



THE CITY OF SAN DIEGO

and

CLUB ONE, INC.
a Delaware Corporation

Lease and Operating Agreement

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CITY OF SAN DIEGO LEASE AND OPERATING AGREEMENT

THIS LEASE AND OPERATING AGREEMENT (Agreement) is executed between the CITY OF SAN DIEGO, a municipal corporation, hereinafter called "CITY," and CLUB ONE, INC., a Delaware corporation hereinafter called "OPERATOR."

SECTION 1: USES

1.1 Premises. CITY hereby leases and conditionally transfers to OPERATOR, and OPERATOR accepts from CITY, the leasehold of that certain real property and operation rights to the improvements on the leasehold situated in the City of San Diego, County of San Diego, State of California, described in Exhibits "10.1" through "10.3", attached hereto and by this reference made part of this Agreement. Said real property is hereinafter called the "premises."

1.2 Uses. It is expressly agreed that the premises are to be used by OPERATOR solely and exclusively for the purposes of operating and maintaining a public swimming pool and parking, and for such other related or incidental purposes as may be first approved in writing by the Mayor, or his/her designee, and for no other purpose whatsoever.

The use of the premises for any unauthorized purpose shall constitute a substantial default and subject this Agreement to termination at the sole option of the CITY.

OPERATOR covenants and agrees to use the premises throughout the term hereof for the above-specified purposes and to diligently conduct the business thereon to produce the most gross income that can be reasonably expected. Failure to continuously use the premises for said purposes, or the use thereof for purposes not expressly authorized herein, shall be grounds for termination by CITY.

1.3 Related Council Actions. By the granting of this Agreement, neither CITY nor the Council of CITY is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to development or operation of the premises. Discretionary action includes but not limited to rezoning, variances, environmental clearances, or any other governmental agency approvals which may be required for the development and operation of the premises.

1.4 Quiet Possession. OPERATOR, paying the rent and performing the covenants and Agreements herein, shall at all times during the term peaceably and quietly have, hold, and enjoy the premises. If during the Agreement term OPERATOR is temporarily dispossessed through action or claim of a title superior to CITY'S, then and in either of such events, this Agreement shall not be voidable nor shall CITY be liable to OPERATOR for any loss or damage resulting therefrom, but there shall be determined and stated in writing by the Mayor, or his/her designee,

a proportionate reduction of the minimum or flat rate rent for the period of periods during which OPERATOR is prevented from having the quiet possession of all or a portion of the premises.

1.5 Easements and Reservations.

- a. CITY hereby reserves all rights, title, and interest in any and all subsurface natural gas, oil, minerals, and water on or within the premises.
- b. CITY reserves the right to grant and use easements or to establish and use rights-of-way over, under, along, and across the premises for utilities, thoroughfares, or access as it deems advisable for the public good.
- c. CITY has the right to enter the premises for the purpose of making repairs to or developing municipal resources and services.

However, CITY shall not unreasonably or substantially interfere with OPERATOR'S use of the premises and will reimburse OPERATOR for physical damages, if any, to the permanent improvements located on the premises resulting from CITY exercising the rights reserved in this section. Such reimbursement may include a reduction in the rent proportionate to the amount of physical damage as determined by CITY. CITY will pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.

1.6 Competent Management. Throughout the term of this Agreement, OPERATOR shall provide competent management of the premises to the satisfaction of the Mayor, or his/her designee. For the purposes of this paragraph, "competent management" shall mean demonstrated ability in the management and operation of a public swimming pool and related activities in a fiscally responsible manner.

1.7 Operation of Facilities. A regular schedule of days and hours of operation shall be established to best serve the public. OPERATOR agrees that the pool shall be open to public use twelve (12) months per year (except for New Year's Day, Thanksgiving Day, Christmas Day, Easter Day, Memorial Day, Independence Day, Labor Day, and regularly scheduled maintenance closure). The following minimum hours shall be observed by OPERATOR: Monday through Friday 6:00 a.m. - 8:00 a.m. and 3:30 p.m. - 8:00 p.m.; Saturday and Sunday 8:00 a.m. - 4:00 p.m.; operating hours for Saturdays during the period from Memorial Day through Labor Day will be 8:00 a.m. - 6:00 p.m. OPERATOR and CITY shall review the minimum established hours of operation annually and mutually agree upon revised hours of operation, if necessary.

1.8 Rates and Charges. OPERATOR agrees that the rate charge for "day use" public access shall not exceed three dollars and twenty-five cents (\$3.25) per adult, and three dollars (\$3.00) per child 17 years of age and under and senior citizens 60 years and over. Upon obtaining the written consent of the Mayor, or his/her

designee, or his authorized representative, which consent shall not be unreasonably withheld, OPERATOR shall be permitted to increase such rates in increments of twenty five cents (.25) to compensate for any increases in the Bureau of Labor Statistics, Consumer Price Index, "All Urban consumers" as published by the U.S. Department of Labor for Los Angeles Anaheim/Riverside, CA.

SECTION 2: TERM

- 2.1 Commencement. The term of this Agreement shall be three (3) years commencing on the first day of the calendar month following execution by the Mayor, or his/her designee, and approval by City Attorney (Effective Date).

"Agreement year" as used in this Agreement shall mean the 12-month period following commencement of the Agreement.

- 2.2 Holdover. Any holding over by OPERATOR after expiration or termination shall not be considered as a renewal or extension of this Agreement. The occupancy of the premises after the expiration or termination of this Agreement constitutes a month-to-month tenancy, and all other terms and conditions of this Agreement shall continue in full force and effect; provided, however, CITY shall have the right to apply a reasonable increase in rent to bring the rent to fair market value and to terminate the holdover tenancy at will.

- 2.3 Surrender of Premises. At termination of this Agreement for any reason, OPERATOR shall execute acknowledge, and deliver CITY, within five (5) days after written CITY demand, a valid and recordable quitclaim deed covering all of the premises. The premises shall be delivered free and clear of all liens and encumbrances and in a decent, safe, and sanitary condition.

If OPERATOR fails or refuses to deliver the required deed, CITY may prepare and record a notice reciting OPERATOR'S failure to execute this Agreement provision, and the notice will be conclusive evidence of the termination of this Agreement and all OPERATOR'S rights to the premises.

SECTION 3: RENT

- 3.1 Time and Place of Payment. All rents required herein must be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 129030, San Diego, California, 92112-9030, or delivered to the Office of the City Treasurer, Civic Center Plaza, 1200 Third Avenue, First Floor, San Diego, California.

The place of payment may be changed at any time by CITY upon thirty (30) days' written notice to OPERATOR. Mailed rental payments shall be deemed paid

upon the date such payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed paid upon actual receipt by the City Treasurer. OPERATOR assumes all risk of loss and responsibility for late payment charges if payments are made by mail.

3.2 Rent.

a. Minimum Rent. The annual minimum rent established for the first two (2) years following the Effective Date of this Agreement is Twenty-Five Thousand (\$25,000), which is Two Thousand Eighty Three Dollars and Eighty Three cents (\$2,083.83), on a monthly installment basis.

- i. If the minimum rent is greater than the percentage rent on a calendar month basis, then 1/12 of the annual minimum rent is required to be paid for that month. Minimum rents are to be paid in monthly installments on or before the day of the calendar month when percentage rents are due pursuant to Section 3.3, Payment Procedure, hereof.

Provided, however, in the event that the combined total percentage rent payments and monthly installments during any Agreement year equal or exceed the required annual minimum rent for that year, then for the balance of such year, OPERATOR shall discontinue paying monthly installments of the minimum rent and shall continue paying only percentage rents until the beginning of the ensuing Agreement year. Provided further, in the event minimum rents paid plus percentage rents paid exceed the annual minimum rent and also exceed the rent which would have been paid if the percentage rent had been paid on total gross income, the excess over the annual minimum rent shall be credited against the next payable rent as it becomes due. It is the intent of this provision that OPERATOR shall pay monthly installments of the annual minimum rent as a guarantee against the percentage rent requirement and that the greater of the two requirements, minimum or percentage, whichever occurs throughout the term, shall prevail on an annual basis.

b. Minimum Rent Adjustment. Effective at the beginning of the first day of the third year of this Agreement, the annual minimum rent shall be eighty percent (80%) of the annual average of actual rents paid or accrued during the two (2) years preceding the adjustment date. Said annual minimum rent shall then be divided by (12) to establish the new monthly minimum rent. It is recognized that such adjustments shall be calculated by CITY upon completion of payments due for the preceding rental period in order to determine the amount of the adjustment to be effective on the dates stated herein. Until such calculations are completed, OPERATOR shall continue paying monthly minimum rents at the prior rate. Any additional rents determined by the

adjustment to be due for the months previously paid at the prior rate shall be paid to CITY within thirty (30) days following written notice. IN NO EVENT SHALL ANY SUCH MINIMUM RENT ADJUSTMENT RESULT IN A DECREASE IN THE MINIMUM RENT REQUIREMENT IN EFFECT IMMEDIATELY PRIOR TO THE ADJUSTMENT DATE.

- c. Percentage Rents. Percentage rents will be calculated on a calendar month basis and will consist of the following percentages of the gross income resulting from the use of the premises:

<u>Percentages</u>	<u>Business Activities</u>
Fifteen Percent (15%)	Of gross income as defined in Section 3.4 below, derived from the operation of a swimming pool.
Twenty-five Percent (25%)	Of commissions or any other compensation paid to OPERATOR or sublessee for the right to install or operate coin-operated vending, game, or service machines or devices on the premises, including telephones, or 10% of the gross income from any such coin-operated machines or devices owned, rented, or leased by OPERATOR or sublessees for use on the premises.
Ten Percent (10%)	Of all other authorized activities
Fifty Percent (50%)	Of all revenue received from any wireless telecommunication equipment installed and operated from the Premises.

The Mayor, or his/her designee, in his sole discretion, may approve another percentage rate or flat rate of rent for each other incidental service or operation supplementary to the permitted use (s) set forth under Section 1.2, Uses, hereof as may be approved in writing by the Mayor, or his/her designee, prior to commencement of such other service (s) or operation(s). Provided , however, any activity conducted on the premises without prior approval by the Mayor, or his/her designee, shall be subject to the requirements of Section 3.6, Unauthorized Use Charge, hereof.

- 3.3 Payment Procedure. On or before the last day of the calendar month following the calendar month in which the gross income subject to rents was earned, OPERATOR shall provide CITY with a correct statement together with a payment of rent on all applicable gross receipts in a form selected by CITY. The statement will be signed by OPERATOR or its authorized agent attesting to the accuracy thereof, which indicate or include:

- a. One-twelfth of the annual minimum rent until the full annual rent is achieved in any Agreement year.
- b. Total gross receipts for the subject month, itemized as to business categories for which separate percentage rents are established. A gross receipts breakdown of each business conducted on the premises must be included when a reported category shows gross income to be from more than one business operation.
- c. The percentage rental due CITY, computed and totaled.
- d. The accumulated total of all rents previously paid for the current Agreement year.
- e. Payment in the greater of the two following amounts: One-twelfth of the annual minimum rent or the total percentage rent due CITY computed as described in this section.
- f. Any rents due CITY from sublease activities or operations will begin with the earliest of the following dates (whether or not prior approval was given by CITY as required by this Agreement and whether or not a separate percentage rent was established by CITY):
 - (1) Sublease commencement date;
 - (2) Physical occupancy date; or
 - (3) Earliest activity date (i.e., sale of goods, solicitation of business, construction or alterations, etc.).

3.4 Gross Income. "Gross Income" or "Gross Receipts", as used in this Agreement, shall consist of income from day use fees, swimming lessons, water fitness classes, subleasing activities, and any and all other activities which are exclusive to the use of the premises." Provided, however, gross income shall not include federal, state, or municipal taxes collected from the consumer (regardless of whether the amount thereof is stated to the consumer as a separate charge) and paid over periodically by OPERATOR to a governmental agency accompanied by a tax return or statement as required by law. Possessory interest taxes or other property taxes shall not be deducted by OPERATOR in computing gross income. Gross income shall not include refunds for goods returned for resale on the premises or refunds of deposits. The amount of such tax and refunds shall be clearly shown on the books and records of OPERATOR. The percentage rent shall be calculated and paid by OPERATOR on the basis of said gross income whether the income is received by OPERATOR or by licensee, or their agents, and all gross income received by any sublessee, permittee, licensee, or other party as a result of occupancy of said premises or the operation thereof shall be regarded as gross income of OPERATOR for the purpose of calculating the

percentage rent hereunder required to be paid by OPERATOR to CITY, except as may be otherwise specified by or pursuant to this Agreement.

3.5 Inspection of Records.

- a. Records. OPERATOR shall, at all times during the Agreement term, keep or cause to be kept true and complete books, records, and accounts of all financial transactions in the operation of all business activities conducted upon the financial transactions resulting from the use of the premises. The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices, or other documents as necessary to allow CITY to easily determine the total gross income.

Any retail sales or charges will be recorded by means of cash registers or other comparable devices which display to the customer the amount of the transaction and automatically issue a sequentially numbered receipt. Totals registered shall be read and recorded at the beginning and end of each business day.

In the event of admission charges or rentals, OPERATOR shall issue serially numbered tickets or receipts for each such admission or rental and shall keep an adequate record of such tickets or receipts, as well as a record of unissued tickets or receipts.

All retail sales and charges may be recorded by a system other than cash registers or other comparable devices provided such system is approved by CITY.

- b. Financial Statements. Within sixty (60) days after the end of each Agreement year as previously established herein, OPERATOR will, at its expense, submit to CITY a statement in which the total gross receipts and the corresponding amounts of rents paid CITY for the year are classified according to the categories of business established for any percentage rental and for any other business conducted on or from the premises. Said statement shall be signed by OPERATOR or its authorized agent attesting to the accuracy thereof, which shall be legally binding upon OPERATOR.
- c. Right to Inspect. All OPERATOR'S books of account, records, and supporting documentation, as described under Section 3.5a. hereinabove, will be kept for at least five (5) years and made available to CITY in one location within the City of San Diego. Said books and records shall be maintained separate from all other accounts not relating to the premises. The CITY, at its discretion, shall have the right to inspect and audit the business of OPERATOR, its agents, sublessees, concessionaires, and licensees operating on and in connection with the premises as necessary and appropriate for CITY

to determine the amounts of rent due CITY in compliance with the requirements of this Agreement.

At CITY'S request, OPERATOR shall promptly provide, at OPERATOR'S expense, any necessary data to enable CITY to fully comply with all requirements of the state or federal government for operating Agreement information or reports concerning the premises. Such data will include, if required, a detailed breakdown of OPERATOR'S receipts and expenses.

- d. Audit Cost. The full cost of CITY'S audit(s) will be borne by CITY unless one or both of the following conditions exists, in which case OPERATOR hereby agrees to pay CITY'S cost of audit(s):
- (1) The audit(s) reveal an underpayment of more than five percent (5%) or more than \$10,000, whichever is less, between the rent due as reported and paid by OPERATOR pursuant to this Agreement and rent due as determined by the audit(s); or
 - (2) OPERATOR has failed to maintain complete and true books, records, accounts, and supporting source documents in strict accordance with this section hereof.

OPERATOR shall pay any deficiency determined by the audit(s) plus interest on such amount as defined in Section 3.6, Delinquent Rent and Audit Fees, hereof, within thirty (30) days of notice thereof by CITY. CITY will credit any overpayment against incoming rents. Any overpayment determined after the end of this Agreement will be refunded by CITY within sixty (60) days of confirmation by the Mayor, or his/her designee, of the audit(s) findings.

- e. Default. OPERATOR'S failure to keep complete and accurate records by means of double entry bookkeeping and make them available for CITY inspection is, like all other failures to comply with covenants of this Agreement, a breach of this Agreement and cause for termination.

- 3.6 Delinquent Rent and Audit Fees. If OPERATOR fails to pay the rent when due, OPERATOR will pay, in addition to the unpaid rents, five percent (5%) of the delinquent rent. If the rent is still unpaid at the end of fifteen (15) days, OPERATOR shall pay an additional five percent (5%) [being a total of ten percent (10%)], which is hereby mutually agreed by the parties hereto to be appropriate to compensate, CITY for loss resulting from rental delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account. Notwithstanding the foregoing, in no event shall the charge for late payments of rent be less than Twenty-five Dollars (\$25).

In the event CITY audit(s), if applicable, discloses that the rent for the audited period(s) has been underpaid in excess of five percent (5%) of the total required rent, then OPERATOR shall pay CITY the cost of the audit(s) plus ten percent (10%) per year on the amount of which said rent was underpaid, in addition to the unpaid rents as shown to be due CITY, as compensation to CITY for administrative costs and loss of interest as previously described herein. In the event CITY audit(s) discloses that the unpaid rent is less than five percent (5%) of the total rent, and should OPERATOR fail to pay said unpaid rent within thirty (30) days after written notice from CITY, an additional fee of ten percent (10%) of said unpaid amount shall be added to the unpaid amount to compensate CITY for costs and losses due to such nonpayment. OPERATOR agrees to pay such amounts and further agrees that the specific late charges represent a fair and reasonable estimate of the costs that CITY will incur from OPERATOR'S late payment. Acceptance of late charges and any portion of the late payment by CITY shall in no event constitute a waiver of OPERATOR default with respect to late payment, nor prevent CITY from exercising any of the other rights and remedies granted in this Agreement.

- 3.7 Unauthorized Use Charge. OPERATOR shall pay CITY one hundred percent (100%) for the gross receipts for any service or use that is not permitted by this Agreement. This payment is subject to the due date provided in this Agreement for rental payments and the provision for delinquent rent. The existence of one hundred percent (100%) charge in this clause and the payment of this charge or any part of it, does not constitute an authorization for a particular service or use, and does not waive any CITY rights to terminate a service or use to default OPERATOR for participating in or allowing any unauthorized use of the premises.

SECTION 4: ASSIGNMENT/DEFAULTS AND REMEDIES/EMINENT DOMAIN

- 4.1 Time is of Essence; Provisions Binding and Successors. Time is of the essence of all of the terms, covenants, and conditions of this Agreement, and, except as otherwise provided herein, all of the terms, covenants, and conditions of this Agreement shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.
- 4.2 Assignment and Subletting. OPERATOR shall not assign this Agreement or any interest therein and shall not sublet the premises or any part thereof, or any right or privilege appurtenant thereto, of any right or privilege appurtenant thereto, or suffer any other person, except employees, agents, and guests of OPERATOR, to use or occupy the premises or any part thereof, without the prior written consent of the Mayor, or his/her designee, in each instance. A consent to assignment, subletting, occupation, or use by any other person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation, or use by another person. Any such assignment or subletting without such consent shall be void and

shall, at the option of CITY, terminate this Agreement. This Agreement shall not, nor shall any interest therein, be assignable as to the interest of OPERATOR by operation of law, without the written consent of the Mayor, or his/her designee.

“Assignment” for the purposes of this clause shall include any transfer of any ownership interest of 50% or more, either in a single transaction or as a result of cumulative transactions by OPERATOR or by any partners, principals, or stockholders, as the case may be, from the original OPERATOR, its general partners, or principals.

Approval of any assignment or sublease shall be conditioned upon the assignee or sublessee agreeing in writing that it will assume the rights and obligations thereby assigned or subleased and that it will keep and perform all covenants, conditions, and provisions of this Agreement which are applicable to the rights acquired. The Mayor, or his/her designee, shall require, as a condition to approval of any sublease of the majority portion of the leasehold or any assignment, that the OPERATOR pay additional consideration to CITY, as set forth in Section 4.4, Additional Consideration to CITY, hereof, shall commence on the effective date of such proposed sublease of the majority portion of the leasehold or assignment, and may further require that this Agreement or the requested sublease otherwise be revised to comply with standard CITY Agreement requirements that are there current. Pursuant to City Charter Section 225, the Mayor, or his/her designee, may review and approve every person or entity which will have an interest in this Agreement as a sublessee or assignee. The Mayor’s, or his/her designee’s, approval will not be unreasonably withheld, provided all such persons and entities are of good character and reputation in the community.

- 4.3 Encumbrance. OPERATOR may not encumber this Agreement, its leasehold estate, and its improvements thereon by deed of trust, mortgage, chattel mortgage, or other security instrument.
- 4.4 Additional Consideration to CITY. OPERATOR acknowledges that operation of the premises enhances the value of OPERATOR’S business adjacent to the premises. OPERATOR and CITY agree that the exact amount of such enhancement is impossible to ascertain. However, CITY desires to be reimbursed to a reasonable extent in consideration for granting operation of the premises to OPERATOR. Therefore, OPERATOR and CITY agree that in the event of an assignment, or in the event of a subletting of the majority portion of the premises, OPERATOR shall pay to CITY two percent (2%) of the gross amount paid for the premises in connection with an approved assignment of the Agreement and/or, two percent (2%) of the amount paid OPERATOR in consideration of a sublease of all or a majority portion of the premises. The amount upon which the two percent (2%) shall be based shall be the total consideration resulting from the transaction including total cash payments and the market value of non cash consideration, including but not limited to stocks, bonds, deferred payments, secured and unsecured notes, and forbearance regarding claims and judgments.

Prior to CITY'S consent to any assignment or majority subletting, OPERATOR shall deliver to CITY a written statement of all sums due and owing to CITY from OPERATOR pursuant to the provisions of this section, together with an acknowledgment from the proposed assignee or sublessee, as to the amount due CITY. The sum due CITY shall be payable in full to CITY concurrent with the completion of the transaction, be it an assignment or a sublease. Any assignment, or subletting, in violation of the terms and conditions of this section shall be void. The provisions of this section shall not apply to:

- a. an assignment or transfer of a beneficial interest in the premises resulting from devise, bequest, intestate succession, or by operation of law for the benefit of the spouse or descendants (i) of OPERATOR (if an individual) or (ii) of OPERATOR'S principal owner or chief executive officer (if OPERATOR is other than an individual);
- b. such other assignment for which the Mayor, or his/her designee, determines that the legal and equitable ownership interests in the premises have remained unchanged, such as a change in the legal or fictitious name of the OPERATOR without any other change in the equity in beneficial use of, or legal title to, the premises as an asset or the income produced thereby; or
- c. an assignment, or subletting of OPERATOR'S interest at any other location not a part of the premises.

4.5 Defaults and Remedies.

a. Default. In the event that:

- (1) OPERATOR shall default in the performance of any covenant or condition required by this Agreement to be performed by OPERATOR and shall fail to cure said default within thirty (30) days following written notice thereof from CITY; or if any such default is not curable within thirty (30) days, and OPERATOR shall fail to commence to cure the default(s) within said thirty-day period and diligently pursue such cure to completion; or
- (2) OPERATOR shall voluntarily file or have involuntarily filed against it any petition under any bankruptcy or insolvency act or law; or
- (3) OPERATOR shall be adjudicated a bankrupt; or
- (4) OPERATOR shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon OPERATOR or upon any person claiming rights through OPERATOR, immediately terminate the Agreement and all rights of OPERATOR and of all persons claiming rights through OPERATOR to the premises or to possession

thereof; and CITY may enter and take possession of the premises. Provided, however, in the event that any default described in Section 4.5a (1), hereinabove is not curable within thirty (30) days after notice to OPERATOR, CITY may enter and take possession of the premises. Provided, however, in the event that any default described in Section 4.5a.(1), hereinabove is not curable within thirty (30) days after notice to OPERATOR, CITY shall not terminate this Agreement pursuant to the default if OPERATOR immediately commences to cure the default and diligently pursues such cure to completion.

In the event there is a deed of trust or mortgage on the leasehold interest, CITY shall give the mortgagee or beneficiary written notice of the default(s) complained of, and the same mortgagee or beneficiary shall have thirty (30) days from such notice to cure the default(s) or, if any such default is not curable within thirty (30) days, to commence to cure the default(s) and diligently pursue such cure to completion. The thirty-day period may be extended during time as mortgagee or beneficiary pursues said cure with reasonable diligence.

- b. Remedies of Lender. Should the default(s) be noncurable by OPERATOR, then any lender holding a beneficial interest in the leasehold, whose qualifications as an assignee have been approved by CITY, shall have the absolute right to substitute itself to the estate of OPERATOR hereunder and to commence performance of this Agreement. If such mortgagee or beneficiary shall give notice in writing of its election to so substitute itself within the thirty-day period after receiving written notice by CITY of the default, and the default, if curable, is cured by such mortgagee or beneficiary, then this Agreement shall not terminate pursuant to the default. In that event, CITY expressly consents to the substitution and authorizes the mortgagee or beneficiary to perform under this Agreement with all the rights, privileges, and obligations of OPERATOR, subject to cure of the default, if possible, by mortgagee or beneficiary. OPERATOR expressly agrees to assign all its interest in and to its leasehold estate to mortgagee or beneficiary in that event.
- c. Abandonment by OPERATOR. Even though OPERATOR has breached the Agreement and abandoned the premises, this Agreement shall continue in effect for so long as CITY does not terminate this Agreement, and CITY may enforce all its rights and remedies hereunder, including but not limited to the right to recover the rent as it becomes due, plus damages.
- d. Waiver. Any CITY waiver of a default is not a waiver of any other default. Any waiver of a default must be in writing and be executed by the Mayor, or his/her designee, in order to constitute a valid and binding waiver. CITY delay or failure to exercise a remedy or right is not a waiver of that or any other remedy or right under this Agreement. The use of one remedy or right for any default does not waive the use of another remedy or right for the same default or for another or later default. CITY'S acceptance of any rents is not a

waiver of any default preceding the rent payment. CITY and OPERATOR specifically agree that the property constituting the premises is CITY-owned and held in trust for the benefit of the citizens of the City of San Diego and that any failure by the Mayor, or his/her designee, or CITY staff to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY shall at all times, have the legal right to require the cure of any default when and as such defaults are discovered or when and as the City Council directs the Mayor, or his/her designee, to take action or require the cure of any default after such default is brought to the attention of the City Council by the Mayor, or his/her designee, or by any concerned citizen.

- 4.6 Eminent Domain. If all or part of the premises are taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of CITY and OPERATOR (or beneficiary or mortgagee) will be as follows:
- a. In the event the entire premises are taken, this Agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whoever first occurs.
 - b. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is unsuitable for operation, this Agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
 - c. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is suitable for continued Agreement operation, this Agreement shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken. The minimum rent shall be equitably reduced to reflect the portion of the premises taken.
 - d. Award. All monies awarded in any such taking shall belong to CITY, whether such taking results in diminution in value of the leasehold or the fee or both; provided, however, OPERATOR shall be entitled to any award attributable to the taking of, or damages to OPERATOR'S then remaining leasehold interest in installations or improvements of OPERATOR. CITY shall have no liability to OPERATOR for any award not provided by the condemning authority.
 - e. Transfer. CITY has the right to transfer CITY'S interests in the premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, OPERATOR shall retain whatever interest it may have in the fair market value of any improvements placed by it on the premises in accordance with this Agreement.

- f. No Inverse Condemnation. The exercise of any CITY right under this Agreement shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for inverse condemnation.

SECTION 5: INSURANCE RISKS/SECURITY

- 5.1 Indemnification & Hold Harmless. OPERATOR shall protect, defend, indemnify, and hold CITY and its elected officials, officers, employees, representatives, and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to OPERATOR's officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with OPERATOR acts or omissions in the performance of its obligations under this Agreement, and all expenses of investigating and defending against same, including without limitation attorney fees costs; provided, however, that OPERATOR duty to indemnify and hold CITY harmless shall not include any claims or liability arising from the sole negligence, or intentional misconduct of CITY and its elected officials, officers, employees, representatives, and agents.

5.2 Insurance.

- a. OPERATOR shall take out and maintain at all times during the term of this Agreement the following insurance at its sole expense:
- (1) Public liability and property damage insurance in the amount of not less than Two Million Dollars (\$2,000,000) Combined Single Limit Liability with an occurrence claims form and a minimum of Four Million Dollars (\$4,000,000) general aggregate. This policy shall cover all injury or damage, including death, suffered by any party or parties from acts or failures to act by CITY or OPERATOR or by authorized representatives of CITY or OPERATOR on or in connection with the use or operation of the premises.
 - (2) Fire, extended coverage, and vandalism insurance policy on all insurable property on the premises in an amount to cover 100 percent of the replacement cost. Any proceeds from a loss shall be payable jointly to CITY and OPERATOR. The proceeds shall be placed in a trust fund to be reinvested in rebuilding or repairing the damaged property. If there is a mortgage or trust deed on the leasehold in accordance with Section 4.3, Encumbrance, hereof, the proceeds may be paid to the approved mortgagee or beneficiary so long as adequate provision reasonably satisfactory to CITY has been made in each case for the use of all proceeds for repair and restoration of damaged or destroyed improvements on the premises.

b. OPERATOR'S responsibility to maintain said insurance also includes the following:

- (1) Additional Insured. All insurance policies will name CITY as an additional insured, protect CITY against any legal costs in defending claims, and will not terminate without sixty (60) days' prior written notice to CITY. All insurance companies must be satisfactory to CITY and licensed to do business in California. All policies will be in effect on or before the first day of the Agreement, except "course of construction fire insurance" shall be in force on commencement of all authorized construction on the premises, and full applicable fire insurance improvement. A copy of the insurance policy will remain on file with CITY during the entire term of the Agreement. At least thirty (30) days prior to the expiration of each policy, OPERATOR shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the terms of the Agreement.
- (2) Modification. CITY, at its discretion, may require the revision of amounts and coverages at a time during the term by giving OPERATOR sixty (60) days' prior written notice. CITY'S requirements shall be designed to assure protection from and against the kind and extent of risk existing on the premises. OPERATOR also agrees to obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this Agreement.
- (3) Accident Reports. OPERATOR shall immediately report to CITY any accident causing property damage or any serious injury to persons on the premises. This report shall contain the names and addresses of the parties involved, a statement of the circumstances, the date and hour, the names and addresses of any witnesses, and other pertinent information.
- (4) Failure to Comply. If OPERATOR fails or refuses to take out and maintain the required insurance or fails to provide the proof of coverage, CITY has the right to obtain the insurance. OPERATOR shall reimburse CITY for the premiums paid interest at the maximum allowable legal rate then in effect in California. CITY shall give notice of the payment of premiums within thirty (30) days of payment stating the amount paid, names of the insurer(s), and rate of interest. Said reimbursement and interest shall be paid by OPERATOR on the first (1st) day of the month following the notice of payment by CITY.

Notwithstanding the preceding provisions of this Subsection (4), if OPERATOR fails or refuses to take out or maintain insurance as required in this Agreement or fails to provide the proof of insurance, CITY has the right to declare this Agreement in default without further notice to

OPERATOR, and CITY shall be entitled to exercise all legal remedies in the event of such default.

- 5.3 Waste, Damage, or Destruction. OPERATOR agrees to give notice to CITY of any fire or other damage that may occur on the premises within ten (10) days of such fire or damage. OPERATOR agrees not to commit or suffer to be committed any waste or injury or any public or private nuisance, to keep the premises clean and clear of refuse and obstructions, and to dispose of all garbage, trash, and rubbish in the manner satisfactory to CITY. If the premises shall be damaged by any cause which puts the premises into a condition which is not decent, safe, healthy, and sanitary, OPERATOR agrees to make or cause to be made full repair of said damage and to restore the premises to the condition which existed prior to said damage; or, at CITY'S option, OPERATOR agrees to clear and remove from the premises all debris resulting from said damage and rebuild the premises in accordance with plans and specifications previously submitted to CITY and approved in writing in order to replace in kind and scope the operation which existed prior to such damage, using for either purpose the insurance proceeds as set forth in Section 5.2, Insurance, hereof.

OPERATOR agrees that preliminary steps toward performing repairs, restoration, or replacement of the premises shall be commenced by OPERATOR within thirty (30) days, and the required repairs, restoration, or replacement shall be completed within a reasonable time thereafter. CITY may determine an equitable deduction in the minimum annual rent requirement for such period or periods that said premises are untenantable by reason of such damage.

SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS

- 6.1 Acceptance of Premises. By signing this Agreement, OPERATOR represents and warrants that it has independently inspected the premises. OPERATOR will not hold CITY responsible for any defects whether apparent or latent, in the premises, including the presence of any hazardous waste.
- 6.2 Entry and Inspection. CITY reserves and shall always have the right, but not the obligation, to enter said premises for the purpose of viewing and ascertaining the condition of the same, or to protect its interests in the premises, or to inspect the operations conducted thereon. Except in the event of an emergency, such entry shall be limited to normal business hours. In the event that such entry or inspection by CITY discloses that said premises are not in a decent, safe, healthy, and sanitary condition, CITY shall have the right, after ten (10) days' written notice to OPERATOR, to have any necessary maintenance work done at the expense of OPERATOR, and OPERATOR hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done, in order to keep said premises in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that said may at its sole option, without additional notice, require OPERATOR to file with CITY a faithful performance

bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. Said bond shall be in an amount adequate in the opinion of CITY to correct the said unsatisfactory condition. OPERATOR shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this Agreement imposed on CITY.

- 6.3 Maintenance. OPERATOR agrees to assume full responsibility and cost for the operation and maintenance of the premises throughout the term. OPERATOR will make all repairs and replacements necessary to maintain and preserve the premises in a decent, safe, healthy, and sanitary condition satisfactory to CITY and in compliance with all applicable laws.
- 6.4 Improvements/Alterations. No improvements, structures, or installations shall be constructed on the premises with the exception of normal maintenance, repairs and/or replacements. The premises may not be altered by OPERATOR without prior written approval by the Mayor, or his/her designee. Further, OPERATOR agrees that Mayor structural or architectural design alterations to approved improvements, structures, or installations may not be made on the premises without prior written approval by the Mayor, or his/her designee, and that such approval shall not be unreasonably withheld. This provision shall not relieve OPERATOR of any obligation under this Agreement to maintain the premises in a decent, safe, healthy, and sanitary condition, including structural repair and restoration of damaged or worn improvements. CITY shall not be obligated by this Agreement to make or assume any expense for any improvements or alterations.
- 6.5 Utilities. OPERATOR agrees to order, obtain, and pay for all utilities and service and installation charges in connection with the operation of the premises. Operator further agrees that if any additional utilities are installed after the date of commencement of this Agreement, OPERATOR will pay the cost of any such installations and insure that they are placed underground.
- 6.6 Construction Bond. Whenever there is any construction to be performed on the premises, in excess of Five Thousand Dollars (\$5,000.00), OPERATOR shall deposit with CITY, prior to commencement of said construction, a faithful performance bond in the amount of 100 percent of the estimated construction cost of the work to be performed. The bond may be in cash or maybe a corporate surety bond or other security satisfactory to CITY. The bond shall insure that the construction plans approved by CITY or, at the option of CITY, that the uncompleted construction shall be removed and the premises restored to a condition satisfactory to CITY. The bond or cash will be held in trust by CITY for the purpose specified above or at CITY'S option it may be placed in an escrow or other trust approved by CITY.
- 6.7 Liens. OPERATOR shall at all times save CITY free and harmless and indemnify CITY against all claims for labor or materials in connection with operations,

improvements, alterations, or repairs on or to the premises and the costs of defending against such claims, including reasonable attorney's fees.

If improvements, alterations, or repairs are made to the premises by OPERATOR or by any party other than CITY, and a lien or notice of lien is filed, OPERATOR shall within five (5) days of such filing either:

- a. take all actions necessary to record a valid release of lien, or
- b. file with CITY a bond, cash, or other security acceptable to CITY sufficient to pay in full all claims of all persons seeking relief under the lien.

6.8 Taxes. OPERATOR agrees to pay, before delinquency, all taxes, assessments, and fees assessed or levied upon OPERATOR or the premises, including the land, any building, structures, machines, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by OPERATOR or levied by reason of the business or other OPERATOR activities related to the premises, including any licenses or permits. OPERATOR recognizes and agrees that this Agreement may create a possessory interest subject to property taxation, and that OPERATOR may be subject to the payment of taxes levied on such interest, and that OPERATOR shall pay all such possessory interest taxes. OPERATOR further agrees that payment for such taxes, fees and assessments will not reduce any rent due CITY.

6.9 Signs. OPERATOR agrees not to erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings, or similar devices or advertising without the prior written consent of CITY. If any such unauthorized item is found on the premises, OPERATOR agrees to remove the item at its expense within 24 hours notice thereof by CITY, or CITY may thereupon remove the item at OPERATOR'S cost. However, normal pool operational and/or directional and/or event-related signs are deemed acceptable provided said signs are not visible from outside the premises.

6.10 Ownership of Improvements and Personal Property.

- a. Any and all improvements, trade fixtures, structures, and installations or additions to the premises constructed on the premises by OPERATOR shall at Agreement expiration or termination be deemed to be part of the premises and shall become, at CITY'S option, CITY'S property free of all liens and claims, except as otherwise provided in this Agreement.
- b. If CITY elects not to assume ownership of all or any improvements, trade fixtures, structures, and installations, CITY shall so notify OPERATOR thirty (30) days prior to termination or one hundred eighty (180) days prior to expiration, and OPERATOR shall remove all such improvements, structures and installations as directed by CITY at OPERATOR'S sole cost on or before

Agreement expiration or termination. If OPERATOR fails to remove any improvements, structures, and installations as directed, OPERATOR agrees to pay CITY the full cost of any removal.

- c. OPERATOR-owned machines, appliances, equipment (other than trade fixtures), and other items of personal property shall be removed by OPERATOR by the date of the expiration or termination of this Agreement. Any said items which OPERATOR fails to remove will be considered abandoned and become CITY'S property free of all claims and liens, or CITY may, at its option, remove said items at OPERATOR'S expense.
- d. If any removal of such personal property by OPERATOR results in damage to the remaining improvements on the premises, OPERATOR agrees to repair all such damage.
- e. Any necessary removal by either CITY or OPERATOR which takes place beyond said expiration or termination hereof shall require OPERATOR to pay rent to CITY at the rate in effect immediately prior to said expiration or termination.

6.11 Unavoidable Delay. If the performance of any act required of CITY or OPERATOR is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform an act, said party shall be excused from performing that act for the period equal to the period of the prevention or delay. Provided, however, this provision shall not apply to obligations to pay rental as required pursuant to this Agreement. In the event OPERATOR or CITY claims the existence of such a delay, the party claiming the delay shall notify the other party in writing of such fact within ten (10) days after the beginning of any such claimed delay.

6.12 Hazardous/Toxic Waste. OPERATOR will not allow the installation of underground storage tanks or release of hazardous substances in, on, under, or from the premises. The foregoing shall not preclude OPERATOR from using normal pool operational materials on the premises. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency (EPA) in regularly released reports and any other substances incorporated into the State's list of hazardous substances. A copy of the presently effective EPA and the State lists is on file in the Office of the City Clerk as Document 769704 and by this reference is incorporated herein.

In the event of any release of a hazardous substance, OPERATOR shall be responsible for all costs of remediation and removal of such substances in

accordance with all applicable rules and regulations of governmental authorities.

OPERATOR agrees to assume the defense of, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from OPERATOR'S operations on the premises, including but not limited to costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.

If OPERATOR knows or has reasonable cause to believe that any hazardous substance has been released on or beneath the premises, OPERATOR shall give written notice to the Mayor, or his/her designee, within five (5) days of receipt of such knowledge or cause for belief. Provided, however, if OPERATOR knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, OPERATOR shall notify the Mayor, or his or her designee, immediately upon receipt of this knowledge or belief and shall take all actions necessary to alleviate such danger. OPERATOR will notify the Mayor, or his or her designee, immediately of any notice of violation received or initiation of environmental actions or private suits relative to the premises. In addition, OPERATOR and OPERATOR'S sublessees shall not utilize or sell any hazardous substance on the property without the prior written consent of CITY.

At any time within the twelve (12) months before the expiration or earlier termination of this Agreement, OPERATOR, at CITY'S sole option, shall cause a environmental assessment of the premises to be completed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. Said environmental assessment shall be obtained at the sole cost and expense of OPERATOR and shall establish what, if any, hazardous substances exist on, in, or under the premises, and in what quantities. If any hazardous substances exist in quantities greater than that allowed by CITY, county, state, or federal laws, statutes, ordinances, or regulations, then said environmental assessment shall include a discussion of these substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes and estimates of the cost of such remediation ore removal. OPERATOR shall cause the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved and shall be solely responsible for all costs and expenses incurred.

6.13 Water Quality Assurance.

OPERATOR shall comply with San Diego Municipal Code Article 3, Division: Stormwater Management and Discharge Control (the "Stormwater Code"), and employ "Best Management Practices" including a "Stormwater Pollution Prevention plan" as those terms are defined by the Stormwater Code

(collectively, "Prevention Plan" as approved by CITY under its Stormwater Management Program. Within the first thirty (30) days of the term. OPERATOR shall submit a Prevention Plan satisfactory to CITY that will control erosion and reduce the amount of "Pollutants," as defined by the Stormwater Code, and other sediments discharged from Premises. CITY may review the Prevention Plan periodically. Within thirty (30) days after written notice from CITY requesting an update of the Prevention Plan, OPERATOR shall submit an updated Prevention Plan to CITY'S satisfaction. OPERATOR shall implement all changes to the Prevention Plan as required by CITY and to ensure compliance with all applicable laws, ordinances, and regulations. OPERATOR shall inform its employees, contractors, subcontractors, agents and vendors of the Prevention Plan and ensure their compliance therewith.

SECTION 7: GENERAL PROVISIONS

7.1 Notices

- a. Any notice required or permitted to be given hereunder shall be in writing and may be served personally or by United States mail, postage prepaid, addressed to OPERATOR and to CITY as follows:

CITY:

Real Estate Assets Director
Civic Center Plaza
1200 Third Avenue, Suite 1700
San Diego, CA 92101-4155

OPERATOR:

General Manager
Frog's Club One
12159 World Trade Drive
San Diego, CA 92128

or to any mortgagee, trustee, or beneficiary, as applicable, at such appropriate address designated in writing by the respective party.

- b. Any party entitled or required to receive notice under this Agreement may by like notice designate a different address to which notices shall be sent.

- 7.2 **Compliance with Law.** OPERATOR shall at all times in the construction, maintenance, occupancy, and operation of the premises comply with all applicable laws, statutes, ordinances, and regulations of CITY, county (including, but not limited to the county's Department of Environmental Health Services' requirements for the safe operation of a public swimming pool), state, and federal governments at OPERATOR'S sole cost and expense. In addition, OPERATOR shall comply with any and all notices issued by the Mayor, or his/her designee, under the authority of any such law, statute, ordinance, or regulation.

- 7.3 **Equal Benefits.** OPERATOR shall comply with San Diego Municipal Code sections 22.4301-22.4308, which require lessees of City-owned property to offer

the same employment benefits to employees with spouses and employees with domestic partners. OPERATOR shall certify that it will maintain such equal benefits throughout the term of this Lease.

- 7.4 CITY Approval. The approval or consent of CITY, wherever required in this Agreement, shall mean the written approval or consent of the Mayor, or his/her designee, unless otherwise specified, without need for further resolution by the City Council.
- 7.5 Nondiscrimination. OPERATOR agrees not to discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in OPERATOR'S use of the premises, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.
- 7.6 Compliance with CITY'S Equal Opportunity Contracting Program.
- a. Equal Opportunity Contracting. OPERATOR shall submit to the Project Manager statistical information as requested in the City of San Diego Contract Activity Report indicating the amount of subcontracting provided by firms during the period covered by the report. This information should be accompanied by an invoice from each subconsultant/subcontractor/vendor/service provider listed in the report.
- b. Equal Employment Opportunity. OPERATOR will comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; The California Fair Employment Practices Act; and any other applicable federal and state laws and regulations hereafter enacted. OPERATOR will not discriminate against any employee or applicant for employment based on race, religion, color, ancestry, age, gender sexual orientation, disability, medical condition, or place of birth.

Upon request by the City of San Diego, OPERATOR will submit a current Work Force Report and, if required, an Equal Employment Opportunity Plan which sets forth the actions that OPERATOR will take to achieve the CITY'S goals for the employment of African Americans, American Indians, Asians, Filipinos, Latinos, women, and people with disabilities.

Further, OPERATOR will cause the foregoing provisions to be inserted in all subcontracts for any work covered by this Agreement so that such provisions will be binding upon each subcontractor.

- c. Equal Benefits. OPERATOR shall comply with San Diego Municipal Code sections 22.4301-22.4308, which require lessees of City-owned property to offer the same employment benefits to employees with spouses and

employees with domestic partners. OPERATOR shall certify that it will maintain such equal benefits throughout the term of this Agreement.

- d. Local Business and Employment. OPERATOR acknowledges that the City of San Diego seeks to promote employment and business opportunities for local residents and firms on all CITY contracts. OPERATOR will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this Agreement from local residents and firms as opportunities occur. OPERATOR agrees to hire qualified local residents and firms whenever feasible.

OPERATOR understands that failure to comply with the above requirements and/or submitting false information in response to these requirements may result in termination of this Agreement and debarment from participating in CITY contracts for a period of not less than one (1) year.

- 7.7 Partial Invalidity. If any term, covenant, condition, or provision of this Agreement is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.
- 7.8 Legal Fees. In the event of any litigation regarding this Agreement, the prevailing party shall be entitled to an award of reasonable legal costs, including court and attorney's fees.
- 7.9 Number and Gender. Words of any gender used in this Agreement shall include any other gender, and words in the singular number shall include the plural, when the tense requires.
- 7.10 Captions. The Agreement outline, section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Agreement. The numbers of the paragraphs and pages of this Agreement may not be consecutive. Such lack of consecutive numbers is intentional and shall have no effect on the enforceability of this Agreement.
- 7.11 Entire Understanding. This Agreement contains the entire understanding of the parties. OPERATOR, by signing this Agreement, agrees that there is no other written or oral understanding between the parties with respect to the premises. Each party has relied on its own examination of the premise, advice from its own attorneys, and the warranties, representations, and covenants of the Agreement itself. Each of the parties in this Agreement agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty whatsoever which is not contained in this Agreement.

The failure or refusal of any party to read the Agreement or other documents, inspect the premises, and obtain legal or other advice relevant to this transaction

constitutes a waiver of any objection, contention, or claim that might have been based on these actions. No modification, amendment, or alteration of this Agreement will be valid unless it is in writing and signed by all parties.

- 7.12 CITY Employee Participation Policy. It is the policy of CITY that all CITY contracts, Agreements, or Agreements with lessees, consultants, vendors, or OPERATORS shall include a condition that the contract, Agreement, or lease may, at the sole option of CITY, be unilaterally and immediately terminated by CITY if the contractor or OPERATOR employs an individual who, within the twelve months immediately preceding such employment, did in his/her capacity as a CITY officer or employee participate in negotiations with or otherwise have an influence on the recommendation made to the City Council in connection with the selection of the contractor or OPERATOR. It is not the intent of this policy that these provisions apply to members of the City Council.
- 7.13 Drug-free Workplace. OPERATOR shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:
- a. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited on the premises and specifying the actions that will be taken against employees for violations of the prohibition.
 - b. Establishing a drug-free awareness program to inform employees about all of the following:
 - (1) The dangers of drug abuse in the workplace.
 - (2) The OPERATOR'S policy of maintaining a drug-free workplace.
 - (3) Any available drug counseling, rehabilitation, and employees assistance programs.
 - (4) The penalties that may be imposed upon employees' for drug abuse violations.
 - c. OPERATOR shall include in each sublease Agreement language which indicates the sublessee's Agreement to abide by the provisions of a drug-free workplace. OPERATOR and sublessees shall be individually responsible for their own drug-free workplace programs.
- 7.14 Disabled Access Compliance. OPERATOR agrees to comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA);

and any other applicable state and federal laws and regulation hereafter enacted protecting the rights of people with disabilities. OPERATOR'S compliance shall include but not necessarily limited to the following:

- a. OPERATOR shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment.
- b. No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs, or activities of OPERATOR.
- c. OPERATOR shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
- d. Where required by law, OPERATOR shall comply with CITY'S disabled access requirements by bringing up to code and making accessible any areas of the premises which deny access to disabled persons. All such improvements and alterations shall be at the sole cost of OPERATOR.
- e. OPERATOR shall include language in each sublease Agreement which indicates the sublessee's Agreement to abide by the foregoing provisions. OPERATOR and sublessees shall be individually responsible for their own ADA employment programs.

OPERATOR understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall constitute a default under this Agreement.

SECTION 8: SPECIAL PROVISIONS

- 8.1 Corporate Authority. Each individual executing this Agreement on behalf of OPERATOR represents and warrants that he/she is duly authorized to execute and deliver this Agreement on behalf of said corporation, in accordance with a duly adopted resolution of the Board of Directors of the corporation or in accordance with the bylaws of the corporation, and that this Agreement is binding upon the corporation in accordance with its terms, and that OPERATOR is a duly qualified corporation and all steps have been taken prior to the date hereof to qualify OPERATOR to do business in the state where the premises are situated.
- 8.2 Standard of Employees. OPERATOR and its employees shall at all times conduct themselves and the operations on the premises in a creditable manner.

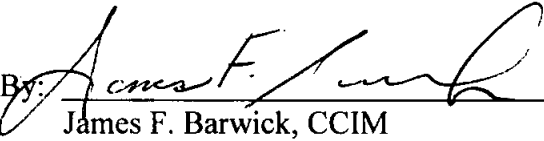
SECTION 9: SIGNATURES

9.1 Signature Page.

IN WITNESS WHEREOF, this operating Agreement is executed by CITY, acting by and Through its City Mayor, and by OPERATOR, acting by and through its lawfully authorized officers.

THE CITY OF SAN DIEGO

Date: 3/17/11

By: 
James F. Barwick, CCIM
Director, Real Estate Assets

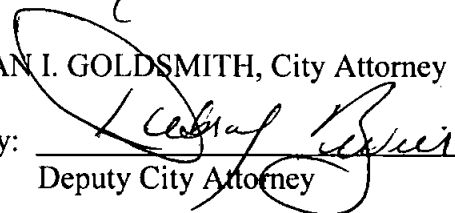
OPERATOR: Club One, Inc.
a Delaware Corporation

Date: 3/11/11

By: 
Name: Bill McFide
Title: President

APPROVED as to form and legality this 23rd day of March, 2011.

JAN I. GOLDSMITH, City Attorney

By: 
Deputy City Attorney

VEB/cb
1-14-11

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SECTION 10: EXHIBITS

10.1 Legal Description.

Being the southerly portion of Parcel 4 of Parcel Map No. 14678, located in the City of San Diego, County of San Diego, State of California, said parcel map being recorded by the County of said county on February 12, 1987 as File No. 87-079344 of Official Records. Said Parcel consists of 1.3 acres, more or less.

Exhibit 10.2 – Parcel View



**EQUAL BENEFITS ORDINANCE
CERTIFICATION OF COMPLIANCE**



For additional information, contact:

**CITY OF SAN DIEGO
EQUAL BENEFITS PROGRAM**

202 C Street, MS 9A, San Diego, CA 92101
Phone (619) 533-3948 Fax (619) 533-3220

COMPANY INFORMATION

Company Name: Club One Inc. 03A Properties Contact Name: Bill McBride
Company Address: 555 Market Street 13th Floor Contact Phone: 415-285-1238
SF CA 94105 Contact Email: Bill.McBride@clubone.com

CONTRACT INFORMATION

Contract Title: Frog's Carmel Ranch Pool Start Date: 4/1/11
Contract Number (if no number, state location): End Date: 3/31/14

SUMMARY OF EQUAL BENEFITS ORDINANCE REQUIREMENTS

The Equal Benefits Ordinance (EBO) requires the City to enter into contracts only with contractors who certify they will provide and maintain equal benefits as defined in San Diego Municipal Code §22.4302 for the duration of the contract. To comply:

- Contractor shall offer equal benefits to employees with spouses and employees with domestic partners.
 - Benefits include health, dental, vision insurance; pension/401(k) plans; bereavement, family, parental leave; discounts, child care; travel/relocation expenses; employee assistance programs; credit union membership; or any other benefit.
 - Any benefit not offered to an employee with a spouse, is not required to be offered to an employee with a domestic partner.
- Contractor shall post notice of firm's equal benefits policy in the workplace and notify employees at time of hire and during open enrollment periods.
- Contractor shall allow City access to records, when requested, to confirm compliance with EBO requirements.
- Contractor shall submit *EBO Certification of Compliance*, signed under penalty of perjury, prior to award of contract.

NOTE: This summary is provided for convenience. Full text of the EBO and its Rules are posted at www.sandiego.gov/administration.

CONTRACTOR EQUAL BENEFITS ORDINANCE CERTIFICATION

Please indicate your firm's compliance status with the EBO. The City may request supporting documentation.

- ☒ I affirm compliance with the EBO because my firm (contractor must select one reason):
- ☒ Provides equal benefits to spouses and domestic partners.
 - ☐ Provides no benefits to spouses or domestic partners.
 - ☐ Has no employees.
 - ☐ Has collective bargaining agreement(s) in place prior to January 1, 2011, that has not been renewed or expired.

- ☐ I request the City's approval to pay affected employees a cash equivalent in lieu of equal benefits and verify my firm made a reasonable effort but is not able to provide equal benefits upon contract award. I agree to notify employees of the availability of a cash equivalent for benefits available to spouses but not domestic partners and to continue to make every reasonable effort to extend all available benefits to domestic partners.

It is unlawful for any contractor to knowingly submit any false information to the City regarding equal benefits or cash equivalent associated with the execution, award, amendment, or administration of any contract. (San Diego Municipal Code §22.4307(a))

Under penalty of perjury under laws of the State of California, I certify the above information is true and correct. I further certify that my firm understands the requirements of the Equal Benefits Ordinance and will provide and maintain equal benefits for the duration of the contract or pay a cash equivalent if authorized by the City.

Bill McBride
Name/Title of Signatory

Bill McBride
Signature

3/22/11
Date

FOR OFFICIAL CITY USE ONLY

Receipt Date: 3/24/11 EBO Analyst: [Signature] ☒ Approved ☐ Not Approved - Reason: