the matter set forth, and expressly supersedes all previous or contemporaneous agreements, understandings, representations, or statements between the parties respecting these matters.

**19. Counterparts:** This Option Agreement may be executed in one (1) or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute one instrument.

**20. Amendment:** This Option Agreement may not be amended or altered except by an instrument in writing executed by the parties.

**21. Partial Invalidity:** Any provision of this Option Agreement that is unenforceable or invalid or the inclusion of which would adversely affect the validity, legality, or enforcement of this Option Agreement shall be of no effect, but all the remaining provisions of this Option Agreement shall remain in full force and effect.

**22. Authority of Parties:** Each person executing this Option Agreement on behalf of a party warrants that he or she has the authority to execute this Option Agreement on behalf of that party.

**24. Governing Law:** The validity, meaning, and effect of this Option Agreement shall be determined in accordance with California law. Venue shall be in the County of Contra Costa.

IN WITNESS WHEREOF, the parties hereto execute this Option on the date first written above.

"CITY":

THE CITY OF MARTINEZ,  
a California municipal corporation

By: \_\_\_\_\_  
Rob Schroder, Mayor

Attest:

By: \_\_\_\_\_  
Mercy Cabral, Deputy City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

"Optionee":

\_\_\_\_\_

Name:

Its:

APPROVED AS TO FORM:

\_\_\_\_\_  
Attorneys for Optionee

**RECORDING REQUESTED BY AND  
AFTER RECORDATION, MAIL TO:**

City of Martinez  
Attn: Assistant to the City Manager  
525 Henrietta Street  
Martinez, CA 94553

**NO FEE RECORDING PURSUANT  
TO GOVERNMENT CODE §27383**

APN#

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**MARINA SUBLEASE  
(RESTAURANT GROUND LEASE AND CONSTRUCTION AGREEMENT)**

This MARINA SUBLEASE (“Sublease” or “Agreement”) is made and entered into this \_\_\_ day of \_\_\_\_\_, 2013, by and between the City of Martinez, a municipal corporation of the State of California (“City”) and \_\_\_\_\_ (“Lessee”). It is hereby mutually covenanted and agreed by and between the parties hereto that this Sublease is made upon the terms and conditions hereinafter set forth and in reference to the following facts:

**RECITALS**

A. On October 27, 1964, the City and the State of California by and through the State Lands Commission (“State Lands Commission”) entered into an agreement (Lease No. 3194.9, amended on April 18, 1977) through which the State Lands Commission leased to the City certain properties (“Original State Lands Lease”). Said Original State Lands Lease was to expire on or about October 17, 2013. On June 9, 2010, the State Lands Commission and the City entered into a revised lease agreement (“State Lands Lease”) through which the State Lands Commission leased to the City that certain real property described therein (the “Leased Lands”) for an extended period Beginning February 1, 2010 and ending January 31, 2056. A true and correct copy of said State Lands Lease is attached hereto as **Exhibit A** and incorporated herein by reference.

B. The State Lands Lease states that all leases, subleases and contracts entered into by the City for the development of the Leased Lands and particularly for the development of a restaurant upon any portion of the Leased Lands shall be subject to the State Lands Lease and approval of the State Lands Commission.

## ATTACHMENT B

C. Since 1964 the City has received several loans from the State Department of Navigation and Ocean Development, the Department of Natural Resources and the Department of Boating and Waterways (“DBAW”) and has constructed on portions of the Leased Lands a 428-slip marina, breakwater, fuel dock, fishing pier, ferry plaza, three parking lots, harbor master’s building, boat launch ramp, and travel lift haul out pier. Among other things, the Leased Lands also contain an old ferry slip, an old ferry pier, a private yacht club, a sea scout building, a bait shop, a boat yard and an amphitheater. Pursuant to the Original State Lands Lease, a restaurant had also been constructed on a portion of the Leased Lands. In 20\_\_\_, the restaurant was demolished.

D. As of \_\_\_\_\_, 2013, DBAW reports that the amounts owed by the City under said loans (the “Existing DBAW Loans”) are approximately \$1,\_\_\_\_\_,\_\_\_\_. The Parties acknowledge and agree that the City’s agreement and ability to timely make the payments under the Existing DBAW Loans, and future loans from DBAW, if any, are expressly based and dependent upon Lessee’s timely payment of Rent (defined below) pursuant to this Agreement.

E. The City subleases several portions of the Leased Lands to various entities. Specifically, at the present time, the City subleases a portion of the Leased Lands and structures located thereon to: Gerald N. Long, Eagle Marine; Sea Scouts; and Martinez Yacht Club. Prior to 2013, the City also leased a portion of the Leased Lands to the Benefactors Inc. dba Willows Theater Company, which lease has been terminated. Prior to 1999, the City directly operated a portion of the Leased Lands constituting the City Marina, including the improvements located thereon, namely a 428-slip marina, fuel dock, fuel tank area and related facilities, harbor master’s building, the boat launch ramp, the travel lift pier, and the breakwater. In or before 1999, the City determined that the City Marina could be more efficiently maintained, managed and operated through an agreement with a private operator. Almar Management, Inc. (“Almar”), a California corporation, commenced operating and managing the City Marina pursuant to a Management Agreement dated as of July 20, 2005 (the “Management Agreement”).

F. The City manages the Leased Lands pursuant to all of the subleases and agreements currently or which may hereafter be in effect. Each of the sublessees and contractors currently occupying a portion of the Leased Lands, pursuant to leases and agreements with the City, recognizes that access to the Leased Lands is shared among each of the sublessees and contractors and that use of certain portions of the Leased Lands, as set forth in the subleases and agreements, are shared among the sublessees and contractors.

G. The City and Lessee have previously entered into that certain Option to Sublease dated \_\_\_\_\_ (“Option to Sublease”). A true and correct copy of the Option to Sublease is attached hereto as **Exhibit B** and incorporated herein by reference. Said Option to Sublease provides that Lessee shall undertake certain activities which are a condition precedent to the exercise of the option and the City and Lessee entering into a sublease agreement. The City and Lessee have determined that each and every condition precedent, as set forth in section 4. A. of the Option to Sublease has been satisfied, waived, or has been deferred to be performed as a Condition Precedent to this Sublease (as defined below) and the Parties now wish to enter

## ATTACHMENT B

into this Sublease through which the City will sublease to Lessee a portion of the Leased Lands. The area subject to this Sublease includes the land on which Lessee shall build certain structure(s) and associated improvements as set forth herein (and once built, said structure(s) and improvements shall also be part of this Sublease). All other areas of the Leased Lands are excluded from this Sublease. The portion of the Leased Lands subject to this Sublease are more explicitly described in Section 1 of this Sublease.

H. As is more specifically provided for in Section 2 of this Sublease, and subject to the term of the State Lands Lease, the Sublease term is potentially 40 years ("Term"). The initial term of the Sublease shall be two years (the "Original Entitlement Term", defined below), subject to extensions as provided hereinafter. During the Original Entitlement Term and with the reasonable, non-financial assistance of the City, Lessee shall be required to, among other things, use commercially reasonable efforts to obtain all the necessary permits and approvals to build, and build a new permanent restaurant structure and associated improvements upon the portion of the Leased Lands described in Section 1 hereof.

I. As is more specifically provided for in Section 2 of this Sublease, if Lessee obtains all of the necessary permits and approvals for the specified work and each and every Condition Precedent as (defined in Section 2(C), below) is satisfied (or waived by the party benefitted by the Condition Precedent) within the applicable Original Entitlement Term, the balance of the Term (the "Remaining Term") shall commence; provided, however, that the Term of this Sublease shall not exceed the term of the State Lands Lease.

J. The City and Lessee agree to be bound by the terms and conditions contained in this Sublease.

WITH REFERENCE TO THE FACTS RECITED ABOVE, the City and Lessee (collectively the "Parties") agree as follows:

### **SECTION 1 PROPERTY**

A. **The Property:**

(1) Attached hereto as **Exhibit A-1** is a map showing all of the property leased by the City from State Lands, namely, the Leased Lands. Attached hereto as **Exhibit A-2** is a map showing that portion of the Leased Lands which are being subleased to Lessee pursuant to this Sublease (collectively, the "Property"). Without limiting the generality of the foregoing, the Property includes (a) the land on which Lessee shall construct a restaurant structure and related improvements. During the Original Entitlement Term and as a condition precedent to the commencement of the Remaining Term, the restaurant structure and associated improvements shall be constructed at the Sole Cost and Expense of Lessee, as set forth herein. If said restaurant structure and associated improvements are not constructed during the Original Entitlement Term, then this Sublease shall

terminate at the end of the Original Entitlement Term.

(2) Attached as **Exhibit A-3** is a map of that portion of the Leased Lands which is not being subleased pursuant to this Sublease. Except as expressly stated hereinafter, the City shall retain full and complete authority to manage, use and control the real property shown on **Exhibit A-3** and the Improvements located thereon, independent of this Sublease. Without limiting the generality of the foregoing, the real property and improvements that are not being subleased pursuant to this Sublease are: the fishing pier, the ferry plaza for public access, all parking lots, the Sea Scouts facility, the Yacht Club building, the amphitheater, amphitheater production building, Eagle Marine's leased premises, the travel lift and pier, the marina (including but not limited to the boat slips and docks, piers, and floats and waterways adjacent thereto), fuel dock, fuel tanks(s) area and related fueling facilities, harbor master's building, boat launch ramp, shoreline rip rap, the breakwater, and all other land and improvements included within the Leased Lands except those set forth in **Exhibit A-2**.

B. **Parking**: Lessee is also hereby granted the privilege of non-exclusive use and the duty to maintain, repair, replace and improve the Parking Area as set forth in **Exhibit C** attached hereto under the terms and conditions of this Sublease ("Parking Area"). Unless otherwise indicated hereafter, whenever the term Property is used herein it shall also include the non-exclusive use of the Parking Area. Lessee understands and agrees that other users and tenants of the Leased Lands shall also have the right to use the Parking Area. Lessee shall maintain the Parking Area in good condition, reasonable and ordinary wear and tear excepted.

C. **LESSEE Accepts the Property "As-Is"**:

(1) Lessee acknowledges and represents (i) that Lessee is entering into this Sublease solely in reliance on Lessee's own investigation, and that no other representations or warranties of any kind whatsoever, express or implied, have been made by City, or City's agents, officers, employees or representatives, (ii) that Lessee has reviewed, fully understands, accepts and shall perform its obligations hereunder in compliance with all grants, loans, leases, stipulations and other agreements between the City and State Lands, the State and/or DBAW as well as all applicable provisions of the California Harbors and Navigation Code, and all other federal, state and local laws, rules and regulations pertinent to the Property, (iii) that Lessee has had ample opportunity and complete access to all parts of the Property to inspect and ascertain, to its entire satisfaction, whether the Property is suitable to its needs and can be improved, used, maintained and operated in accordance with this Sublease, (iv) that Lessee has had ample access to and has read, understands and finds acceptable all reports, investigations, studies, evaluations and all other documents regarding the Property, including, but not limited to, the City's files pertaining to the Property, environmental studies, bathymetrical depth reports, title surveys, preliminary title reports, and other reports and documents Lessee deemed necessary to its decision to enter this Sublease, and (v) that Lessee is entirely satisfied as to the Property's (a) compliance or noncompliance with applicable laws, codes, rules and regulations, including but not limited to fire safety, health safety, hazardous materials and other code standards and all other applicable

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governmental and other requirements, and (b) physical condition, environmental condition, title, and all other aspects of the Property and each component thereof, including but not limited to, investigation of the presence of any hazardous wastes, substances or materials as those terms may be defined by any law, ordinance and/or regulation of any regulatory agency with jurisdiction, at and surrounding the Property; determination of suitability of the Property for the uses contemplated herein; investigation of conditions, at, of and surrounding the Property, including, but not limited to, geotechnical, soils, drainage, flooding, subsidence, erosion, stormwater, earthquake, fault rupture, ground shaking, liquefaction, seiche, tsunami, unstable soils, expansive soils, effect of tides, (including, but not limited to King Tide conditions), parking, access, lighting, and utility availability; investigation and determination of the costs and other financial considerations associated with this Sublease and the uses and improvements contemplated herein and/or the fitness of the Property or any improvements located thereon, for Lessee's intended use, and/or the compliance of the Property and/or any improvements located thereon with any applicable laws, rules and regulations, including, without limitation, the Americans With Disabilities Act of 1990. Lessee warrants and represents that it is a sophisticated owner, operator, manager and developer of real property and restaurants, and is familiar and experienced with the requirements for the development, management, financing, operation and ownership of same. Upon the exercise of the Option set forth in the Option to Sublease and as a further condition precedent to this Lease, Lessee shall deliver to City, prior to the Commencement Date, a notice of acceptance of the condition of the Property and completion of due diligence, which notice shall: (1) acknowledge the satisfaction of each condition precedent set forth in section 4 of the Option to Sublease; (2) acknowledge Lessee's unconditional acceptance of the condition of the Property, including, but not limited to those conditions set forth in this Section 1; and (3) advise City of Lessee's completion of all due diligence which Lessee determines necessary or desirable ("Notice of Acceptance").

(2) **No City Representations:** Lessee specifically acknowledges that except as otherwise may be expressly provided in this Sublease, the City has made no representations concerning the condition of the Property or any improvements located thereon, including, without limitation, investigation of the presence of any hazardous wastes, substances or materials as those terms may be defined by any law, ordinance and/or regulation of any regulatory agency with jurisdiction, at and surrounding the Property; investigation of conditions, at, of and surrounding the Property, including, but not limited to, geotechnical, soils, drainage, flooding, subsidence, erosion, stormwater, earthquake, fault rupture, ground shaking, liquefaction, seiche, tsunami, unstable soils, expansive soils, effect of tides, (including, but not limited to King Tide conditions), parking, access, lighting, and utility availability; investigation and determination of the costs and other financial considerations associated with the Sublease and the uses and improvements contemplated and/or the fitness of the Property or any improvements located thereon, for Lessee's intended use, and/or the compliance of the Property and/or any improvements located thereon with any applicable laws, including, without limitation, the Americans With Disabilities Act of 1990, and Lessee expressly waives any duty which the City might have to make any disclosures in connection with the subject matter of this Section. Lessee further agrees that, in the event Lessee subleases or assigns its interest in this Sublease, Lessee shall protect, indemnify, defend and hold harmless the City for, from and against any matters which arise as a result of Lessee's failure to disclose any relevant information about the Property

and/or Improvements to any subtenant or assignee. It is the intention of the City and Lessee that the immediately preceding sentence shall survive any release of Lessee by the City upon any assignment of this Sublease by Lessee.

## SECTION 2

### TERM

A. **Agreement to Lease:** The City agrees to lease the Property to Lessee and Lessee agrees to hire the Property from the City pursuant to the terms and conditions stated herein. This Agreement is subject to each and every term and condition of the State Lands Lease.

B. **Commencement Date of this Agreement:** As a condition precedent to this Agreement becoming effective, each and every Condition Precedent to the Exercise of Option set forth in section 4.A of the Option to Sublease shall have been satisfied prior to the Commencement Date and Lessee shall have delivered to City the written Notice of Acceptance. This Agreement shall thereafter become effective on the later of the delivery by the Lessee of the Notice of Acceptance or the date hereinabove first written upon the full execution of this Sublease (“Commencement Date@”). The Parties shall, upon the occurrence of the Commencement Date, execute a letter agreement setting forth the date of the Commencement Date.

C. **Term:** The Term of this Sublease shall commence upon the Commencement Date. Notwithstanding anything to the contrary stated herein, the Term of this Sublease shall not extend beyond the term of the State Lands Lease.

(1) It is the intention of the Parties that the Lessee shall have developed and constructed a restaurant and associated improvements as set forth in **Exhibit D** within two (2) years of the Commencement Date of this Sublease. To accomplish this goal, this Sublease shall have an initial lease term of 2 years during which Lessee will be afforded the opportunity to meet the Conditions Precedent (defined below). This two year term is identified as the “Original Entitlement Term”, is described in Section 2(B) of this Sublease and shall commence on the Commencement Date and expire two years later, unless extended by the mutual written agreement of the Parties or as set forth hereinbelow. Provided that within the Original Entitlement Term or Extended Entitlement Term, as the case may be each and every Condition Precedent (defined below) is performed (or waived in writing by the party benefitted by the Condition Precedent), the Remaining Term shall commence.

B. **Original Entitlement Term:** Lessee shall be solely responsible for using commercially reasonable efforts to meet each of the Conditions Precedent (defined below) including, but not limited to, obtaining all of the permits and entitlements required for the commencement and completion of the works and Improvements described in **Exhibit D** within the Original Entitlement Term at Lessee’s Sole Cost and Expense.

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(1) For purposes of this Agreement, “Lessee’s Sole Cost and Expense ” shall include, but not be limited to, all costs and expenses incurred by the City and/or Lessee, and/or their agents, subcontractors and/or consultants in obtaining the Discretionary Entitlements as set forth in Section 4 B of the Option to Sublease, and meeting each and every Condition Precedent (defined below), including, but not limited to designing, performing environmental review of, processing applications for, planning, applying for all approvals, permits, authorizations and entitlements for, attending necessary meetings with respect to, consulting with agencies with jurisdiction over and obtaining the approvals of all required permits authorizations and entitlements for and the costs for construction of the works and Improvements specified in **Exhibit D**.

(2) If Lessee fails to meet each of the Conditions Precedent (defined below) including but not limited to, completing construction of and obtaining a certificate of occupancy for the works and Improvements specified in **Exhibit D** by the last day of the Original Entitlement Term, the City shall have the right to terminate this Sublease as of midnight of the last day of the Original Entitlement Term; (i) provided, however, that should any litigation be brought during the Original Entitlement Term challenging a permit or entitlement obtained by Lessee during the Original Entitlement Term, the City shall have the right to terminate this Sublease in the event said litigation is not finally resolved in favor of issuance of the permit or entitlement, without right of further appeal or court challenge, by no later than five (5) years after the Commencement Date; and (ii) provided, further, that in the event of such litigation that is not finally resolved within the Original Entitlement Term, as to the permit or entitlement at issue in said litigation, the Original Entitlement Term shall be extended to midnight of the date said final resolution is achieved or midnight of the day five (5) years after the Commencement Date, whichever is earlier (the “Extended Entitlement Term”) (but said extension of the Original Entitlement Term shall not extend the Original Entitlement Term for any permit or entitlement other than that in issue in the said litigation.

(3) If this Sublease is terminated for failure of Lessee to meet the Conditions Precedent (defined below) including, but not limited to the construction of and certificate of occupancy for, the works and Improvements specified in **Exhibit D** within the applicable Original Entitlement Term or the Extended Entitlement Term, this Sublease shall be of no further legal force and effect except for those provisions designated herein which survive the termination of the Sublease. In the event of any adversarial proceedings occurring as a result of the City’s invocation of its rights under this subsection, the Parties agree that the sole issue before the tribunal will be whether Lessee demonstrates that Lessee met each and every Condition Precedent, including, but not limited to, the construction of and certificate of occupancy for the works and Improvements specified in **Exhibit D** by the end of the Original Entitlement Term or Extended Entitlement Term, whichever is applicable. If Lessee fails to so demonstrate, this Sublease shall be deemed terminated as of the end of the Original Entitlement or Extended Entitlement Term, whichever is applicable, possession of the Property shall be immediately restored to the City (if possession has not theretofore been turned over to the City) and Lessee shall take all steps reasonably requested by the City to restore the Property to the condition it was in at the Commencement Date.

C. **The Remaining Term:** Each of the following tasks, agreements, permits, entitlements, obligations and actions shall be performed by Lessee, at Lessee's Sole Cost and Expense as a Condition Precedent to the Remaining Term ("Condition Precedent"): (1) each and every Condition Precedent to the Exercise of the Option as set forth in the in section 4. A of the Option to Lease and delivery of the Notice of Acceptance prior to the Commencement Date; (2) the application for and issuance of a building permit for the works and Improvements specified in **Exhibit D** ; (3) the complete construction of the works and Improvements specified in **Exhibit D** and the issuance of a certificate of occupancy therefore. If each and every Condition Precedent is completed, consummated, approved, executed, obtained, performed and/or satisfied (collectively "Perform" or "Performed"), as the case may be, by the last day of the Original Entitlement Term or, if applicable, the Extended Entitlement Term, then the remaining balance of the Term ("Remaining Term") shall commence on the day after the later of the last day of (i) the Original Entitlement Term or (ii) the Extended Entitlement Term, as the case may be, and end forty years thereafter, but in no event longer than the term of the State Lands Lease. As a condition precedent to the Remaining Term commencing, the Parties shall execute a document in which they confirm that all Conditions Precedent have been met and that, therefore, they agree that the Remaining Term shall commence on the date written in that document.

D. **Renewal Option:** Lessee shall have the option to extend the Sublease Term for one additional period of fifteen (15) years or for the then balance of the State Lands Lease, whichever is less ("Renewal Period") provided that:

(1) Lessee delivers to the City a written notice irrevocably exercising the option ("Extension Notice") at least ninety (90) days, but not more than three hundred sixty five (365) days, in advance of the expiration date of the Remaining Term;

(2) Lessee is not in material default (after the expiration of any applicable notice and cure period) of its obligations under the Sublease on the date Lessee delivers the Extension Notice and on the expiration date of the Remaining Term; and

(3) The Rent to be paid by Lessee during the Renewal Period and other financial conditions applicable to the Renewal Period shall be determined and agreed upon in writing by the Parties prior to the expiration of the Remaining Term.

E. **State Lands Lease Controls:**

(1) Lessee has the right to use the Property by virtue of the State Lands Lease under which the City is the lessee. Notwithstanding anything to the contrary stated herein, this Sublease and any extension thereof are subject and subordinate to the State Lands Lease, and under no circumstances shall the term of this Sublease extend beyond the term of the State Lands Lease. To the maximum extent legally, reasonably and practically possible, the City shall seek to extend, renew and/or exercise any option it possesses under the State Lands Lease for the maximum renewal period possible. Provided, however, the City shall have no liability or responsibility to Lessee for the City's failure to exercise any extension or renewal rights the City may have under the State Lands Lease.

(2) The terms, conditions and respective obligations of the City and Lessee to each other under this Sublease shall include the terms and conditions of the State Lands Lease, as they apply to the Property. Therefore, for the purposes of this Sublease, Lessee hereby expressly assumes and agrees to comply with the obligations of the City with respect to the Property as set forth in the State Lands Lease and to perform, for the benefit of the City, each and every one of the following obligations of the City under the State Lands Lease with respect to the Property: those obligations set forth in Special Provisions Sections 6(a), 6(c), 8, 9, 11, 12, 14, 15, 18, 19, and General Provisions Sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the State Lands Lease. Lessee expressly waives any claims it may have against and releases the City from any and all claims, damages, injuries, expenses and liability of any sort arising out of an early termination of the State Lands Lease in accordance with the Terms thereof.

### SECTION 3

#### DEFINITIONS

Unless otherwise specified herein, the following terms shall have the following definitions:

A. Environmental Laws: All federal, state and local laws, statutes, ordinances and regulations, now or hereafter in effect, and in each case as amended or supplement from time to time, and any judicial or administrative interpretation thereof, including, without limitation, any judicial or administrative order, consent decree or judgment, relating to the regulation and protection of human health, safety, the environment and natural resources (including without limitation, ambient air, surface water, groundwater, wetlands, land surface or subsurface strata, wildlife, aquatic species and vegetation).

B. Hazardous Materials: Flammable explosives, asbestos, radioactive materials, hazardous waste, toxic substances or related injurious material whether injurious by themselves or in combination with other materials, substances defined as “hazardous substances”, “hazardous materials”, or “toxic substances”, in the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq.; 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.; the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq.; and those substances defined as “hazardous waste” in Section 25117 of the Cal. Health & Safety Code; in any other Environmental Law, and in the regulations adopted and publications promulgated pursuant to the Environmental Laws.

C. Release: Any release, spill, emission, leaking, pumping, injection, deposit, disposal, handling, transporting, discharge, dispersal, leaching or migration of Hazardous Material (including the abandonment or discarding of barrels, containers or other closed receptacles containing Hazardous Materials) into the indoor or outdoor environment.

D. Remedial Action: Any and all action, investigations, testing,

monitoring, administrative or legal processes and steps necessary to remedy, remediate, remove and/or eliminate any Hazardous Materials which are required by Environmental Laws and/or the agencies having jurisdiction to enforce said Laws.

E. Force Majeure: If either party shall be delayed such that its performance hereunder is in violation of this Sublease or prevented from the performance of any act required under this Sublease by reason of acts of God, strikes, lockouts, labor troubles, inability to procure materials, restrictive governmental laws or regulations (other than those of the City), or other cause beyond the control of the party obligated, performance of this act shall be excused for the period of the delay and the period for the performance of any act shall be extended for a period equal to the period of delay; provided, however, that nothing in this Section shall excuse Lessee from (i) performing those duties it is obligated to perform within the Original or Extended Entitlement Period beyond the applicable Original or Extended Entitlement Period, (ii) completing the **Exhibit D** Improvements beyond the date specified herein, and/or (iii) promptly paying Rent and other monetary consideration owed to the City. Furthermore, any party that is delayed in or prevented from performing its obligations hereunder by a cause of force majeure shall use its best efforts to avoid, remove and remedy the affecting cause, and shall resume performance hereunder as soon as may be possible after such cause shall cease to exist.

#### SECTION 4

##### PAYMENTS BY LESSEE

###### A. Rent.

(1) Entitlement Term Rent: Commencing on the Commencement Date and continuing through the earlier of (i) the end of the Original Entitlement Term or Extended Entitlement Term or (ii) the date of the issuance of a certificate of occupancy for the Improvements described in **Exhibit D**, as the case may be, Lessee shall pay no Rent to the City pursuant to this Sublease.

(2) Remaining Term Rent:

(a) Commencing on the earlier of (i) the end of the Original Entitlement Term or Extended Entitlement Term or (ii) the date of the issuance of a certificate of occupancy for the Improvements described in **Exhibit D** and continuing through a date that is thirty six (36) months from the first day of earlier of (i) the end of the Original Entitlement Term or Extended Entitlement Term or (ii) the date of the issuance of a certificate of occupancy for the Improvements described in **Exhibit D** (the "Initial Remaining Term"), Lessee shall pay to the City as Rent the sum of three dollars, payable in advance on the first day of said thirty six month period.

(b) Commencing on the expiration of the Initial Remaining Term and

## ATTACHMENT B

continuing throughout the Remaining Term, subject to the adjustments set forth in subsection B below, Lessee shall pay to the City as Rent, without notice or demand the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_) per year, payable in equal monthly installments, in advance, on or before the first day of each and every successive calendar month during the Remaining Term hereof. Said Rent shall be paid to City without deduction or offset, in lawful money of the United States of America. Rent for any period with is for less than one (1) month shall be a prorated portion of the monthly installment herein based upon a thirty (30) day month.

- (c) Commencing on the first day of the Renewal Period, if any, and continuing throughout the Renewal Period, subject to the adjustments set forth in subsection B below, Lessee shall pay to the City as Rent, without notice or demand the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_) per year, payable in equal monthly installments, in advance, on or before the first day of each and every successive calendar month during the Renewal Period. Said Renewal Period Rent shall be paid to City without deduction or offset, in lawful money of the United States of America. Renewal Period Rent for any period with is for less than one (1) month shall be a prorated portion of the monthly installment herein based upon a thirty (30) day month.

**B. Adjustments to Rent:** Commencing one year following the expiration of the Initial Remaining Term, the Rent shall be adjusted each year on the anniversary date of the expiration of the Initial Remaining Term. Each such annual anniversary date shall be referred to as an "Adjustment Date". The Rent shall be increased as of each Adjustment Date by the greater of (1) an amount equal to two percent (2%) of the Rent payable for the year immediately preceding such Adjustment Date; or (ii) an amount calculated by multiplying the Rent for the immediately preceding year by a fraction, the numerator of which shall be the United States Department of Labor's Bureau of Labor Statistics Consumer Price Index, All Urban Consumers, All Items, San Francisco-Oakland California, or the successor of such index (the "CPI"), for the year immediately preceding such Adjustment Date, and the denominator of which shall be the CPI for the year in which the immediately preceding Adjustment Date occurred.

**C. Security Deposit:** As a condition precedent to the commencement of the Initial Remaining Term, Lessee shall pay to the City the amount of ten thousand dollars (\$10,000) ( the "Security Deposit"). The amount of the Security Deposit shall serve as a deposit to secure Lessee's performance hereunder. In the event that City is required to utilize any or all of the security deposit to cure any of Lessee's Defaults under this Sublease, City shall provide Lessee written notice of City's intended utilization of said deposit, the amount which the City intends to utilize, the reasons therefor and a reasonable date by when Lessee must replenish the Security Deposit to maintain it at ten thousand dollars (\$10,000). If Lessee performs all of Lessee's obligations under this Sublease, the Security Deposit, or so much thereof as has not theretofore

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been applied by City, shall be returned to Lessee (or, at City's option, to the last assignee, if any, of Lessee's interest under this Agreement) at the expiration or termination of the Term, and after Lessee has vacated the Property. No trust relationship is created herein between City and Lessee with respect to the Security Deposit. City shall deposit the Security Deposit in an interest-bearing account, and notwithstanding any other provision in this Agreement, all interest earned thereon shall become the sole property of the City and shall be used by the City in any fashion it deems appropriate.

D. **Dredge Fund Payments**: In addition to Rent as set forth herein, in the event that the City of Martinez City Council approves, the establishment of a fund, assessment district, improvement district, or other mechanism to pay the costs associated with performing periodic maintenance dredging, as set forth in section 2 Paragraph 17, of the State Lands Lease, to permit access to the Leased Lands from the water ("Periodic Dredging"), Lessee shall make an annual payment in an amount established by the City Council of the City, which shall represent a pro-rata share of the costs to perform the Periodic Dredging which shall be shared by all of the lessees and contractors operating within the Leased Lands as established by the City.

E. **Charge for Late Payment**: If any payment due under this Sublease is not paid to City within ten (10) days after written notice that it was not paid when due, a late charge equal to the lesser of (i) \$250, or (ii) six percent (6%) of the payment shall become immediately due and payable to City, which the Parties agree represents a fair and reasonable estimate of the costs incurred by the City as a result of the late payment by Lessee. An additional charge of ten percent (10%) per annum or the highest lawful interest rate permissible under state and federal law, whichever is higher (but in no event in excess of 18%), shall apply to said late payments (excluding late charges) from and after the 11th day following written notice of non-payment through and including the date of payment.

F. **Place of Payment**: Payments shall be delivered to the City of Martinez, (City Manager ), 525 Henrietta Street, Martinez, CA 94553. The designated place of payment may be changed at any time by City upon ten (10) days written notice to Lessee.

G. **Taxes and Assessments**: Lessee acknowledges and understands that this Sublease may create a possessory interest in real property that may be subject to real property or other taxation. Lessee shall pay any and all taxes (including any possessory interest tax), assessments, and other charges of any description levied or assessed against or on the Property or Lessee's use of the Property or any portion thereof, and any interest thereon, during the term of this Sublease by any governmental agency or entity.

(ii) any and all taxes and assessments and installments of taxes and assessments required to be paid under this Sublease by Lessee shall be paid at least ten (10) days before each such tax, assessment, or installment of tax or assessment becomes delinquent.

(iii) Lessee shall defend, indemnify, and hold City, including the Property and any Improvements now or hereafter on the Property, free and harmless from any liability, loss or damage resulting from any taxes, assessments or other charges required by this Section to be

paid by LESSEE and from all interest penalties, and other sums imposed thereon and from any proceedings to enforce collection of any such taxes, assessments, or other charges.

(iv) Should Lessee fail to pay within the time specified in this Section any taxes, assessments or other charges required by this Section to be paid by Lessee, City may, but is not obligated to, without notice to or demand to Lessee, pay, discharge or adjust such tax, assessment or other charge for its benefit. In such event, Lessee shall promptly, on written demand of City, reimburse City for the full amount paid by it in paying, discharging or adjusting such tax, assessment or other charge together with interest thereon at the rate of ten percent (10%) per annum from the date of payment until the date of repayment.

H. **Utilities:** Lessee shall pay or cause to be paid, and hold City free and harmless from, all charges for the installation, connection, maintenance and furnishing of all necessary utilities, utility facilities, and services, including but not limited to, gas, water, electricity, telephone service, cable or other Television and/or internet service, sewage and other public utilities to the Property during the term of this Sublease and for the removal of garbage, rubbish, and weeds from the Property during the term of this Sublease.

I. **Existing and Other DBAW Loans:** This Sublease shall be subordinate and subject to all liens, matters of record, plans, and matters listed on the Schedule of Encumbrances attached as **Exhibit E**.

J. **Payment Obligation:** Except as otherwise provided herein, Lessee shall be obligated to make all payments of the Rent regardless of whether operations at or Lessee's use of the Property have been interrupted or halted, in whole or in part, by severe storm, weather, tide, spill, flooding, seiche, tsunami, strike, contamination, fire or any other insurable or uninsured accident or disaster whether or not under the control of Lessee, except to the extent caused by the gross negligence or willful misconduct of City.

## SECTION 5

### RECORDS AND AUDIT

A. **Records:** Lessee shall, at all times during the term of this Agreement, keep or cause to be kept, true and complete records of all personnel matters and financial transactions in the operation of all business activities, of whatever nature, conducted in performance of this Agreement, which records shall be kept in conformance with generally accepted accounting practice and as reasonably required by the Director of Finance of the City. Said accounting records must be supported by source documents such as sales slips, cash register tapes, purchase invoices, or other pertinent documents. Lessee shall retain such records for a minimum period of seven years after their creation or preparation, in order to, among other things, permit enforcement of the terms of this Agreement and compliance with grant and loan contracts between the City and DBAW which provide that the California General Auditor shall have the right to review and copy any record for possible audit for a minimum period of three years after

final payment.

B. **Location of Records**: The financial and accounting records, described above, including sales slips, cash register tapes, purchase invoices, banking deposit tickets, statements and any other banking records, and all records of sales, fees and charges from the operation of the Property shall be kept and made available at one location in the City of Martinez for a period of not less than seven (7) years.

C. **Annual Reporting**: Within ninety (90) days after the end of each accounting year, as established by Lessee and City, Lessee shall, at its Sole Cost and Expense, submit to City a balance sheet and income statement reflecting business transacted on or from the Property during the preceding accounting year. Lessee or its Certified Public Accountant or tax preparer must attest that the balance sheet and income statement submitted are an accurate representation of Lessee's records as reported to the United States of America for income tax purposes. At the same time, LESSEE shall submit to City a statement certified as to accuracy by Lessee or its Certified Public Accountant or tax preparer which sets forth the total Income for said accounting year. The statement shall be signed by Lessee or its responsible agent under penalty of perjury, and shall be in the form prescribed by the Finance Director of the City .

D. **Filing**: Lessee shall file all statements and reports required under this Section with the City of Martinez, City Manager, 525 Henrietta Street, Martinez, CA 94553. LESSEE shall file with the City a duplicate copy of all statements and reports herein required unless otherwise specified by City in writing. Any and all reports which LESSEE is required to provide hereunder must be prepared in accordance with generally accepted accounting principles.

G. **Audit**: The City shall, through its duly authorized agents or representatives, have the right to examine and audit Lessee's accounting records at any and all reasonable times for the purpose of determining the accuracy of the accounting records and the accuracy of all financial and accounting reports prepared or submitted by Lessee as required under this Section 5. The cost of the audit shall be borne by City, unless the audit reveals a discrepancy of greater than three (3) percent, in which case Lessee shall be responsible for the audit costs. If the annual Income shown by the annual report submitted by Lessee is less than the amount of annual Income disclosed by the audit, and such discrepancy affects the amount Lessee owes the City in rental and other payments pursuant to this Agreement, Lessee shall pay any delinquent amount within thirty (30) days after the date on which City mails Lessee a bill therefor, and said payment obligation shall be subject to the late payment provisions of Section 4 of this Agreement. If the audited report indicates that the annual gross income was less than the gross income shown by the report made by Lessee, and such discrepancy affects the amount Lessee owes the City, the City shall refund Lessee the amount of any overpayment within thirty (30) days of the City's approval of the audit.

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**USE, OPERATION AND MANAGEMENT OF THE PROPERTY**

A. **Permitted Use:** Lessee shall use, operate and manage the Property only and exclusively for the purposes of (i) construction and operation of a restaurant as described in **Exhibit D** and as permitted in City Use Permit \_\_\_\_\_ (“Use Permit”). Nothing in this Section shall be construed as City's permission for any other uses that require a and amendment to the Use Permit any new or additional use permit, land use approval or other authorization from the City in the exercise of its police powers, unless such permit, authorization or approval is properly obtained.

B. **Limitations on Use:** Lessee shall not use or occupy, nor permit or suffer the Property or any part thereof to be used or occupied for any unlawful, noisy, hazardous or illegal business, use or purpose, or for any business, use or purpose in violation of any present or future laws, ordinances or regulations of the City or any other federal, state or local governmental entity. Lessee shall immediately upon the discovery of any such unlawful or illegal use take all reasonable steps, legal and equitable, to compel the discontinuance of such use and to oust and remove any subtenants, occupants, licensees, invitees, or other persons guilty of such unlawful or illegal use. On behalf of the City, Lessee shall obtain and maintain in good standing all Permits and Entitlements from, and make all submittals required by, agencies with jurisdiction over the use, construction, maintenance, and/or operation of the Property, including but not limited to submittals required under the NPDES program established under the Federal Clean Water Act. Lessee shall, at all times, conduct its activities hereunder in compliance with any and all said Permits and Entitlements and shall immediately notify the City, in writing, of any violation or notice of violation of same. In the event Lessee violates or receives notice of violating any of the Permits and Entitlements, it shall take immediate action to cure or remedy the violation in accordance with applicable laws and/or the directives of the agency whose permit or entitlement has been violated.

C. **Scope and Quality of Operations:**

(1) The Parties acknowledge and agree that the continued use of the Property enhances the value of the tidelands, provides a needed public service, provides a reasonable return to City, and provides additional employment, taxes and other benefits to the general economy of the area. The Parties further acknowledge and agree that the primary purpose of this Agreement is the continuous use of all the Property for the benefit of the public, without unlawful discrimination, and that an immediate and long term objective of this Agreement is to realize the greatest possible revenue from the operation of the Property. Accordingly, Lessee covenants and agrees that it will operate and manage the Property: (i) every day of the year, unless a closure is necessitated by reason of war, strikes, shortage of supplies, riots, civil commotion, act of public enemies, acts of God, or other causes beyond the reasonable control of Lessee, or as a result of a material City Default legally entitling Lessee to close the Property; and (ii) commencing with the Remaining Term of this Sublease, in a manner consistent with the management and operation of other first-class restaurant operations in the San Francisco Bay Region (the “Restaurant Standard”). Lessee shall provide, at Lessee’s Sole Cost and Expense, all furniture, fixtures, and

equipment and personnel necessary to operate the Property in the manner required by this Section 6.

(2) Subject to the restrictions and limitations contained in this Agreement, LESSEE shall have the sole and exclusive authority and obligation to fully and completely supervise and direct the operations of the Property and matters associated or related to the operation of the Property.

(3) In furtherance of realizing the greatest possible revenue from the operation of the Property, Lessee shall take commercially reasonable steps to advertise and promote the Lessee's operations thereon.

## SECTION 7 CAPITAL IMPROVEMENTS

A. **Initial Capital Improvements:** Lessee shall be responsible, at its Sole Cost and Expense, within the times agreed to during the Original Entitlement Term as the same may be extended (and memorialized in an amendment to this Sublease and **Exhibit D**), to timely obtain any and all Discretionary Entitlements as set forth in section 4 of the Option to Sublease and any other permits and entitlements required for the construction of the Improvements and activities identified in **Exhibit D**, and shall design, plan, engineer, undertake, supervise the construction of, construct and complete in a competent, first-class, and timely manner all of the Improvements and activities identified in **Exhibit D** as well as any other activities or improvements required by any condition of approval for the Discretionary Entitlements as set forth in section 4 of the Option to Sublease within the Entitlement Term. Lessee shall provide City with detailed plans and specifications for such capital Improvements, together with evidence of its contractors= and subcontractors= insurance in conformity with the provisions of this Agreement.

B. **Additional Capital Improvements:** Lessee covenants and agrees and it is an express condition of this Sublease that Lessee with due diligence and at its Sole Cost and Expense, but subject to the terms and conditions of Section 13, shall construct such additional Improvements as shall become necessary as a result of damage (except caused by City), destruction (except caused by City), normal wear and tear or obsolescence. It is also anticipated by the parties that Lessee shall make other capital Improvements on a voluntary basis. Lessee shall provide City with detailed plans and specifications for such capital Improvements, together with evidence of its contractors= and subcontractors= insurance in conformity with the provisions of this Agreement.

### C. **Approval of Plans:**

(1) **Approval of Initial Restaurant Plans:** As set forth in the Option to Sublease and section 2 hereof, prior to and as a condition precedent to the Commencement Date, Lessee shall have obtained all of the necessary permits and entitlements as set forth in Section 4 of the Option to Sublease, to construct the works and Improvements set forth in **Exhibit D** . within one hundred eighty (180) days of the Commencement Date, Lessee shall provide to City

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at Lessee's Sole Cost and Expense, detailed plans and specifications for such Improvements, and a complete application for all required, grading, demolition and building permits to construct said Improvements ("Construction Permits"). Prior to the approval of such Construction Permits, and as a condition of approval thereof, Lessee shall provide to City a copy of Lessee's proposed contract with the construction contractor who shall perform said work on behalf of Lessee ("Proposed Construction Contract"). Said Proposed Construction Contract shall name the City (and State Lands if so required by the City) as a third party beneficiary, provide for insurance complying with the terms and conditions of Section 12 hereof to be held by contractor and shall provide for performance and labor and materials bonds with the City (and State Lands if so required by the City) as beneficiary in the full amount of the costs of construction to be issued in a form acceptable to the City. Said Proposed Construction Contract shall be subject to the review and approval of the City prior to the issuance of the Construction Permits. City approval of said Proposed Construction Contract shall not be unreasonably withheld. Lessee shall not commence any construction on the Property until approval of the Proposed Construction Contract, bonds and insurance required therein and issuance of valid Construction Permits. Lessee must process such application(s) for all required Construction Permit(s) to a successful conclusion in accordance with the applicable federal, state and local, laws, rules and regulations which shall govern the issuance of such permit(s).

(2) Approval of Subsequent Plans Where Discretionary Land Use Powers are Not Applicable: This subsection 7(C)(2) shall only apply to uses and grading, developing, demolishing, erecting, replacing or constructing Improvements (collectively, "Subsequent Capital Improvement"), subsequent to the works and Improvements set forth in **Exhibit D** which do not require the City's discretionary land use approval under the City's land use policies, rules, ordinances, zoning code, and/or building codes (collectively, "Land Use Rules"). Prior to the commencement of any Capital Improvement, Lessee shall deliver for the City's review and written approval, which such approval not to be unreasonably withheld or delayed, complete plans and specifications showing, without limitation and where applicable, scaled elevations, scaled floor plans, design concepts, dimensions, material selection, colors, signing and such additional information as is required under the Land Use Rules and reasonably necessary for City to make an informed decision. After the City's approval of Lessee's initial plans and proposed Capital Improvements, City shall approve or disapprove any subsequent modifications or additions to plans and/or specifications within sixty (60) days of receipt of complete plans and specifications from Lessee. Failure to grant either approval or disapproval to the additions or modifications within such sixty (60) day period shall be deemed to constitute disapproval. Such Capital Improvements shall be subject to the issuance of all required grading, demolition and building permits and shall additionally be subject to the same review and approval process relating to the construction contract, bonds and insurance as set forth for the Initial Restaurant Plans in Section 7 C. (1) above.

(3) Approval of Plans Where Discretionary Land Use Powers are Applicable: Notwithstanding anything to the contrary stated herein, and regardless of the cost to install or construct the Capital Improvement, in the event that any Subsequent Capital Improvement which Lessee proposes for the Property is subject to the City's discretionary land use authority and must be considered and acted upon in accordance with the City's applicable Land Use Rules,

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then prior to and as a condition precedent to effecting such Subsequent Capital Improvement, Lessee must submit to the City the applications, fees and documents which said Land Use Rules require and must process such applications to a successful conclusion in accordance with said Land Use Rules, and the time periods within which the City must respond to such applications shall be governed by the Land Use Rules and applicable federal and state laws and not by this Agreement.

(4) **City Retains Police Powers:** The City cannot assure that any application or design, plan or specification submitted by Lessee will be granted and the Parties acknowledge that the City cannot contract away its police powers in this regard. The City shall have the right to exercise its full panoply of police and land use powers and authority in reviewing and acting upon any such submittal and application by Lessee.

D. **Consistency With Laws and Permits:** Lessee warrants that all Improvements it constructs or installs on the Property shall comply with all applicable federal, state and local laws, rules and regulations ("Laws"), including Laws relating to disabled or handicapped persons, such as, without limitation, the Americans With Disabilities Act of 1990. In addition, construction or installation of Improvements shall not commence unless and until Lessee, or its licensed contractor, shall have secured, at no cost to the City, all necessary permits, including; but not limited to, California Environmental Quality Act (CEQA) approvals, building permits and any necessary approvals and permits from any governmental agency having jurisdiction over the proposed Improvements. Lessee agrees to comply with all terms and conditions of permits whether secured by Lessee or the City. Lessee shall diligently prosecute to completion the construction of the Improvements and all other work required by this Section.

E. **Repair Caused by Construction:** Lessee shall be responsible for the repair of any portion of the Property, Improvements or other facilities which are damaged as a result of Lessee's construction activities.

F. **Completion Requirements:** Lessee within thirty (30) days of completion of any Improvements as evidenced by a Notice of Completion and issuance of a Certificate of Occupancy, if applicable, for all or any portion of Improvements constructed or installed by Lessee, where applicable, shall submit to the City a statement signed by Lessee's chief financial officer of the total of Lessee's expenditures for Lessee's Improvements, equipment, furnishings and trade fixtures and a certification that all required payments for all Improvements have been made by Lessee, together with a complete set of "as built plans."

G. **Ownership of Improvements at Termination:** Upon the expiration or sooner termination of this Sublease, City upon written notice may take title to any or all improvements, including any and all structures or other improvements installed by Lessee, or City may require Lessee to remove any or all such improvements at its Sole Cost and Expense and risk; or City may itself remove or have removed all or any portion of such improvements at Lessee's Sole Cost and Expense. Lessee shall deliver to City such documentations as may be necessary to convey title to such improvements to City free and clear of any liens, mortgages, loans or any other encumbrances. In removing any such improvements Lessee shall restore the Property as

nearly as possible to the conditions existing prior to their installation or construction.

## SECTION 8 OPERATIONS, MAINTENANCE AND REPAIR

A. **Lessee's Obligations During the Entitlement Term:** The City and Lessee acknowledge that the works and Improvements set forth in **Exhibit D** will, subject to the completion of the Conditions Precedent and the issuance of the Construction Permits therefore, be built on the Property during the Original and if, applicable Extended Entitlement Terms of this Agreement. During the Original and, if applicable, Extended Entitlement Terms, and prior to the issuance of a Certificate of Occupancy for the works and Improvements set forth in **Exhibit D**, Lessee shall operate, maintain and repair the Property in accordance with the requirements for Pre - Construction Maintenance set forth in **Exhibit F**, attached hereto and incorporated herein by reference,

B. **Lessee's Obligations During the Remaining Term:** With the exception of those maintenance obligations assumed by the City as specified in **Exhibit F**, attached hereto and incorporated herein by reference, during the Remaining Term Lessee shall, at its sole cost and expense, maintain, repair and improve the Property and all existing and future furniture, fixtures, equipment and Improvements on the Property and all utilities within and serving the Property to the points of connection with the City's or utility companies' facilities as set forth in **Exhibit F** for Post-Construction Maintenance. Lessee shall perform, at its sole cost and expense, any and all maintenance, repairs, rehabilitation, reconstruction and cleanup or removal, whether required by structural failure or deterioration or by operations of Lessee, by actions of others or otherwise (except by actions of the City). Except as specified in **Exhibit F**, as the responsibility of City, the City shall have no maintenance, repair, rehabilitation, reconstruction, cleanup, removal or security obligations of any kind with respect to the Property or the Improvements, fixtures, furniture and equipment located thereon and/or the utilities described above in this Section.

## SECTION 9 CITY NOT LIABLE FOR INJURY OR DAMAGE

A. **Limitation on Liability.** City shall not in any event whatsoever be liable for any injury or damage to any property or to any person happening on or after the Commencement Date, on, in or about the Property and its appurtenances, nor for any injury or damage to the Property or to any property belonging to Lessee or to any other person which may be caused by any cause whatsoever, including, but not limited to: the presence of any hazardous wastes, substances or materials as those terms may be defined by any law, ordinance and/or regulation of any regulatory agency with jurisdiction, at and surrounding the Property; the effects of any geotechnical, soils, drainage, flooding, subsidence, erosion, stormwater, earthquake, fault rupture, ground shaking, liquefaction, seiche, tsunami, unstable soils, expansive soils, tides, (including, but not limited to King Tide conditions) conditions, the condition or availability of

the Parking Area or parking, access, lighting, and utility availability, any fire, breakage, leakage, flooding or defect or by water, flooding or rain that may leak into, issue or flow from or to any part of the Property, Parking Area or areas of egress or ingress to the Property; the use, misuse or abuse of any of the Property, structures, areas of egress or ingress, or which may arise from any other cause whatsoever, except to the extent caused by the gross negligence or willful misconduct of the City or the City's agents or their breach of any of its representations and/or obligations hereunder.

**SECTION 10**  
**INDEMNIFICATION OF CITY**

A. **Indemnity Agreement**: Lessee shall indemnify, defend, protect, and save harmless City and City's officials, officers, employees, and agents, from and against all liabilities, suits, obligations, fines, damages, penalties, demands, claims, costs, charges and expenses, including without limitation reasonable fees of attorneys, architects and consultants, which may be imposed upon or incurred by or asserted against City and arising directly or indirectly out of any of the following except to the extent accrued prior to the Commencement Date or caused by the gross negligence or willful misconduct of City or City's breach of any of its obligations under this Sublease:

(1) any work, act or event occurring on the Property or any part thereof, or any work, act or event occurring in any area adjacent to the Property and related to the activities of Lessee or Lessee's agents;

(2) any use, possession, occupation, alteration, repair, condition, operation, maintenance or management of the Property, or any part thereof by any person or entity;

(3) any act or omission on the part of Lessee or any of Lessee's subtenants, contractors, employees, agents, licensees or invitees;

(4) any lien or claim which may be alleged to have arisen against or on the Property under the laws of the State of California or of any other governmental authority;

(5) any breach by Lessee of any of its representations and/or obligations under this Sublease;

(6) any failure by Lessee to keep, observe and perform any of the terms, covenants, agreements, provisions, conditions or limitations contained in any contract or agreement affecting the Property, including this Sublease, which Lessee is required to keep, observe or perform; or

(7) any violation of any Environmental Law, applicable fire safety, health safety, building code standard or any other standard, regulation or law by Lessee.

B. **Prevailing Wage:** The Parties acknowledge that although they are of the opinion that the work contemplated to be performed under this Sublease by Lessee may be subject to the prevailing wage requirements of the State of California (“State”), the State, and particularly its Department of Industrial Relations, and/or a court with jurisdiction may possess a different view. In the event the State, a court or other authority with jurisdiction imposes any prevailing wage requirements upon Lessee’s work performed hereunder and, as a result, imposes fines, penalties and/or assessments upon Lessee and/or the City for alleged violations of such prevailing wage requirements, or as a result thereof Lessee suffers increased costs, expenses, attorneys’ fees or other damages or liabilities, Lessee agrees to (i) indemnify, defend and hold the City harmless from any such fines, damages, increased costs, fees, liabilities, penalties and/or assessments, as well as any costs, fees, and expenses incurred by the City in connection with any actions of the State taken in accordance with its prevailing wage laws, rules and/or regulations, and (ii) waive and release the City from any and all claims Lessee may have against the City for such fines, damages, increased costs, fees, liabilities, penalties and/or assessments, including claims Lessee may have under Cal.Labor Code §1781.

This Section 10 shall survive the expiration or termination of this Sublease.

## SECTION 11

### ENVIRONMENTAL PROVISIONS

A. **Lessee's Compliance:** Lessee shall comply with all Environmental Laws affecting or relating to the Property and shall not perform, or suffer or permit to be performed, any acts, or omit or refuse to take any required actions, in violation of Environmental Laws. In addition to the foregoing, Lessee agrees as follows:

(1) Lessee will not use the Property, nor will Lessee permit the Property to be used, for the purpose of refining, producing, storing, handling, transferring, processing, transporting, generating, manufacturing, treating or disposing of any Hazardous Material except in material compliance with all Environmental Laws and as necessary for the operation of Lessee's business (but in no event in excess of that required for the ordinary commercial operations of comparable restaurants).

(2) Lessee shall comply, and shall cause Lessee's employees, contractors, agents, affiliates, assigns, invitees and other persons using or occupying all or a portion of the Property with Lessee's consent or knowledge, to comply, with all Environmental Laws affecting the Property and shall notify City of any Release or violation of any Environmental Law affecting the Property known to Lessee. Lessee shall be responsible for all liabilities arising out of violations of Environmental Laws (“Environmental Liabilities”), costs and all Remedial Actions associated with any Release or threatened Release in, over, on, under or about the Property which occurs after the Commencement Date and which is caused by Lessee or any Lessee employees, contractors, agents, affiliates, assigns, invitees and other persons using or occupying all or a portion of the Property. For purposes of this Section, a “Release”

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shall include any Release occurring in the course of Lessee's construction activities, including any Release of pre-existing Hazardous Materials caused by such construction activities.

(3) In the event that a document ("Environmental Lien") is recorded or filed against the Property or any portion thereof as a result of any act or omission for which Lessee bears responsibility under this Section 11, Lessee shall immediately notify City thereof and, within thirty (30) days from the date that Lessee receives notice that said Environmental Lien has been placed against the Property or within such shorter period of time as may be required to stay the enforcement of such Environmental Lien and to ensure that no portion of the Property shall be sold pursuant to any foreclosure of any such Environmental Lien, Lessee shall either (i) pay the claim and remove the lien from the Property or any portion thereof or (ii) institute at Lessee's sole cost and expense, and acting diligently and in good faith, an appropriate legal proceeding to contest, object or appeal the validity of such Environmental Lien; provided, however, that the contest, objection or appeal with respect to the validity of an Environmental Lien shall suspend Lessee's obligation to eliminate such Environmental Lien under this subsection pending a final determination by appropriate administrative or judicial authority of the legality, enforceability or status of such Environmental Lien.

(4) Lessee shall cause all of Lessee's employees, contractors, agents, affiliates, assigns, invitees and other persons using or occupying all or a portion of the Property to comply in all material respects with the representations, warranties and covenants contained in subsections (1) through (3) above.

**B. LESSEE's Indemnification of City:** Lessee agrees to defend, indemnify and hold harmless City, its officials, officers, employees and agents, from and against any and all Environmental Liabilities, Remedial Actions and costs which result directly or indirectly from (i) any violation of any Environmental Law with respect to all or any portion of the Property caused by Lessee or any of Lessee's employees, contractors, agents, affiliates, assigns, invitees and other persons using or occupying all or a portion of the Property after the Commencement Date; (ii) any Environmental Liability or cost and any Remedial Action associated with any Release or threatened Release in, over, on, under or about the Property which occurs after the Commencement Date and which is caused by Lessee or any of Lessee's employees, contractors, agents, affiliates, assigns, invitees and other persons using or occupying all or a portion of the Property; (iii) any breach of any warranty or representation regarding environmental matters made by Lessee hereunder; and (iv) the migration, seepage, leaching or other movement of any Hazardous Materials which have been Released onto the Property by Lessee or any of Lessee's employees, contractors, agents, affiliates, assigns, invitees and other persons using or occupying all or a portion of the Property after the Commencement Date.

**C. City's Indemnification of LESSEE:** City agrees to defend, indemnify and hold harmless Lessee and its officers, employees and agents from and against any and all Environmental Liabilities and costs which result directly or indirectly from any violation of any Environmental Law with respect to the Property caused by the City after the Commencement Date.

D. **Notification**: The Parties agree that in the event that any investigation, litigation or proceeding is threatened in writing or instituted against either Lessee or City, or any Remedial Action is requested of either Lessee or City, for which the other party hereto may be entitled to indemnification or defense hereunder, the party against which the investigation, litigation or proceeding is threatened or instituted shall promptly notify the other party in writing.

E. **Indemnitees**: Any indemnitee under this Section 11 may participate in the defense of any investigation, litigation or proceeding with legal counsel of its choice at its cost.

F. **Survival of Obligations**: The provisions of this Section 11 shall survive the expiration or earlier termination of this Agreement.

## SECTION 12

### INSURANCE

A. **Required Insurance**: Lessee shall procure and maintain during the entire Term of the Sublease the following types of insurance.

(1) **Worker's Compensation Insurance**. Lessee shall, at Lessee's own cost and expense, procure and maintain during the entire term of this Agreement, workers' compensation insurance in accordance with the laws of California, and employers' liability insurance with a limit of not less than One Million Dollars (\$1,000,000) per employee and One Million Dollars (\$1,000,000) per occurrence. Said Worker's Compensation policy shall have the following endorsement:

"All rights of subrogation are hereby waived against the City, its officers and employees when acting within the scope of their appointment or employment".

(2) **Business Interruption Insurance**. Lessee shall, at Lessee's own cost and expense, procure and maintain during the entire term of this Agreement, business interruption insurance, insuring that the payments of Rent shall be paid to City for a period of up to one (1) year in the event the Property, Parking Area or adjacent property is totally or partially damaged, destroyed or inaccessible due to fire, natural causes, flooding, tides, or other causes so as to render Lessee's business activities at the Property impossible or impracticable.

(3) **Liability Insurance**. Lessee shall, at Lessee's own cost and expense, secure and maintain during the entire Term of this Sublease, commercial general liability and property damage insurance, insuring Lessee and Lessee's employees against all bodily injury, property damage, personal injury, and other loss or liability caused or connected with Lessee's operation and use of the Property under this Agreement (with no less than the following coverages: property and operations liability, completed operations liability, products liability, blanket

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contractual liability, personal injury liability, broad form property damage liability, fire legal liability, independent contractors liability, advertising liability, pollution legal liability, owned, non-owned and hired automobile liability (see Section 12(A)(5)), business interruption (see Section 12(A)(2)) in amounts not less than:

- (a) Five Million Dollars (\$5,000,000) per occurrence for personal injury or death combined, single limit with an annual aggregate of five million dollars (\$5 million); and
- (b) Five Million Dollars (\$5,000,000) for property damage.

Each such policy shall be endorsed with the following specific language:

(i) The City is named as additional insured for all liability arising out of the work performed by or on behalf of the named insured, and this policy protects the additional insured, its officers, agents, and employees against liability for personal and bodily injuries, deaths or property damage or destruction arising in any respect, directly, or indirectly, in the performance of this Sublease.

(ii) The inclusion of more than one insured shall not operate to impair the rights of one insured against another insured, and the coverages afforded shall apply as though separate policies had been issued to each insured.

(iii) The insurance provided is primary and no insurance held or owned by the City shall be called upon to contribute to a loss.

(iv) The coverage provided by this policy shall not be canceled without thirty (30) days prior written notice given to the City.

(4) Property Insurance: Lessee shall, at Lessee's own cost and expense, secure and maintain all risk extended form insurance (including builder's all-risk insurance during the course of construction) coverage in an amount equal to 100% of the full replacement cost of the Property and Improvements (including all changes in building code requirements) and Lessee's personal property and materials and supplies used at the site (including all changes in code requirements) and covering course of construction exposure and all risks of direct physical loss (including flood and losses occasioned by flood). Any loss payable under any policy described in this Section shall be used to rebuild and/or repair the damaged portions of the Property, Improvements and Lessee's personal property. The insurer shall waive all rights of subrogation against City. The City shall be named a loss payee on all insurance policies covering casualty losses and builder's risk.

(5) Automobile Insurance. Lessee shall, at Lessee's own cost and expense, secure and maintain during the entire term of this Agreement, automobile liability insurance insuring Lessee and Lessee's employees to an amount not less than One Million Dollars (\$1,000,000) combined single limit per accident for bodily injury and property damage.

**C Proof of Insurance Coverage; Coverage Satisfactory to City:** All insurance policies required under this Section 12 shall be satisfactory to City in its reasonable discretion and shall be provided by companies having a Best's rating of "A VII" or better (and if Best's no longer provides such ratings, an equivalent rating, if available). Lessee shall provide to the City all certificates of insurance with original endorsements reflecting coverage required by Section 12 on or before the Commencement Date. All insurance policies required under this Agreement shall be in full force and effect on or before the Commencement Date. As often as any such policies shall expire or terminate, renewal or additional policies shall be procured and maintained in like manner and to like extent during the term of this Agreement. All policies of insurance shall provide that the same shall be noncancellable or subject to reduction in the amounts of coverage without thirty (30) days' written notice to City. With respect to each of the policies described in subsections A (1) to (5), (i) the City, and if required State Lands, shall be a named insured(s) , (ii) coverage shall be primary and non contributory, that is, the City's, and State Lands insurance and/or self-insurance shall not be called upon to contribute in the event of loss, and (iii) they shall be endorsed with a severability of interest or cross-liability endorsement. The liability insurance required by this Section 12(A) shall insure Lessee's indemnification obligations pursuant to Sections 11(B) and 10.

(1) Deductibles and self-insured retentions over ten thousand dollars (\$10,000) shall be permitted only at Lessee's written request and upon the prior written approval of the City, which approval the City shall not unreasonably withhold or delay and shall be subject to the following:

(a) Lessee agrees that for any such deductible or selfinsured retention amount, Lessee shall provide to the City a defense and indemnification agreement at least equal to the defense and indemnification to which the City would be entitled as an additional insured had Lessee provided the above specified coverages respectively under Insurance Services Office Form Number GL 0001 and Insurance Services Office Form Number CA 0001. It is understood that Lessee's agreement to provide such defense and indemnification would be required under the insurance policy forms for claimed loss, damage, injury or death which was caused solely by the active or passive negligence or other wrongful conduct of the City.

**E. Periodic Review of Coverage Amounts:** The amounts and extent of coverage of property insurance and general liability insurance policies shall be subject to adjustment every five (5) years during the term of this Agreement, based on the Parties' review of such amounts and extent of coverage in consultation with their respective insurance advisors, and based on then-customary insurance requirements for facilities of size, value and operation similar to the Property and its Improvements.

**F. Contractors and Subcontractors Insurance:** All contractors and subcontractors performing work or providing services in connection with the Property shall be required to carry the insurance described in Section 12(A)(1)-(5) and name the City as an additional insured, in accordance with this Section 12.

**SECTION 13  
DAMAGE AND DESTRUCTION**

A. **Reconstruction By Lessee:** If, during the Term, the Improvements (which includes all fixtures, equipment, contents, and personal property therein) on the Property are totally or partially destroyed from any casualty whatever, Lessee shall restore the Improvements to substantially the same condition as they were in immediately before destruction (provided that such condition is permissible under then applicable Laws) and as soon as commercially reasonably possible; provided, however, Lessee may make modifications to the Improvements with the City's prior approval, which approval shall not be unreasonably withheld, delayed, or conditioned but shall otherwise be sought and acted upon in accordance with this Sublease; provided, further, that as to any Improvements damaged from a casualty covered in whole or in part by insurance required to be carried by Lessee, restoration shall be completed within 240 days of the date of the casualty; and provided further that as to any Improvements damaged from a casualty not covered in whole or in part by insurance required to be carried by Lessee, restoration shall be completed within 365 days of the date of the casualty. Such destruction shall not terminate this Sublease. Any reconstruction work shall be carried out in accordance with this Section and other applicable provisions of this Sublease relating to construction by Lessee.

B. **Provisions Applicable to Reconstruction:** In any case under this Section that Lessee is required to restore the Improvements on the Property after damage or destruction, the City agrees promptly to execute all documents and to endorse any insurance proceeds from Lessee's insurance policies payable to the City to a trustee designated by Lessee and acceptable to the City, provided that a trust agreement satisfactory to the City is first executed by all interested parties and that all costs and expenses associated with the trust shall be the sole responsibility of Lessee. Lessee agrees to keep the City advised during the adjustment process. Subject to the rights of any Subleasehold Mortgagee set forth in this Sublease, the proceeds of insurance shall be held by Lessee and/or any Subleasehold Mortgagee as trust funds to be used for the purpose of restoring the Improvements damaged by fire or other casualty. Lessee agrees to use good faith reasonable efforts to have all Subleasehold Mortgagees agree in relevant loan documents to have insurance proceeds applied to restoration of the Improvements. Lessee also agrees that if, nevertheless, a Subleasehold Mortgagee will not so agree but reserves the power to apply all or portions of such proceeds against its loan, then in the event of a loss Lessee shall use diligent, good faith reasonable efforts (including legal action), in consultation with Lessee's legal counsel and the City, to cause all proceeds of insurance to be applied to reconstruction, but not so as to jeopardize Lessee's interest in the leasehold estate in the good faith reasonable judgment of Lessee's attorney.

C. **Damage or Destruction During Last Five Years of Term.** The provisions of this Section 13 to the contrary notwithstanding, if during the last five (5) years of the Term the Improvements are destroyed from any casualty in excess of twenty five percent (25%) of the then replacement value of all of the Improvements at the Property and at least 50% of the cost of

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restoration of the destroyed Improvements is not covered by insurance required to be carried by Lessee, Lessee shall have the election to terminate this Sublease and must do so by delivering written notice of said election to the City no later than thirty (30) days following the date of the destruction. If Lessee does not timely terminate this Sublease, Lessee shall restore the Improvements as required by, and subject to, this Section 13. If Lessee elects to terminate this Sublease, then:

(1) On or before the effective date of termination, Lessee shall turn over, or assign to the City, all available insurance proceeds payable as a result of the destruction; or

(2) If no insurance proceeds are available, or if only part of the insurance proceeds are available, then in addition to the City's right to receive all available insurance proceeds, Lessee shall, at the City's election, raze the destroyed Improvements and remove the destroyed Improvements and all resulting debris from the Property prior to the effective date of termination.

D. **No Abatement or Reduction of Rent:** In case of destruction to all or a portion of the Improvements located on the Property, there shall be no abatement or reduction of Rent as a result thereof, and all obligations of Lessee under this Sublease shall remain unchanged and in full force and effect, except as provided in Section 13(C).

E. **Inapplicability of Civil Code Sections:** Lessee hereby waives and releases its rights under the provisions of California Civil Code §§ 1932(2) and 1933(4), it being the intention of the Parties hereto that the express terms of this Sublease shall control under any circumstances in which those provisions might otherwise apply.

F. **No Option to Terminate for Insured Casualty:** Lessee shall have no option to terminate this Sublease or otherwise be relieved of its obligation to restore the Property to substantially the same condition as it was in immediately before such damage or destruction, where the damage or destruction results from a cause required to be insured against by this Sublease.

### SECTION 14 ASSIGNMENT, SUBLETTING, ETC.

A. **Restrictions on Assignment and Subletting:** Lessee may not sell, assign, transfer, sublease, encumber, convey or otherwise dispose of Lessee's interest in this Sublease (including, without limitation, an assignment of this Sublease or a subletting of the Property, as an entirety or substantially as an entirety) without the prior written consent of the City as set forth in Section 14(C). In no event shall Lessee have the right, or attempt, to enter into any assignment, transfer, sublease or other transfer agreement which purports to extend any rights to any third party beyond the Term of this Sublease.

B. **Restrictions on Transfers of Interest in LESSEE:** City shall have the right to approve or disapprove, in the exercise of its reasonable discretion, any transaction or series of transactions (i) which would result in the cumulative transfer of more than fifty percent (50%) of any Person's ownership in or control of Lessee, as compared to the ownership structure of Lessee

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as of the Commencement Date of this Sublease, or (ii) which would result in the addition, removal or replacement of one or more general partners of Lessee and/or the addition, removal or replacement of one of Lessee's general partner's managing members (collectively, "Proposed Transfers").

C. **City Review:** City's review of any proposed assignment, transfer, or sublease, shall be made according to the terms of this Section 14(C), as well as the rights set forth in Section 14(B) for Proposed Transfers. City's consent to a proposed assignment, transfer or sublease shall not be unreasonably conditioned, delayed or withheld. However, in determining whether to grant or withhold consent to a proposed assignment, transfer or sublease, Lessee agrees that it is reasonable for City to consider any factors relevant to the operation of the Property in accordance with the standards and expectations contained in this Agreement. Without limiting the foregoing, Lessee agrees that it is reasonable for City to consider whether:

- (i) Lessee has complied with the requirements set forth in Section 14 above;
- (ii) The proposed assignee or subtenant, in City's reasonable judgment, has a sufficient worth, considering the financial responsibility involved;
- (iii) The prospective assignee or subtenant has the sufficient restaurant management experience to perform Lessee's obligations under this Sublease;
- (iv) The City has had prior negative experience with the proposed assignee or subtenant;
- (v) The use of the Property by the proposed assignee or subtenant will be limited to the uses permitted by this Sublease and the restaurant proposed by the assignee or subtenant will be the same as that of Lessee or of the same or similar quality and type as that of Lessee;
- (vi) The proposed assignee or subtenant assumes in writing all of the obligations of Lessee under the Sublease applicable to the portion of the Property affected by the assignment or subletting; or
- (vii) Lessee is then in default of any of Lessee's obligations under this Sublease.

D. **City Processing of Lessee Request for Assignment, Sublease or Transfer:** Lessee shall be required to reimburse City for all of its reasonable costs incurred in conducting its review, including City's reasonable attorney fees, whether or not the City ultimately grants its approval to the proposed assignment, sublease or transfer. In advance of the City conducting its review, Lessee shall pay a deposit in an amount determined in the reasonable judgment of the City against which said City review costs shall be charged, but should the actual, out-of-pocket costs of the City's review exceed the amount of the deposit, within 30 days of receipt of the City's invoice therefor, Lessee shall pay to the City the difference. If the amount of the deposit exceeds the City's actual costs of review, within 30 days after the City approves or disapproves the proposed assignment, the City shall refund the unused portion of the deposit to Lessee.

(1) The City shall have the right to require the proposed assignee to disclose all documents, information and other material which, in the City's reasonable discretion, may establish or tend to establish that the proposed assignee meets the standards specified hereinabove. Lessee shall provide the City at least sixty (60) days advance written notice of Lessee's intent to assign this Agreement and delivers that notice as well as all documents, information and other material requested by the City sufficient to enable the City to exercise the

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discretion vested in it pursuant to this Section 14. No later than thirty (30) calendar days after the City receives the materials submitted by Lessee, the City shall deliver to Lessee a written determination whether the submitted materials are complete. If the City's written determination is not delivered within said thirty (30) day period, the submission shall be deemed complete. If within said thirty (30) day period, the City delivers a notice to Lessee that the submitted materials are incomplete, Lessee shall have fifteen (15) calendar days to submit the necessary, additional information and after timely submittal thereof, the City shall have fifteen (15) calendar days within which to, again, deliver notice to Lessee whether the submitted materials are complete. If Lessee does not submit additional materials within fifteen (15) calendar days after receiving the City's determination of incompleteness, it shall be conclusively deemed that Lessee has withdrawn its request for consent to the assignment in question. Not later than forty-five (45) days after Lessee's submittal is determined or deemed complete, the City shall accept or reject the proposed assignment. If the City consents to an assignment to any third-party assignee, this Agreement shall be deemed to have been amended to provide: (1) that the assignee shall be acknowledged by City to be the sublessee hereunder; (2) that the assignee shall assume all obligations of Lessee hereunder; (3) that all security deposited with the City shall be retained by the City pursuant to the terms hereof and any balance owing to Lessee shall be paid to the assignee; and (4) the assignee shall provide evidence that it has obtained the requisite insurance.

### SECTION 15 MORTGAGING OF SUBLEASE BY LESSEE

A. **Lessee's Right to Mortgage Sublease:** Lessee shall have the right, at any time and from time to time, with City's written consent or approval, not to be unreasonably conditioned, delayed or withheld, to mortgage and/or pledge ("Subleasehold Mortgage") its interest in this Sublease to one or more lenders ("Subleasehold Mortgagee"). However, no mortgage and/or pledge of Lessee's interest under this Sublease shall result in a loan to value ratio of more than seventy percent (70%) without City's prior written approval which in the sole discretion of the City, may be withheld for any reason or no reason.

B. **No Subordination:** City's rights in the Property and this Sublease, including without limitation City's right to receive rental payments, shall not be subordinated to the rights of any Subleasehold Mortgagee. Notwithstanding the foregoing, a Subleasehold Mortgagee shall have all of the rights set forth in the Subleasehold Mortgage, as approved by City in accordance with this Section 15, to the extent that such rights are not inconsistent with the terms of this Sublease, including the right to commence an action against Lessee for the appointment of a receiver and to obtain possession of the Property under and in accordance with the terms of said Subleasehold Mortgage, provided that all obligations of Lessee hereunder shall be kept current, including but not limited to the payment of rental payments and curing of all defaults or Events of Default hereunder.

(1) **Limitations of Purpose of Mortgaging Leasehold:** Lessee shall have no right to require the City to encumber the City's leasehold interest in the Property, and notwithstanding anything herein contained to the contrary, Lessee hereby agrees that Lessee is entitled to enter into a Subleasehold Mortgage for only the following purposes and on the

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following conditions which Lessee shall have the burden of establishing exist: (a) to finance the construction of Improvements required or permitted to be constructed under this Sublease; (b) to provide so-called "take out" or "permanent financing" of any construction loan not to exceed the lesser of ninety percent (90%) of the original cost of construction or seventy percent (70%) of the value of Lessee's subleasehold interest in the Property as determined by a qualified real estate appraiser holding the MAI designation of the American Institute of Real Estate Appraisers or its successor organization with at least ten (10) years full-time appraisal experience involving primarily commercial property in the San Francisco Bay Area; (c) to finance the sale of Lessee's leasehold interest in the Property to a third party permitted hereunder; and/or (d) to finance Lessee's capital additions and equipment, acquisitions and/or replacements reasonably required in pursuit of its business activities on the Property.

C. **City's Covenants:** City agrees, for the benefit of Lessee and of each Subleasehold Mortgagee, to comply with the following provisions, all of which shall be binding on the Lessee and each Subleasehold Mortgagee, as set forth herein:

(1) City and Lessee shall not enter any agreement of cancellation, surrender, acceptance of surrender or modification of this Sublease without the prior written consent of the Subleasehold Mortgagee. This Sublease shall not merge in the fee of the Property without the prior written consent of such Subleasehold Mortgagee and the City.

(2) City, upon serving Lessee any notice or demand as provided for in this Sublease, shall at the same time serve copies of such notice upon each Subleasehold Mortgagee that has complied with the provisions of this Section 15, and no such notice or demand shall be deemed to have been served unless and until so served upon each such Subleasehold Mortgagee. Lessee shall provide the address of each Subleasehold Mortgagee to City, and shall be solely responsible for the accuracy thereof. Each such Subleasehold Mortgagee shall have the right to remedy the Event of Default, or cause the same to be remedied, within the time allowed to Lessee therefor, plus, in the case of monetary Events of Default, an additional twenty (20) days, and in the case of non-monetary Events of Default, an additional forty-five (45) days, provided that Subleasehold Mortgagee (i) expeditiously pursues its remedies as herein described, (ii) continues to make all rental payments to the City while the cure is pending, and, (iii) continues to perform and/or cure all of Lessee's obligations.

(3) With respect to those events of Default the curing of which requires entry upon the Property, then (a) whenever a Subleasehold Mortgagee desires to cure an event of Default, there shall be added to the period otherwise provided to the Subleasehold Mortgagee for the cure of the event of Default the additional period needed by the Subleasehold Mortgagee in the exercise of reasonable diligence to enter upon the Property, (b) whenever a Subleasehold Mortgagee seeks to have a receiver appointed for the interest of the Lessee under this Sublease, so as to have the receiver cure such event of Default, then there shall be added to the period otherwise provided to the Subleasehold Mortgagee for the cure of such event of Default the additional period needed by the Subleasehold Mortgagee to effect with reasonable diligence, the appointment of such receiver and the entry by such receiver upon the Property, (c) whenever a Subleasehold Mortgagee elects to foreclose upon the interest of Lessee under this Sublease, there

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shall be added to the period otherwise provided to the Subleasehold Mortgagee for the cure of such event of Default, such additional period as is needed, in the exercise of reasonable diligence, for the effectuation of a private foreclosure sale and (d) whenever a Subleasehold Mortgagee is prohibited from commencing or prosecuting foreclosure or other appropriate proceedings in the nature thereof by any process or injunction issued by any court or by reason of any action by any court having jurisdiction of any bankruptcy or insolvency proceeding involving Lessee, then there shall be added to the period otherwise provided to the Subleasehold Mortgagee for the cure of such event of Default the additional period needed by the Subleasehold Mortgagee to avoid such prohibition, provided, in each case, that Subleasehold Mortgagee shall have fully cured any event of Default in the payment of any monetary obligation and shall continue to pay currently those monetary obligations as and when the same fall due and shall have cured or be in the process of curing all non-monetary events of Default that are capable of being cured by such Subleasehold Mortgagee without possession of the Property. City recognizes that each Subleasehold Mortgagee has the right to proceed by any or a combination of the courses of action described in clauses (a), (b), (c) and (d) of this Section, and, in that event, the Subleasehold Mortgagee in question shall be entitled to the maximum cumulative period allowed by any one such clause (but not the cumulative period of two or more such clauses added together), so long as such Subleasehold Mortgagee is proceeding diligently and in good faith. For the protection of each Subleasehold Mortgagee, it is the intention of the Parties that there shall not be any event of Default or condition entitling Landlord to terminate this Sublease, which is incapable of being cured by a Subleasehold Mortgagee upon taking possession of the Property or by any other person who acquires the interest of Lessee hereunder as a result of the foreclosure of a Subleasehold Mortgage.

(4) City shall accept performance by, or on behalf of, any Subleasehold Mortgagee who has complied with the notice provisions of this Section 15 as if the same had been performed by Lessee. Such acceptance shall not thereby create any additional rights as against the City in such Subleasehold Mortgagee, nor shall such Subleasehold Mortgagee thereby be subrogated to any interest or right of the City.

(5) Subleasehold Mortgagee shall have the right, to the extent Lessee agrees in writing, to appear in a legal action or proceeding on behalf of Lessee.

(6) In the event of conflict between the rights of multiple Subleasehold Mortgagees the rights of the respective Subleasehold Mortgagees shall be determined in the order of priority of their Subleasehold Mortgages.

(7) City agrees that, in the event of termination of this Sublease by Lessee or any debtor in possession, the City shall, upon request of Subleasehold Mortgagee, enter into a new Sublease of the Property with the applicable Subleasehold Mortgagee, effective as of the date of such termination, at the then-applicable Rent and upon the terms, provisions, covenants and agreements as contained in this Sublease with respect to the remainder of the Term, provided:

(a) Said Subleasehold Mortgagee shall make written request upon the City for such new Sublease within thirty (30) days after the date of its receipt of written notice

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from the City of such termination and such written request shall be accompanied by payment to the City of all sums then due the City under this Sublease up to date of termination as to which the City has previously notified the Subleasehold Mortgagee. The City shall, within ten (10) Business Days after request from any Subleasehold Mortgagee, advise such Subleasehold Mortgagee of the amounts then claimed by the City to be due under this Sublease.

(b) Said Subleasehold Mortgagee shall pay to the City as they become due, the rental payments required under this Agreement and any other amounts hereunder and, at the time of execution and delivery of said new Sublease, any and all sums which would at the time of execution and delivery thereof, be due pursuant to this Sublease but for such termination, and in addition thereto, any expenses, including reasonable attorneys' fees, to which the City shall have been subjected to by reason of such event of Default and termination, less the net income actually collected by City subsequent to the termination of this Sublease and prior to execution of the new Sublease as rental payments; any excess of such net income over the aforesaid sums and expenses shall be applied in payment of the rental payments thereafter becoming due under the new Sublease.

(c) Said Subleasehold Mortgagee shall cure all past defaults and remedy any other conditions which LESSEE was obligated to perform under the terms of this Sublease, whether before or after the default or execution and delivery of a new Sublease.

(d) The Subleasehold Mortgagee shall have the same right, title and interest in and to the Property as Lessee had under the terminated Sublease, to the extent that priority of interest may be preserved by law or by the inclusion in this Sublease of the right to obtain such new Sublease; and, notwithstanding the reference to such new Sublease as a "new Sublease" such "new Sublease" shall be a continuation or extension of this Sublease; and in the event that any Subleasehold Mortgagee shall exercise its right to such new Sublease, such new Sublease shall be considered for all purposes a continuation or extension of this Sublease, without lapse or break in continuity of Lessee's interest or of the Term, and the termination from which the right to such new Sublease has arisen shall be deemed void ab initio except to the extent of terminating the rights of the then sublessee, transferring all such rights to the Subleasehold Mortgagee electing the new Sublease, and forming the basis for such election.

(e) The City shall assign its interest, if any, in all applicable Subleases and subleases then in force for all or a portion of the Property to the Subleasehold Mortgagee under the new Sublease and deliver to said Subleasehold Mortgagee all unapplied security deposits, if any, which were delivered to the City and the income thereon. Such assignment shall be effective as of the termination of the terminated Sublease and all rights of sublessee thereunder shall be transferred to the new sublessee .

(8) In the event any Subleasehold Mortgagee becomes the sublessee under this Sublease as a result of foreclosure or conveyance in lieu thereof, or under a new Sublease, as provided herein, such Subleasehold Mortgagee shall be required, as a condition to City's recognition of such party as the sublessee under this Sublease, to cure all previous events of Default hereunder that are capable of being cured or performed by such transferee. Following

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such cure, each such party shall be liable for the obligations of the sublessee under this Sublease or the new Sublease (as applicable) only insofar as they arise during the period of time that such party remains the beneficial holder of the Subleasehold estate under this Sublease.

(9) The name of the Subleasehold Mortgagee may be added as a named insured to any insurance carried by Lessee, provided insurance proceeds are first used for repair and restoration, and provided, further, that said addition has no effect upon the rights of the City hereunder.

(10) Whenever requested in writing by any Subleasehold Mortgagee, the City shall, within twenty (20) days after such request, execute, acknowledge and deliver to such Subleasehold Mortgagee a certificate certifying (1) that this Sublease is unmodified and in full force and effect (or if there have been modifications, that this Sublease is in full force and effect as modified and stating the modifications), (2) the dates, if any, to which the rental payments and any other sums payable with respect to this Sublease have been paid, (3) the Commencement Date and expiration date of this Sublease, (4) whether or not to the knowledge of the City, there are then existing any events of Defaults under this Sublease (and, if so, specifying same), (5) whether there are any outstanding notices of event of Default or termination, and the nature thereof, and (6) if notice of event of Default has been given, the period remaining for the cure of said event of Default as then estimated by the City.

(11) The making of any Subleasehold Mortgage shall not, by itself, be deemed to constitute an assignment or transfer of this Sublease or of the Subleasehold estate, nor shall any Subleasehold Mortgagee, as such, be deemed to be an assignee or transferee of this Sublease or the Subleasehold estate so as to require such Subleasehold Mortgagee, as such, to assume the performance of any of the terms, covenants or conditions on the part of Lessee under this Sublease to be performed.

(12) All notices to which any Subleasehold Mortgagee shall be entitled under this Section from Landlord shall be sent by certified or registered mail, return receipt requested, and shall be marked City's NOTICE TO SUBLEASEHOLD MORTGAGEE.

(13) Upon request, the City agrees to execute, acknowledge and deliver to the Subleasehold Mortgagee an agreement, prepared by the Subleasehold Mortgagee at Lessee's sole cost and expense, agreeing to the foregoing provisions and to such other provisions as Subleasehold Mortgagee may reasonably request in order to reasonably protect Subleasehold Mortgagee's security interest in the leasehold estate created by this Sublease.

## SECTION 16 COVENANT AGAINST LIENS

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A. **Protection of City**: Nothing in this Agreement shall be construed as constituting the consent of City, express or implied, to the performance of any labor or the financing of any materials or any specific Improvements, alterations or repairs to the Property or any part thereof by any contractor, subcontractor, laborer or material man, nor as giving Lessee or any other person any right, power or authority to act as agent of or to contract for, or permit the rendering of, any services, or give rise to the filing of mechanics' liens or other claims against City's fee interest in the Property. City shall have the right at all reasonable times to post, and keep posted, on the Property any notices which City may deem necessary for the protection of City from mechanics' liens or other claims. Lessee shall give City ten (10) days prior written notice of the commencement of any work to be done on the Property to enable City to post such notices. In addition, Lessee shall make, or cause to be made, prompt payment of all monies due and legally owing to all persons doing any work or furnishing any materials or supplies to Lessee or any of its contractors or subcontractors in connection with the Property and the Improvements thereon. Lessee shall keep the Property and such Improvements free and clear of all mechanics' liens and other liens on account of work done for Lessee or persons claiming under it. Lessee shall indemnify and save City harmless against liability, loss, damages, costs, reasonable attorneys' fees, and all other reasonable expenses incurred by City on account of claims of lien of laborers or materialmen or others for work performed or materials or supplies furnished to Lessee or persons claiming under it. City shall indemnify and save Lessee harmless against liability, loss, damages, costs, reasonable attorneys fees, and all other reasonable expenses incurred by Lessee on account of claims of liens of laborers or materialmen or others for work performed or supplies furnished to City or persons claiming under it.

B. **Notice**: Should any claims of lien be filed against the Property or the Improvements thereon, or any action affecting the title to the Property be commenced, the party receiving notice of such lien or action shall forthwith give the other party written notice thereof.

### SECTION 17

#### CITY'S RIGHT OF ACCESS

A. **Access**: The City and its agents, officers and employees, State Lands and DBAW shall have the right to enter onto the Property or any portion thereof at all reasonable times and upon not less than one hour oral or written notice to Lessee (except in the case of emergency access by the City or City's Agents) to review the condition of the Property and to perform the City's obligations or to exercise the City's rights hereunder. An emergency is any event or circumstance which poses an imminent threat to life or property.

B. **Emergency Access**: In the event of emergency access, the City shall have the right to enter without notice and shall not be responsible for any damage or injury to any property, nor for the replacement of any such property and any such emergency entry shall not be deemed to be a forcible or unlawful entry onto or a detainer of, the Property, or an eviction, actual or constructive, of Lessee from the Property or any portion thereof.

C. **No Liability**: The City shall not be liable in any manner, and Lessee hereby waives any claims, for any inconvenience, disturbance, loss of business, loss of revenue, loss or profit, nuisance or any other damage arising out of the City's entry onto the Property, except damage resulting from the gross negligence or willful misconduct of the City or City's agents.

## SECTION 18

### CITY'S RIGHT TO PERFORM LESSEE'S COVENANTS

A. **City's Right to Cure Lessee Defaults**: If Lessee shall at any time fail to pay any tax in accordance with the provisions hereof, or to take out, pay for, maintain or deliver any of the insurance policies provided for herein, or to make any other payment or perform any other act on its part to be made or performed under this Agreement, then the City, without waiving or releasing Lessee from any obligation of Lessee contained in this Agreement, may, but shall be under no obligation to:

(i) Pay such Tax payable by Lessee pursuant to the provisions hereof;

(ii) Take out, pay for and maintain any of the insurance policies provided for herein;

(iii) Make any other payment or perform any other act on Lessee's part to be made or performed under this Agreement. The City may, after such notice is provided for herein, enter upon the Property for the purpose of curing Lessee's defaults and take all such action thereon as may be necessary to effect such cure.

B. **Lessee Payment to City**: Lessee shall pay to the City on demand all sums paid by City and all costs and expenses incurred by City in connection with the performance of any such act, together with interest thereon at the highest rate allowed by law or 10%, whichever is lower, from the respective dates of City's making of each such payment. Any payment or performance by City pursuant to the foregoing provisions of this Section shall not be nor be deemed to be a waiver or release of the Default or event of Default by Lessee with respect thereto or of the right of the City to terminate this Agreement, institute summary proceedings and/or take such other action as may be permissible hereunder in the event of Default by Lessee.

## SECTION 19

### DEFAULT, REMEDIES, ETC.

A. **Default by Lessee**: The occurrence of any of the following shall constitute an event of "Default" by Lessee:

(1) Any action taken or suffered by Lessee under any insolvency or bankruptcy act, including the appointment of a receiver to take possession of all or substantially all of the

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assets of Lessee, provided that if such action is not initiated by Lessee, Lessee shall have ninety (90) days in which to terminate, set aside or otherwise cure such action;

(2) Any general assignment by Lessee on behalf of creditors;

(3) Vacation or abandonment of the Property by Lessee, with no indication of an intent to resume operations;

(4) Failure to make any payments to City where the delinquency continues beyond ten (10) days following written notice for payment thereof;

(5) Failure to submit accounting and/or operations reports required under Section 5 where the failure continues beyond fifteen (15) business days following written notice thereof, or

(6) Failure in the performance or compliance with any of the other terms, covenants or conditions contained in this Agreement within thirty (30) days after written notice from City specifying the Default; provided, however, that if the City gives notice of a Default of such a nature that it cannot be cured within such thirty (30) day period, such Default shall not be deemed to continue so long as Lessee, after receiving such notice, proceeds to cure the Default as soon as reasonably possible and continues to take all steps necessary to complete the same as soon as reasonably possible. No Default shall be deemed to continue if and so long as Lessee shall be so proceeding to cure the same in good faith.

**B. Remedies of City Upon Default:** It is understood and agreed that upon the occurrence of an event of Default, City, in addition to any other rights or remedies available to City at law or in equity, shall have the right to

(1) terminate this Sublease and all rights of Lessee under this Sublease by giving Lessee written notice that this Sublease is terminated, in which case City may recover from Lessee the aggregate sum of:

(a) the worth at the time of award of any unpaid Rent that had been earned at the time of termination;

(b) the worth at the time of award of the amount by which (A) the unpaid Rent that would have been earned after termination until the time of award exceeds (B) the amount of the rental loss, if any, as Lessee affirmatively proves could have been reasonably avoided;

(c) the worth at the time of award of the amount by which (A) the unpaid Rent for the balance of the term after the time of award exceeds (B) the amount of rental loss, if any, as Lessee affirmatively proves could be reasonably avoided;

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(d) any other amount necessary to compensate City for all the detriment caused by Lessee's failure to perform Lessee's obligations or that, in the ordinary course of things, would be likely to result from Lessee's failure; and

(e) all other amounts in addition to or in lieu of those previously set out as may be permitted from time to time by applicable California law.

As used in clauses (a) and (b) of Section 19(B)(1), the worth at the time of award is computed by allowing interest at the rate of ten percent (10%) per annum. As used in clause (c) of Section 19(B)(1), the worth at the time of award is computed by discounting that amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%). As used in this Section, the term Rent shall include Minimum Monthly Rent, Percentage Rent, Alternative Rent and any other payments required by Lessee under this Sublease.

(2) without invoking the arbitration procedures set forth in Section 20(G), continue this Sublease, and from time to time, without terminating this Sublease, either

(a) recover all Rent and other amounts payable as they become due or

(b) relet the Property or any part on behalf of Lessee on terms and at the rent that City, in City's sole discretion, may deem advisable, all with the right to make alterations and repairs to the Property, at Lessee's cost, and apply the proceeds of reletting to the Rent and other amounts payable by Lessee. To the extent that the Rent and other amounts payable by Lessee under this Sublease exceed the amount of the proceeds from reletting, the City may recover the excess from Lessee as and when due.

(3) Without having to invoke the arbitration procedures set forth in Section 20(G), upon the occurrence of an event of Default, City shall also have the right, with or without terminating this Sublease, to re-enter the Property and remove all persons and property from the Property. City may store the property removed from the Property in a public warehouse or elsewhere at the expense and for the account of Lessee.

(4) None of the following remedial actions, alone or in combination, shall be construed as an election by City to terminate this Sublease unless City has in fact given Lessee written notice that this Sublease is terminated or unless a court of competent jurisdiction or an arbitration panel decrees termination of this Sublease: any act by City to maintain or preserve the Property; any efforts by City to relet the Property; any re-entry, repossession, or reletting of the Property; or any re-entry, repossession, or reletting of the Property by City pursuant to this Section. If City takes any of the previous remedial actions without terminating this Sublease, City may nevertheless at any later time terminate this Sublease by written notice to Lessee.

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(5) If City relets the Property, City shall apply the revenue from the reletting as follows: first, to the payment of any indebtedness other than Rent due from Lessee to City; second, to the payment of any cost of reletting, including without limitation finder's fees and leasing commissions; third, to the payment of the cost of any maintenance and repairs to the Property; and fourth, to the payment of Rent and other amounts due and unpaid under this Sublease. City shall hold and apply the residue, if any, to payment of future amounts payable under this Sublease as the same may become due, and shall be entitled to retain the eventual balance with no liability to Lessee. If the revenue from reletting during any month, after application pursuant to the previous provisions, is less than the sum of (i) City's expenditures for the Property during that month and (ii) the amounts due from LESSEE during that month, Lessee shall pay the deficiency to City immediately upon demand.

(6) After the occurrence of an event of Default, City, in addition to or in lieu of exercising other remedies, may, but without any obligation to do so, cure the breach underlying the event of Default for the account and at the expense of Lessee. However City must by prior notice first allow Lessee a reasonable opportunity to cure, except in cases of emergency, where City may proceed without prior notice to Lessee. Lessee shall, upon demand, immediately reimburse City for all costs, including costs of settlements, defense, court costs, and attorney fees, that City may incur in the course of any cure.

(7) No security or guaranty for the performance of Lessee's obligations that City may now or later hold shall in any way constitute a bar or defense to any action initiated by City for unlawful detainer or for the recovery of the Property, for enforcement of any obligation of Lessee, or for the recovery of damages caused by a breach of this Sublease by Lessee or by an event of Default.

(8) Except where this is inconsistent with or contrary to any provisions of this Sublease, no right or remedy conferred upon or reserved to either party is intended to be exclusive of any other right or remedy, or any right or remedy given or now or later existing at law or in equity or by statute.

(9) Whether or not the City elects to terminate this Sublease on account of any Default by Lessee, the City may:

(i) terminate any sub-sublease, license, concession or other consensual arrangement for possession entered into by Lessee and affecting the Property; and/or

(ii) choose to succeed to Lessee's interest in such arrangements. If City elects to succeed to Lessee's interest in such arrangements, Lessee shall, as of the date of notice the City of that election, have no further right to, or interest in, the rent or other consideration receivable under such arrangement(s).

C. **Damages for Nonmaterial Breach:** In the event of a violation of the terms of this Agreement by Lessee which the City deems immaterial and to be less than a Default entitling City to the remedies specified in Section 19(B), the City shall notify Lessee in writing of such

determination. Commencing thirty (30) days following the service on Lessee of said written notice explaining the violation and, so long as the violation remains uncured, Lessee shall pay to City the amount of One Hundred Dollars (\$100.00) per day until the violation has been corrected. The Parties acknowledge that damages in the event of an uncured nonmaterial breach would be impossible to ascertain and agree that the sum set forth above represents a reasonable approximation of the amount of such liquidated damages. Should Lessee disagree with the City as to the violation upon which such notice is served, within ten (10) days of its receipt of the City's notice, Lessee shall submit in writing all information concerning the violation, explaining the reasons why liquidated damages should not be levied. The City shall have ten (10) days to respond in writing to Lessee. Should Lessee not be satisfied with the response, Lessee shall have the option of submitting the dispute to mediation provided the City agrees to do so. The liquidated damages amount shall be paid by Lessee to the City within ten (10) days of the City's delivery to Lessee of a demand to so pay.

D. **Default by City:** The failure of the City to perform any of its obligations hereunder shall constitute a Default by the City, whereupon Lessee shall be entitled to exercise all of its rights and remedies at law and equity.

## SECTION 20 GENERAL PROVISIONS

A. **Time is of the Essence:** Time is of the essence of each and every term and provision of this Agreement.

B. **Waiver of Breach:** The waiver by City of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of any other term, covenant or condition, nor of any subsequent breach of the same or any other term, covenant or condition herein contained. Any consent or approval given by City to an act of Lessee for which consent or approval is required under this Agreement shall not be deemed to waive or render unnecessary the need for City's consent or approval to or of any subsequent or similar act of Lessee. The subsequent acceptance of payments hereunder by the City shall not be deemed to be a waiver of any preceding breach by Lessee of any term, covenant or condition of this Agreement other than the failure of Lessee to pay the particular payments so accepted, regardless of City's knowledge of such preceding breach at the time of the accepting of such payments.

C. **Nondiscrimination:** Lessee and its assigns shall not discriminate in the providing of admission or service hereunder against any person on the basis of such person's race, color, creed, religion, national origin, ancestry, sex, age or physical disability. Lessee shall include in any subcontract a nondiscrimination clause forbidding discrimination against any person in the providing of service hereunder because of such person's race, color, creed, religion, national origin, ancestry, sex, age or physical disability.

D. **Taking:**

(1) **Total Taking.** If the whole or a substantial part of the Property shall be taken by right of eminent domain or otherwise for any public or quasi-public use, then, when possession shall be taken thereunder by the condemnor, this Sublease and all rights and obligations of City and Lessee hereunder shall terminate. In the event of a partial taking, as a result of which the remaining portion of the Property cannot be restored to an economically operable facility of a comparable kind and quality to the facility existing prior to the taking, then this Agreement shall terminate as of the time when possession of the Property shall be taken by the condemnor.

(2) **Partial Taking.** If a portion of the Property shall be taken by right of eminent domain or otherwise for any public or quasi-public use and the remaining portion of the Property can be used by Lessee as an economically operable facility of comparable kind and quality to the facility existing prior to the taking, Lessee shall have the right either to terminate this Sublease or continue leasing the remaining portion of the Property; provided, however, if Lessee continues operating the remaining portion of the Property, the Rent shall be reduced in proportion to the amount of the Property taken.

(3) **Eminent Domain Award.** If there is a taking by right of eminent domain, all damages awarded for such taking shall belong to the City except that Lessee shall receive from the award a sum attributable to (1) the value of any installations or Improvements on the Property constructed by Lessee in accordance with this Sublease and (ii) an amount equal to the value of Lessee's interest under this Sublease. Notwithstanding anything to the contrary in the foregoing, the City shall make available to LESSEE any such proceeds for restoration as referenced in Section 19(D)(1) and/or (2), above.

E. **Conformance with Rules and Regulations:** In performing under this Sublease, Lessee agrees to abide by: (1) all applicable federal, state and local laws, rules, regulations, contracts and restrictions; (2) laws, rules and regulations of the California Department of Boating and Waterways, the San Francisco Bay Conservation and Development Commission, United States Coast Guard, Water Quality Control Board, Army Corps of Engineering, State Lands Commission, East Bay Regional Park District, City (including City's Marina Rules and Regulations and Martinez Municipal Code section 12.36), and any other agency with jurisdiction, as amended from time to time. The City approved Marina Rules and Regulations are attached to this Agreement as **Exhibit G**; (3) the requirements, conditions and terms of all the documents and things included in the Schedule of Encumbrances; and (4) the requirements of the State Lands Lease.

## ATTACHMENT B

F. **Governing Law**: This Agreement and the performance thereof shall be governed, interpreted, construed, and regulated by the laws of the State of California. The Parties agree that this Sublease was entered into in Martinez, California. In the event of legal action between the Parties, it is agreed that such action shall be commenced in the Superior Court of Contra Costa County.

G. **Conflict of Interest**: Lessee represents and warrants that Lessee has not employed, retained, relied upon, received assistance or solicited aid from any official, agent, representative or employee of the City or any person related by blood or marriage to any said City employee, official, agent or representative in the negotiation of this Agreement or in the operation of the Property. Lessee warrants that it will not in the future knowingly employ, retain or become affiliated in any fashion with any officer, agent, representative or employee of the City, any business entity in which any such officer, agent, representative or employee is interested or any person related by blood or marriage to any such officer, agent, representative or employee in the performance of this Agreement. Violation of this provision shall be deemed a material breach and a Default. In the event the City determines such employment, retention or affiliation exists, the City, in addition to any other remedy it may have under this Agreement or at law or equity, may request Lessee to terminate its affiliation, employment or retention of said person and Lessee shall comply with said City request. In the event of the termination of said affiliation, employment or retention, Lessee shall release, indemnify, hold harmless and defend the City and all of its agents, officers, employees and representatives from any and all liability, injury, damage or claim of any sort, including attorney's fees, or other damages or injuries arising out of said termination. As to the claims which Lessee releases hereunder it waives any and all rights provided under Cal. Civil Code section 1542.

H. **Signs**: Lessee agrees not to construct, maintain, or allow any sign upon the Property except as approved by the City and in compliance with all applicable City laws, rules and regulations. Unapproved signs, banners, and flags shall be immediately removed by Lessee upon request of the City.

I. **Easements**: This Sublease and all rights given hereunder shall be subject to all easements and rights-of-way now existing or heretofore granted or reserved by City in, to, or over the Property for any purpose whatsoever, and shall be subject to such rights-of-way for reasonable access, sewers, pipelines, conduits and such telephone, telegraph, light, heat, or power lines as may from time-to-time be determined by City to be in the best interests of the development or use of the Property. City agrees that such future easements and rights-of-way shall be so located and installed as to not interfere with the business of Lessee. Lessee shall be obligated to make payments of all Rent notwithstanding the fact that the City or any other party lawfully exercises its rights under any future easement(s) and/or right(s)-of-way.

J. **Holdover**: Lessee shall not holdover after the termination, revocation, or expiration of this Sublease without the written approval of the City which may be withheld with or without reason. Any such permitted holdover shall be deemed an extension of this Sublease on a month-

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to-month basis upon the same terms and conditions as set forth in this Sublease or may exist immediately prior to the commencement of the holdover period.

K. **Surrender of Property**: Upon the expiration of this Sublease or the earlier termination or cancellation thereof, as herein provided, Lessee will peaceably surrender the Property to City in good condition.

L. **Successors and Assigns**: Unless otherwise provided in this Sublease, the terms, covenants and conditions herein shall apply to and bind the heirs, successors, executors, administrators, and assigns of all the Parties hereto, all whom shall be jointly and severally liable hereunder.

M. **Attorney Fees**: If either party brings any action or proceeding to enforce, protect or establish any right or remedy, the prevailing party shall be entitled to recover reasonable attorney's fees, expert witness fees and costs.

N. **Section Headings**: The section headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision thereof.

O. **Entire Understanding**: This Sublease contains the entire understanding of the Parties, and Lessee, by accepting the same, acknowledges that there is no other written or oral understanding between the Parties in respect to the Property. No modification, amendment, or alteration of this Sublease shall be valid unless it is in writing and signed by the Parties hereto.

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

Q. **Quiet Enjoyment**: For so long as Lessee performs its obligations hereunder, City agrees that Lessee shall be entitled to the quiet enjoyment and use of the Property in accordance with the terms hereof.

R. **Notices**: As used in this Sublease, notice includes, but is not limited to, the communication of notice, request, demand, approval, statement, report, acceptance, consent, waiver and appointment.

(1) All notices must be in writing.

(2) All notices shall be delivered via confirmed facsimile, overnight courier, by hand delivery, by first class mail, or by certified or registered mail, return receipt requested, to the appropriate party at the addresses set forth below. All communications shall be deemed served upon delivery of, or if mailed, upon the first of the following events to occur: (a) signed return of the receipt or (b) the expiration of three (3) days after the deposit in the United States Postal Service mail, postage prepaid and addressed to the address specified below. If

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transmitted via facsimile, notice shall be deemed served upon electronic confirmation of receipt. Non-receipt of any communication as the result of any change of address or facsimile number of which the sending party was not notified or as the result of a refusal to accept delivery shall be deemed receipt of such communication.

Notices to the City:

City MANAGER  
City OF MARTINEZ  
525 HENRIETTA STREET  
MARTINEZ, CA 94553  
FAX (925) 229-5012  
Attention: City Council, City Attorney, City Manager

with a copy to

City Attorney  
City of Martinez  
670 W. Napa St., Suite F  
Sonoma, CA 95476  
FAX: (707) 996-9603

Notices to Lessee:

with copy to:

(3) Either party may, by notice given at any time or from time to time, require subsequent notices to be given to another individual person, whether a party or an officer or representative, or to a different address, or both. Notices given before actual receipt of notice of change shall not be invalidated by the change.

S. **Amendments to Sublease**: Any amendment or modification of this Sublease must be in writing duly executed by both Parties.

T. **Exhibits**: All exhibits attached hereto are incorporated herein by this reference. The Exhibits that are attached hereto are:

- Exhibit A: State Lands Lease
- Exhibit A-1: Description of all Lands Leased from State Lands Comm'n
- Exhibit A-2: Description of Portion of Leased Lands Being Subleased Pursuant to this Sublease
- Exhibit A-3: Map Showing Portion of Leased Lands not Being Subleased Pursuant to this Sublease

- Exhibit B: Option to Sublease
- Exhibit C: Description of the Parking Area
- Exhibit D: Lessee's Capital Improvement Obligations
- Exhibit E: Schedule of Encumbrances
- Exhibit F: Maintenance Obligations
- Exhibit G: City's Marina Rules and Regulations

U. **Recording:** Upon Commencement Date City shall record in the official records a copy of this Sublease or at the request of City, Lessee and City shall execute and record in the official records a memorandum of this Sublease, in a form agreed to by the Parties.

V. **Recitals:** The recitals stated above are true and incorporated into this Agreement by this reference.

"City":  
 THE CITY OF MARTINEZ,  
 A California municipal corporation

By: \_\_\_\_\_  
 Rob Schroder, Mayor

APPROVED AS TO FORM:

\_\_\_\_\_  
 City Attorney

"LESSEE":

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

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

APPROVED AS TO FORM:

\_\_\_\_\_

DRAFT