

**DUPLICATE**

THE CITY OF SAN DIEGO

LEASE AGREEMENT

KENCAL OWNERSHIP,  
A CALIFORNIA LIMITED LIABILITY COMPANY

DOCUMENT NO. RR-300863  
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OFFICE OF THE CITY CLERK  
SAN DIEGO, CALIFORNIA

## **CITY OF SAN DIEGO LEASE AGREEMENT**

This Lease Agreement ("Lease") is entered into between the CITY OF SAN DIEGO, a municipal corporation, ("CITY") and KenCal Ownership LLC, a California limited liability company ("LESSEE").

### **SECTION 1: PREMISES**

- 1.1 Leased Premises. CITY leases to LESSEE and LESSEE leases from CITY all of that City-owned real property situated in the City of San Diego, County of San Diego, State of California, consisting of approximately 9.73 land acres and 9.119 water acres, described in Exhibit "A" PREMISES attached to this Lease and by this reference made part of this Lease. The real property is hereinafter called the "Premises."
- 1.2 Easements and Reservations.
  - a. CITY 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, in its sole discretion, 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 LESSEE'S use of the Premises and will reimburse LESSEE for physical damages, if any, to the permanent improvements located on the Premises resulting from CITY exercising the rights reserved in this section. The 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.

- 1.3 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 LESSEE (or beneficiary or mortgagee) will be as follows:

- a. If the entire Premises is taken, this Lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- b. If a partial taking of the Premises, and in the opinion of CITY, the remaining part of the Premises is unsuitable for the lease operation, this Lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- c. If a partial taking of the Premises, and in the opinion of CITY, the remaining part of the Premises is suitable for continued lease operation, this Lease 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 taking shall belong to CITY, whether the taking results in diminution in value of the leasehold or the fee or both; provided, however, LESSEE shall be entitled to any award attributable to the taking of, or damages to LESSEE'S then remaining leasehold interest in installations or improvements of LESSEE. CITY shall have no liability to LESSEE 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, LESSEE shall retain whatever interest it may have in the fair market value of any improvements placed by it, or any prior ground lease tenants, on the Premises in accordance with this Lease, or any prior ground leases.
- f. No Inverse Condemnation. The exercise of any CITY right under this Lease shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for inverse condemnation.

- 1.4 Related Council Actions. By entering into this Lease, 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 is not limited to rezonings, variances, environmental clearances, or any other governmental agency approvals which may be required for the development and

operation of the Premises. LESSEE shall diligently seek all entitlements and actions (and shall pay for the cost of related permits, licenses and approvals as are required thereby) from both CITY and other governmental agencies with jurisdiction over the Premises, as are necessary to develop and operate the use contemplated by this Lease.

- 1.5 Quiet Possession. LESSEE, paying the rent and performing the covenants and agreements in this Lease, shall at all times during the Term (defined in Section 2.1 below) peaceably and quietly have, hold, and enjoy the Premises. If CITY for any reason cannot deliver possession of the Premises to LESSEE at the commencement of the Term, or if during the Term LESSEE is temporarily dispossessed through action or claim of a title superior to CITY'S, then this Lease shall not be voidable nor shall CITY be liable to LESSEE for any loss or resulting damage, but there shall be determined and stated in writing by the City Manager of CITY a proportionate reduction of the minimum or flat rate rent for the period or periods during which LESSEE is prevented from having the quiet possession of all or a portion of the Premises.
- 1.6 Operation of Facilities. A regular schedule of days and hours of operation shall be established by LESSEE to best serve the public. The schedule shall be subject to the approval of the City Manager. The LESSEE shall diligently and in a creditable manner furnish services to the public in conformity with all applicable rules and regulations of the City of San Diego. The type and quality of service furnished by LESSEE for food service operations shall qualify for the conditions and requirements of the "A" Card issued by the County of San Diego to operators of food handling establishments.

## **SECTION 2: TERM**

- 2.1 Term. The Term of this Lease shall be fifty (50) years ("Term"). The Term of this Lease is effective following execution by the City Manager, approval by City Attorney and the close of escrow for the purchase of the leasehold interest of the Premises between Islandia Associates, Ltd. and LESSEE ("Commencement Date"). If the Commencement Date is not the first day of a calendar month, then the Term shall include the partial calendar month from and including the Commencement Date through the last day of the full Term, so that the Term shall expire on the last day of a calendar month. "Lease Year" as used in this Lease shall mean the 12-month period commencing on the first day of the calendar month following the Commencement Date. Within ten (10) days following the Commencement Date, CITY and Lessee shall enter into a Memorandum of Commencement Date (substantially in the form attached as Exhibit "B") which shall identify the Commencement Date and be incorporated into this Lease.

2.2 Holdover. Any holding over by LESSEE after the expiration or earlier termination of this Lease shall not be considered as a renewal or extension of this Lease. The occupancy of the Premises after the expiration or termination of this Lease constitutes a month-to-month tenancy, and all other terms and conditions of this Lease shall continue in full force and effect; provided, however, at the sole discretion of the City Manager, CITY shall have the right to increase the rent to bring the rent to a minimum of one hundred twenty-five percent (125.0%) of fair market value and to terminate the holdover tenancy at will with thirty (30) days prior written notice.

2.3 Quitclaim and Surrender of LESSEE'S Interest.

- a. Quitclaim Deed. On execution of this Lease, LESSEE shall deliver to CITY a quitclaim deed in recordable form quitclaiming all its rights in and to the Premises. CITY may record the deed only on the expiration or earlier termination of this Lease. If CITY requires any subsequent quitclaim deed, LESSEE or its successor in interest shall deliver the same within five (5) days after receiving written demand from CITY. If LESSEE fails or refuses to deliver the required deed, CITY may prepare and record a notice reciting LESSEE'S failure to execute this Lease provision, and the notice will be conclusive evidence of the termination of this Lease and all LESSEE'S rights to the Premises.
- b. Surrender and Restoration of Premises. At the expiration or earlier termination of this Lease, LESSEE shall surrender the Premises to CITY free and clear of all liens and encumbrances, except those liens and encumbrances which existed on the date of execution of this Lease, and in a decent, safe, and sanitary condition in accordance with the provisions of Section 8.10 Ownership of Improvements and Personal Property. In the case of termination of this Lease by CITY prior to the end of the specified Term, any liens and encumbrances must be approved in writing by the City Manager.

### **SECTION 3: USES**

- 3.1 Sole Permitted Uses. The Premises are leased to LESSEE solely and exclusively for the purposes of developing, operating and maintaining for the use of the general public, a resort hotel including restaurant, cocktail lounge, coffee shop, gift shop, boat slips, boat rental and sales, marine fuel docks, sportfishing facilities including sale and rental of fishing equipment, all in accordance with the General Development Plan referenced in Section 8.12 Development Plan and for other related purposes or incidental purposes as may be first approved in writing at the sole discretion of City Manager and for no other purpose whatsoever.

The use of the Premises for any unauthorized, illegal or unpermitted purpose shall constitute a substantial default and subject this Lease to termination at the sole option of the CITY. If LESSEE is reasonably in doubt as to the propriety of any particular use, LESSEE may request the written determination of the City Manager or designee that the use is permitted or is not permitted. The determination will be at the sole discretion of the City Manager or designee and shall be final as to the proposed use.

- 3.2 Failure to Use Premises. LESSEE covenants and agrees to use the Premises for the purposes specified in Section 3.1 Sole Permitted Uses and to diligently pursue the purposes throughout the term of this Lease. Failure to continuously use the Premises for the purposes permitted under this Lease, or the use of the Premises for purposes not expressly authorized herein, shall be grounds for termination by CITY.
- 3.3 Competent Management. Throughout the Term, LESSEE shall provide competent management of the Premises for the intended uses to the satisfaction of the City Manager. For the purposes of this paragraph, "competent management" shall mean demonstrated ability in the management and operation of a resort hotel and related activities in a fiscally responsible manner.

#### **SECTION 4: RENT**

- 4.1 Place of Payment. All rents required by this Lease must be made payable to the City Treasurer and mailed to:

The Office of the City Treasurer  
City of San Diego  
P.O. Box 122289  
San Diego, California 92112-4165

or hand 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 LESSEE. Mailed rental payments shall be deemed paid upon the date the payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed paid upon actual receipt by the City

Treasurer. LESSEE assumes all risk of loss and responsibility for late payment charges if payments are made by mail.

4.2 Rent.

- a. Minimum Rent. The annual minimum rent for a one-year period ("Construction Period") during the construction of the improvements related to the General Development Plan described in Section 8.12 Development Plan of this Lease shall be one million dollars (\$1,000,000.00), which is eighty-three thousand three hundred thirty-three dollars and thirty-three cents (\$83,333.33) on a monthly installment basis. The Construction Period shall commence on November 1, 2005 unless LESSEE provides written notice to CITY of changes in the construction schedule and establishes a revised starting date for the Construction Period. Under no circumstances shall the Construction Period begin later than July 1, 2006. If the Construction Period begins after the Commencement Date, the initial annual minimum rent for the period between the Commencement Date and the beginning of the Construction Period shall be one hundred ten thousand dollars (\$110,000.00) per month. The annual minimum rent between the end of the Construction Period and the end of the fourth Lease Year shall be one million three hundred twenty thousand dollars (\$1,320,000.00), which is one hundred ten thousand dollars (\$110,000.00) on a monthly installment basis. At the beginning of the fifth Lease Year, the minimum rent shall be adjusted as described in Section 4.2b Minimum Rent Adjustment of this Lease.

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 4.3 Payment Procedure of this Lease.

Provided, however, if the combined total percentage rent payments and monthly installments of the minimum rent during any Lease Year equal or exceed the required annual minimum rent for that year, then for the balance of the year, LESSEE shall discontinue paying monthly installments of the minimum rent and shall continue paying only percentage rents until the beginning of the following Lease Year. Provided further, if in any Lease Year, 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 total rent owed shall be credited

against the next payable rent as it becomes due. It is the intent of this provision that LESSEE 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 fifth Lease Year of this Lease and at the beginning of each three (3) year period thereafter during the Term, the annual minimum rent shall be adjusted to seventy-five percent (75%) of the annual average of actual rents paid or accrued during the two (2) years preceding the adjustment date. The annual minimum rent shall then be divided by twelve (12) to establish the new monthly minimum rent. CITY will calculate adjustments 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 in this Lease. Until the calculations are completed, LESSEE shall continue paying monthly minimum rents at the prior rate. LESSEE shall pay to CITY any additional rents determined by the adjustment to be due for the months previously paid at the prior rate within thirty (30) days following written notice. In no event shall any 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 Gross Income (as defined in Section 4.4 of this Lease) resulting from the use of the Premises:

Percentages

Seven and one-quarter percent (7.25%)

Business Activities

Of the gross income from the rental of rooms. The percentage rate for this activity shall increase to seven and one-half percent (7.5%) at the beginning of the sixth Lease Year; then seven and three-quarter percent (7.75%) at the beginning of the eleventh Lease Year. After the twenty-fifth Lease Year, the percentage rate shall be adjusted as described in Section 4.2d below.

Three and one-quarter percent (3.25%)

Of the gross income from the sale of food and non-alcoholic beverages prepared or dispensed on the Premises. The percentage rate for this activity shall increase to three and one-half percent (3.5%) at the beginning of the sixth Lease Year. After the twenty-fifth Lease Year, the percentage rate shall be adjusted as described in Section 4.2d below.

Six and one-quarter percent (6.25%)

Of the gross income from the sale of alcoholic beverages prepared or dispensed on the Premises. The percentage rate for this activity shall increase to six and one-half percent (6.5%) at the beginning of the sixth Lease Year; then seven percent (7.0%) at the beginning of the eleventh Lease Year. After the twenty-fifth Lease Year, the percentage rate shall be adjusted as described in Section 4.2d below.

Eight and one-half percent (8.5%)

Of the gross income from the operation of any gift shop or lobby shop on the Premises. The percentage rate for this activity shall increase to nine and one-quarter percent (9.25%) at the beginning of the sixth Lease Year; then ten percent (10.0%) at the beginning of the eleventh Lease Year. After the twenty-fifth Lease Year, the percentage rate shall be

|                                 |                                                                                                                                                                                            |
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|                                 | adjusted as described in<br>Section 4.2d below.                                                                                                                                            |
| Fifty percent (50.0%)           | Of the gross income from in-<br>house movies.                                                                                                                                              |
| Twenty-five percent (25.0%)     | Of the gross income from the<br>rental of boat slips and<br>related boating operations.                                                                                                    |
| Three percent (3.0%)            | Of the gross income from the<br>sale of petroleum products,<br>except diesel fuel.                                                                                                         |
| One and one-half percent (1.5%) | Of the gross income from the<br>sale of diesel fuel.                                                                                                                                       |
| Five percent (5.0%)             | Of the gross income from<br>commissions derived by<br>LESSEE from the sale of<br>used boats, used boat<br>engines, and used boat<br>trailers in which LESSEE has<br>no financial interest. |
| Two percent (2.0%)              | Of the gross income from the<br>sale of boats and motors,<br>except as otherwise specified<br>in this Lease, and any<br>accessories included at the<br>time of the sale.                   |
| Four percent (4.0%)             | Of the gross income from the<br>service of boats and motors,<br>sale of boat and motor parts,<br>and marine hardware.                                                                      |
| Seven percent (7.0%)            | Of the gross income from the<br>sale of sportfishing and sight-<br>seeing tickets.                                                                                                         |
| Fifty percent (50.0%)           | Of LESSEE'S gross income<br>from coin-operated<br>telephones.                                                                                                                              |

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| Seven percent (7.0%)        | Of the gross income from all other telephone operations.                                                                                                                                                                                 |
| Twenty-five percent (25.0%) | Of the of the net commissions or any other compensation paid to LESSEE or sublessees for the right to install or operate coin-operated vending, game or service machines or devices on the Premises, excluding coin-operated telephones. |
| Ten percent (10.0%)         | Of the gross income from coin-operated machines or devices owned, rented or leased by LESSEE or sublessees for use on the Premises.                                                                                                      |
| Fifty percent (50.0%)       | Of the gross income derived from telecommunication installations permitted on the Premises.                                                                                                                                              |
| Ten percent (10.0%)         | Of the gross income derived from all other activities permitted on the Premises.                                                                                                                                                         |

The City Manager, in his sole discretion, may approve an additional percentage rate or flat rate of rent for each other incidental service or operation supplementary to the permitted use(s) set forth under Section 3.1 Sole Permitted Uses of this Lease as may be approved in writing by the City Manager prior to commencement of the other service(s) or operation(s). Provided, however, any activity conducted on the Premises without prior approval by the City Manager shall be subject to the requirements of Section 4.7 Unauthorized Use Charge of this Lease.

- d. Percentage Rent Adjustment. At least six (6) months prior to the beginning of the twenty-sixth Lease Year and at least six (6) months prior to the beginning of the thirty-sixth Lease Year, and forty-sixth Lease Year, the parties, through appraisal, will adjust the percentage rates of

LESSEE'S gross income to be paid CITY effective upon the first day of the twenty-sixth Lease Year, thirty-sixth Lease Year, and forty-sixth Lease Year. The adjustment will be made to the degree necessary to provide a fair rental to CITY as determined by the City Manager and LESSEE, taking into consideration the criteria set forth in Section 4.2e Percentage Rent Appraisal. The City Manager, in his sole discretion, may determine that no percentage rent adjustment is necessary and waive the requirement for the appraisal process for any specific adjustment period.

- e. Percentage Rent Appraisal. If the parties do not agree upon the amount of adjustment to the percentage rates as provided for in Section 4.2d Percentage Rent Adjustment, then the adjustment shall be determined by a qualified professional independent real estate appraiser selected by mutual consent of the parties to this Lease from the list of appraisers approved by CITY. CITY and LESSEE agree to equally share the cost of the mutually selected appraiser.

If the parties do not reach agreement as to selection of a mutually acceptable appraiser, then CITY and LESSEE shall each select a qualified professional independent real estate appraiser who in turn will select a third qualified professional independent real estate appraiser, which third appraiser will be employed to set the percentage rates to be applied to LESSEE'S percentage rate adjustment.

If a mutually acceptable third appraiser is not agreed upon between the two selected appraisers within ten (10) days, then the third appraiser will be appointed by the presiding judge of the Superior Court of the State of California, County of San Diego, acting in his or her individual capacity, upon application by either CITY or LESSEE with prior written notice thereof to the other party. If the Superior Court judge declines to make the appointment, the parties hereto agree that the third appraiser shall be promptly determined in accordance with the rules of the American Arbitration Association. The third appraiser shall complete the assignment within sixty (60) days of appointment. Each party shall pay the cost of its own selected appraiser, and both CITY and LESSEE agree to equally share the cost of the third mutually selected or court-appointed appraiser. CITY and LESSEE agree to accept and be bound by the percentage rates determined by the appraiser selected or appointed to complete the assignment.

In establishing the percentage rates for the items under review, the appraiser shall consider the Premises as a fee simple absolute estate, and as vacant and available for a Term equal to the initial full term of the Lease on the open market for the authorized purposes of this Lease at the

commencement of the rental period under review. The appraiser will be guided by prevailing market percentage rates for similar operations primarily within the Southern California area, if available. If the appraisal is not completed in time to permit the percentage adjustment to be made upon the applicable commencement of the period under review, LESSEE shall continue to pay rent in accordance with the then-existing lease rates, and the adjustment, when determined, will be retroactive to the adjustment date. LESSEE shall pay any deficiency to CITY within sixty (60) days after determination of the new percentage rate(s). In no event, however, shall any rent adjustment result in any decrease in any percentage rental rate.

4.3 Payment Procedure.

- a. On or before the last day of the calendar month following the calendar month in which the Gross Income subject to rents was earned, LESSEE shall provide to CITY a statement signed by LESSEE or its authorized agent attesting to its accuracy, which shall be legally binding upon LESSEE, and which will include the following:
  - i. One-twelfth of the annual minimum rent until the full annual rent is achieved in any Lease Year.
  - ii. 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.
  - iii. The percentage rental due CITY, computed and totaled.
  - iv. The accumulated total of all rents previously paid for the current Lease Year.
- b. Together with the statements, LESSEE shall provide payment in the greater of the two following amounts:
  - i. One-twelfth of the annual minimum rent; or
  - ii. The total percentage rent due CITY computed as described in this section.
- c. Any rents due CITY from sublease activities or operations shall be calculated based upon the earliest of the following dates (whether or not

prior approval was given by CITY as required by this Lease and whether or not a separate percentage rent was established by CITY):

- i. Sublease commencement date; or
- ii. Physical occupancy date; or
- iii. Earliest activity date (i.e., sale of goods, solicitation of business, construction or alterations, etc.).

4.4 Gross Income. "Gross Income" as used in this Lease, includes all income resulting from occupancy of the Premises from whatever source derived whether received or to become due. Gross Income includes income received by LESSEE or by any sublessee, permittee or licensee, or their agents, and all Gross Income received by any sublessee, permittee, licensee, or other party as a result of occupancy or operation of the Premises, except as may be otherwise specified in this Lease. Gross Income does not include federal, state, or municipal taxes collected from the consumer (regardless of whether the amount is stated to the consumer as a separate charge) and paid over periodically by LESSEE 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 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 the taxes and refunds shall be clearly shown on the books and records of LESSEE. The percentage rent shall be calculated and paid by LESSEE on the basis of the Gross Income whether the income is received by LESSEE or by any sublessee, permittee or licensee, or their agents, and all Gross Income received by any sublessee, permittee, licensee, or other party as a result of occupancy of the Premises or the operations conducted on or from the Premises shall be regarded as Gross Income of LESSEE for the purpose of calculating the percentage rent under this Lease required to be paid by LESSEE to CITY, except as may be otherwise specified by or pursuant to this Lease.

4.5 Inspection of Records.

- a. Records. LESSEE shall, at all times during the 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 and 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 receipt. The registers will be equipped with devices that lock in sales totals and other transaction numbers and sales details that are not resettable. Totals registered shall be read and recorded at the beginning and end of each business day.

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

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

- b. Financial Statements. Within sixty (60) days after the end of each Lease Year, LESSEE shall, at its expense, submit to CITY a statement in which the total Gross Income 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. The statement shall be signed by LESSEE or its authorized agent attesting to the accuracy of the Gross Income and shall be legally binding upon LESSEE.
- c. Right to Inspect. All LESSEE'S books of account, records, and supporting documentation, as described in Section 4.5 of this Lease, will be kept for at least five (5) years and made available to CITY in one location within the City of San Diego. The 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 LESSEE, 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 Lease.

At CITY'S request, LESSEE shall promptly provide, at LESSEE'S expense, any necessary data to enable CITY to fully comply with all requirements of the state or federal government for lease information or reports concerning the Premises. The data will include, if requested by CITY, a detailed breakdown of LESSEE'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 LESSEE agrees to pay CITY'S cost of audit(s):

- i. The audit(s) reveal an underpayment of more than five percent (5%) or more than Ten Thousand Dollars (\$10,000), whichever is

less, between the rent due as reported and paid by LESSEE pursuant to this Lease and rent due as determined by the audit(s); or

- ii. LESSEE has failed to maintain complete and true books, records, accounts, and supporting source documents in strict accordance with this section of this Lease.

LESSEE shall pay any deficiency determined by the audit(s) plus interest on the amount as defined in Section 4.6 Delinquent Rent of this Lease, within thirty (30) days of notice by CITY. CITY will credit any overpayment against incoming rents. Any overpayment determined after the end of this Lease will be refunded by CITY within thirty (30) days of confirmation by the City Manager of the audit(s) findings.

- e. Default. LESSEE'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 Lease, a breach of this Lease and cause for termination.

#### 4.6 Delinquent Rent.

- a. Late Payment. If LESSEE fails to pay the rent when due, LESSEE shall 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, LESSEE shall pay an additional five percent (5%) [being a total of ten percent (10%)], which is agreed by the parties to this Lease 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. In no event shall the charge for late payments of rent be less than twenty-five dollars (\$25).
- b. Audit Deficiency. If a CITY audit(s), as 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 LESSEE shall pay CITY the cost of the audit(s) plus ten percent (10%) per year on the amount by which the 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 in this Lease. In the event CITY audit(s) discloses that the unpaid rent is less than five percent (5%) of the total rent, and should LESSEE fail to pay the unpaid rent within thirty (30) days after written notice from CITY, an additional fee of ten percent (10%) of the unpaid amount shall be added to the unpaid amount to compensate CITY for costs and losses due to the nonpayment. LESSEE agrees to pay the

amounts and further agrees that the specific late charges represent a fair and reasonable estimate of the costs that CITY will incur from LESSEE'S late payment. Acceptance of late charges and any portion of the late payment by CITY shall in no event constitute a waiver of LESSEE default with respect to late payment, nor prevent CITY from exercising any of the other rights and remedies granted in this Lease.

- 4.7 Unauthorized Use Charge. LESSEE shall pay CITY fifty percent (50%) of the gross receipts for any service or use that is not permitted by this Lease. This payment is subject to the due date provided in this Lease for rental payments and the provision for delinquent rent. The existence of the fifty percent (50%) 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 or to default LESSEE for participating in or allowing any unauthorized use of the Premises.

## **SECTION 5: ASSIGNMENT**

- 5.1 Assignment and Subletting. LESSEE shall not assign this Lease or any interest in this Lease and shall not sublet the Premises or any part, or any right or privilege appurtenant to this Lease, or allow any other person, except employees, agents, and guests of LESSEE, to use or occupy the Premises, or any part, without the prior written consent of the City Manager 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 assignment or subletting without consent shall be void and shall, at the option of CITY, terminate this Lease. This Lease shall not, nor shall any interest in this Lease, be assignable as to the interest of LESSEE by operation of law, without the written consent of the City Manager.

"Assignment" for the purposes of this clause shall include any transfer of any ownership interest in this Lease by LESSEE or by any partners, principals, or stockholders, as the case may be, from the original LESSEE, 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 assigned or subleased and that it will keep and perform all covenants, conditions, and provisions of this Lease which are applicable to the rights acquired. The City Manager shall require, as a condition to approval of any sublease of the majority portion of the leasehold or any assignment, that the LESSEE pay additional consideration to CITY, as set forth in Section 5.3 Additional Consideration to CITY of this Lease, commencing on the effective date of the proposed sublease of the majority portion of the leasehold or assignment, and may further require

that this Lease or the requested sublease otherwise be revised to comply with standard CITY lease requirements that are then current. Pursuant to City Charter Section 225, which is incorporated into this Lease by reference, the City Manager must review and approve every person or entity which will have an interest in this Lease as a sublessee or assignee. The City Manager's approval will not be unreasonably withheld, provided all persons and entities are of good character and reputation in the community.

- 5.2 Encumbrance. Subject to prior consent by City Manager, which shall not be unreasonably withheld, LESSEE may encumber this Lease, its leasehold estate, and its improvements thereon by deed of trust, mortgage, chattel mortgage, or other security instrument to assure the payment of a promissory note or notes of LESSEE, upon the express condition that the proceeds of the loan or loans be devoted exclusively to the purpose of acquiring the leasehold interest and developing the Premises in accordance with Section 8.12 Development Plan of this Lease. However, a reasonable portion of the loan proceeds may be disbursed for payment of incidental costs of construction, including but not limited to the following: off-site improvements for service of the Premises; on-site improvements; escrow charges; premiums for hazard insurance or other insurance or bonds required by CITY; title insurance premiums; reasonable loan costs such as discounts, interest, and commissions; and architectural, engineering, and attorneys fees and other normal expenses incidental to the construction.

Any subsequent encumbrances on the Premises or on any permanent improvements on the Premises must first have the approval in writing of the City Manager. Subsequent encumbrances shall also be for the exclusive purpose of development of the Premises. Provided, however, after the Premises are fully developed in accordance with said Development Plan to the satisfaction of the City Manager, proceeds from refinancing or from subsequent encumbrances may be used to reduce LESSEE'S equity so long as LESSEE pays additional consideration to CITY as set forth in Section 5.3 Additional Consideration to CITY of this Lease, and further that LESSEE understands and specifically agrees that the City Manager shall have the sole and absolute discretion to approve, disapprove, or condition any proposed subsequent encumbrance, including but not limited to amending the Lease to provide then current rents and provisions.

In the event any approved deed of trust or mortgage or other security-type instrument should at any time be in default and be foreclosed or transferred in lieu of foreclosure, CITY will accept the approved mortgagee or beneficiary of the Lease as its new tenant under this Lease with all the rights, privileges, and duties granted and imposed in this Lease.

Upon prior written approval by City Manager, the mortgagee or beneficiary may assign this Lease to its nominee, if nominee is a reputable, qualified, and financially responsible person or entity in the opinion of City Manager. Any deed of trust, mortgage, or other security instrument shall be subject to all of the terms, covenants, and conditions of this Lease and shall not be deemed to amend or alter any of the terms, covenants, or conditions of this Lease. Pursuant to City Charter Section 225, the City Manager must review and approve every person or entity which will have a financial interest in this Lease. The City Manager's approval will not be unreasonably withheld, provided all persons and entities are of good character and reputation in the community.

- 5.3 Additional Consideration to CITY. CITY acknowledges that LESSEE will enter into an operating sublease with KenCal Operating LLC. LESSEE and CITY agree that in the event of an assignment, in the event of a subsequent subletting of the majority portion of the leasehold, or in the event of a refinancing creating an encumbrance against the leasehold after the permanent improvements have been constructed, pursuant to the Development Plan as described in Section 8.12 of this Lease, LESSEE shall pay to CITY two percent (2%) of the gross amount paid for the leasehold in connection with an approved assignment of the Lease, two percent (2%) of any amount paid LESSEE in consideration of a sublease of all or a majority portion of the leasehold, or two percent (2%) of the amount of any increased loan or encumbrance against the property over and above the amount of the then existing balance(s) of the existing encumbrance(s). 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 noncash consideration, including but not limited to stocks, bonds, deferred payments, secured and unsecured notes, and forbearances regarding claims and judgments. Prior to CITY'S consent to any assignment, majority subletting, or refinancing, LESSEE shall deliver to CITY a written statement of all sums due and owing to CITY from LESSEE pursuant to the provisions of this paragraph, together with an acknowledgment from the proposed assignee, sublessee, or refinancing agency 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, a sublease, or a refinancing. Any assignment, subletting, or refinancing in violation of the terms and conditions of this paragraph shall be void. The provisions of this paragraph shall not apply to:

- a. An assignment or transfer of a beneficial interest in the leasehold resulting from devise, bequest, intestate succession, or by operation of law for the benefit of the spouse or descendants (i) of LESSEE (if an individual) or (ii) of LESSEE'S principal owner or chief executive officer (if LESSEE is other than an individual);

- b. Another assignment for which the City Manager determines that the legal and equitable ownership interests in the leasehold have remained unchanged, such as a change in the legal or fictitious name of the LESSEE without any other change in the equity in beneficial use of, or legal title to, the leasehold as an asset or the income produced.
- 5.4 Control by Specified Individuals or Entities. The limited liability company named in this Lease as LESSEE shall remain owned and controlled by KAREC California Development Program, LLC, a California limited liability company at least to the extent of fifty-one percent (51%) of the membership interests of the corporation, and they shall, as co-executives, supervise the business enterprise operated on the Premises. Provided, however, if any of the members shall become incapacitated, then the other(s) shall continue in the supervision of the business enterprise. If all parties are incapacitated, then the members of the limited liability company shall select an experienced manager acceptable to CITY to supervise the enterprise on the Premises. Sale or transfer of any membership interest in the corporation in excess of five percent (5%) shall be considered an assignment of interest and shall be treated in accordance with the provisions of Section 5.1 Assignment and Subletting and Section 5.3 Additional Consideration to CITY of this Lease; provided, however, that the stock of any stockholder may be assigned to his or her spouse or direct lineal heirs upon notification in writing to CITY.
- 5.5 Mortgage Requirements. CITY shall execute the documents and agreements as may be reasonably required by LESSEE'S leasehold mortgagee which are not contrary to the term, conditions and provisions of this Lease. CITY further agrees to modify the provisions of this Lease regarding the giving of notice as may be reasonably required by LESSEE'S leasehold mortgagee.
- 5.6 Operating Agreements. CITY approves KenCal Operating LLC, as sublessee, Hyatt Corporation as operator and manager of the hotel, and JG Management as manager and operator of the marina and sportfishing operations of the Premises. Lessee shall submit, within 90-days of the Commencement Date, copies of the operating sublease with KenCal Operating LLC, and management agreements with Hyatt Corporation and JG Management for City Manager review and approval, which approval shall not be unreasonably withheld.

## **SECTION 6: DEFAULTS AND REMEDIES**

- 6.1 Defaults and Remedies. On the occurrence of a default by LESSEE, CITY shall have the right to pursue any one or more of the remedies listed in this section in addition to any other remedies now or later available to CITY in law or equity. These remedies are not exclusive but cumulative.

- a. Defaults. Each of the following shall constitute an event of default under this Lease:
- (1) LESSEE'S failure to make any payment required under this Lease when due if the failure continues for five (5) days following written notice of the failure by CITY.
  - (2) LESSEE defaults in the performance of any covenant or condition required by this Lease, other than those requiring payment to CITY, to be performed by LESSEE and fails to cure the default within thirty (30) days following written notice from CITY; or if any default, other than those requiring payment to CITY, is not curable within thirty (30) days, and fails to commence to cure the default(s) within the thirty-day period and diligently pursue the cure to completion.
  - (3) LESSEE voluntarily files any petition under any bankruptcy or insolvency act or law.
  - (4) LESSEE has involuntarily filed against it any petition under any bankruptcy or insolvency act or law and the matter is not dismissed within ninety (90) days of filing.
  - (5) LESSEE is adjudicated a bankrupt.
  - (6) LESSEE makes a general assignment for the benefit of creditors.
  - (7) LESSEE uses the Premises for any unauthorized purpose.
- b. Remedies
- (1) For Default Based Upon Nonpayment. Upon default by LESSEE for nonpayment under Section 6.1a (1) above, City may, at its option, give LESSEE, or any person claiming rights through LESSEE, a written Three-Day Notice to Pay or Quit or CITY may terminate the Lease and all right of LESSEE and of all persons claiming right through LESSEE to the Premises or to possession of the Premises and CITY may enter and take possession of the Premises and may recover the sum set forth below.
  - (2) For Any Other Default. Upon default by LESSEE based upon Section 6.1a (2-7) above, CITY may, at its option, terminate the lease and all right of LESSEE and of all persons claiming right through LESSEE to the Premises or possession of the Premises,

and CITY may enter and take possession of the Premises and may recover from LESSEE the sums set forth below. However, in the event that any default described in Sections 6.1a (2-7) is not curable within thirty (30) days after notice to LESSEE, CITY will not terminate this Lease pursuant to the default if LESSEE immediately commences to cure the default and diligently pursues the cure to completion.

- (3) Upon termination of the Lease due to default, City may recover the sum of:
- (a) the worth at the time of award of any unpaid rent that had been due at the time of termination;
  - (b) the worth at the time of award of the amount by which (i) the unpaid rent that would have been earned after termination until the time of award minus (ii) the amount of rent lost, if any, and LESSEE affirmatively proves could have been reasonably avoided;
  - (c) the worth at the time of award of the amount by which (i) the unpaid rent for the balance of the Term after the time of the award minus (ii) the amount of rent lost, if any, as LESSEE affirmatively proves could be reasonably avoided;
  - (d) any other amount necessary to compensate CITY for the detriment proximately caused by LESSEE'S failure to perform LESSEE'S obligations or that, in the ordinary course of things, would be likely to result; and
  - (e) all other amounts in addition to or in lieu of those previously stated as may be permitted from time to time by California law. As used in clauses (a) and (b) of this Section, the "worth at time of award" is computed by allowing interest at the rate of ten percent (10%) per annum. As used in clause (c) of this Section, 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 two percent (2%). As used in this Section the term "rent" shall include base rent, percentage rent and any other payments required by LESSEE.

- (4) If there is a deed of trust or mortgage on the leasehold interest, and LESSEE has provided CITY with an address where notice can be sent to the respective mortgagee or beneficiary, CITY will give the mortgagee or beneficiary written notice of the default(s) complained of, and the same mortgagee or beneficiary will have thirty (30) days from the notice to cure the default(s) or, if any the default is not curable within thirty (30) days, to commence to cure the default(s) and diligently pursue the cure to completion. The thirty (30) day period may be extended during the time as mortgagee or beneficiary pursues the cure with reasonable diligence upon written request by the mortgagee or beneficiary. CITY agrees that CITY shall not terminate this Lease in connection with any non-monetary default which Lender has elected to remedy or is causing to be remedied so long as Lender attempts to remedy such default with diligence toward completion (and if such non-monetary default is not susceptible to cure by Lender, so long as Lender is diligently pursuing foreclosure under its Mortgage).

If the mortgagee or beneficiary will be required to exercise its right to cure the default(s) through litigation or through foreclosure, then CITY will have the option of the following courses of action in order that the default(s) may be expeditiously corrected:

- (a) CITY may correct the default(s) and charge the costs of the default(s) to the account of LESSEE, which charge will be due and payable on the date that the rent is next due after presentation by CITY to LESSEE and mortgagee or beneficiary of a statement of the costs.
- (b) CITY may correct the default(s) and may recover the costs of the default(s) from the proceeds of any insurance fund held by CITY, CITY and LESSEE or by CITY and mortgagee or beneficiary, or CITY may use the funds of any faithful performance or cash bond on deposit with CITY, or CITY may call on the bonding agent to correct the default(s) or to pay the cost of correction performed by or at the direction of CITY.
- (c) CITY may terminate this Lease as to the rights of LESSEE by assuming or causing the assumption of liability for any trust deed or mortgage. LESSEE agrees to assume and pay any and all penalties or bonuses required by the beneficiaries, trustees or mortgagees as a condition of early payoff of the related obligations by CITY. CITY may, as

an alternative, substitute for the terminated LESSEE a new tenant reasonably satisfactory to the mortgagee or beneficiary. Any reasonable costs incurred by CITY in releasing to a new tenant will be the responsibility of the terminated LESSEE, and LESSEE agrees to reimburse CITY for any costs.

Should the default(s) be noncurable by LESSEE, then any lender holding a beneficial interest in the leasehold, whose qualifications as an assignee have been approved by CITY, will have the absolute right to substitute itself in place of LESSEE under this Lease and to commence performance of this Lease. If the mortgagee or beneficiary gives notice in writing of its election to so substitute itself within the thirty (30) day period after receiving written notice by CITY of the default, and the default, if curable, is cured by the mortgagee or beneficiary, then this Lease will not terminate pursuant to the default. In that event, CITY consents to the substitution and authorizes the mortgagee or beneficiary to perform under this Lease all the rights, privileges, and obligations of LESSEE, subject to cure of the default, if possible, by mortgagee or beneficiary and LESSEE agrees to assign all its interest in and to its leasehold estate to mortgagee or beneficiary. Upon written request by mortgagee or beneficiary, CITY shall enter into a new direct lease with the mortgagee or beneficiary under the same terms and conditions of the Lease for the remaining portion of the Term.

- c. Abandonment by LESSEE. Even though LESSEE has breached the Lease and abandoned the Premises, this Lease will continue in effect so long as CITY does not terminate this Lease, and CITY may enforce all its rights and remedies under this Lease, including but not limited to the right to recover the rent as it becomes due, plus damages. Any personal property left at the Premises thirty (30) days after the expiration or termination of this Lease shall be considered abandoned and LESSEE forfeits all ownership to the abandoned personal property. CITY may dispose of the abandoned personal property as it deems appropriate, without further liability to LESSEE or any person claiming an interest in the personal property. CITY may, at its option, remove or dispose of the abandoned personal property at LESSEE'S expense. LESSEE shall hold CITY harmless and shall defend CITY against all claims asserted by third persons claiming an interest in the personal property.

- 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 City Manager 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 Lease. 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. The property constituting the Premises is CITY-owned and held in trust for the benefit of the citizens of the City of San Diego. Any failure by the City Manager 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 the defaults are discovered or when the City Council directs the City Manager to take action or require the cure of any default after the default is brought to the attention of the City Council by the City Manager or by any concerned citizen.

## **SECTION 7: INSURANCE RISKS/SECURITY**

- 7.1 Indemnity. LESSEE shall defend, indemnify, protect, and hold the CITY, its elected officials, officers, representatives, agents, and employees harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to LESSEE'S employees, invitees, guests, agents, or officers, which arise out of or are in any manner directly or indirectly connected with the development or operation of the leasehold or the work and operations to be performed under this Lease, and all expenses of investigating and defending against same; provided, however, that LESSEE'S duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of the CITY, its elected officials, officers, representatives, agents, and employees.
- 7.2 Insurance.
- a. LESSEE shall take out and maintain at all times during the Term the following insurance at its sole expense:
- (1) Public liability and property damage insurance in the amount of not less than Five Million Dollars (\$5,000,000) Combined Single Limit Liability with an occurrence claims form. 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 LESSEE or by

authorized representatives of CITY or LESSEE 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 one hundred percent (100%) of the replacement cost. Any proceeds from a loss shall be payable jointly to CITY and LESSEE. 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 5.2 Encumbrance of this Lease, 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. LESSEE'S responsibility to maintain the insurance also includes the following:
- (1) Additional Insured. All insurance policies, by separate endorsement, shall name the CITY, its elected officials, officers, representatives, agents, and employees as additional insureds, 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 shall be in effect on or before the Commencement Date, except "course of construction fire insurance" shall be in force on commencement of all authorized construction on the Premises, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. LESSEE shall provide to the CITY, original certificates, endorsements and all other documents required in this Section 7.2 prior to the Commencement Date. These original documents will remain on file with CITY during the entire Term. At least thirty (30) days prior to the expiration of each policy, LESSEE shall furnish an original certificate(s) showing that a new or extended policy has been obtained which meets the terms of this Lease.
  - (2) Modification. CITY, at its discretion, may require the revision of amounts and coverages at any time during the Term by giving LESSEE 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.

LESSEE also agrees to obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this Lease.

- (3) Accident Reports. LESSEE shall report to CITY any accident causing more than ten thousand dollars (\$10,000) worth of 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 LESSEE 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. LESSEE shall reimburse CITY for the premiums paid with 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. The reimbursement and interest shall be paid by LESSEE on the first (1st) day of the month following the notice of payment by CITY.

Notwithstanding the preceding provisions of this Subsection (4), if LESSEE fails or refuses to take out or maintain insurance as required in this Lease or fails to provide the proof of insurance, CITY has the right to declare this Lease in default without further notice to LESSEE, and CITY shall be entitled to exercise all legal remedies in the event of a default.

- 7.3 Waste, Damage, or Destruction. LESSEE shall give notice to CITY of any fire or other damage that may occur on the Premises within ten (10) days of the fire or damage. LESSEE shall 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 a manner satisfactory to CITY. If the Premises is damaged by any cause which puts the Premises into a condition which is not decent, safe, healthy, and sanitary, LESSEE agrees to make or cause to be made full repair of the damage and to restore the Premises to the condition which existed prior to the damage; or, at CITY'S option, LESSEE 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 the damage, using for either purpose the insurance proceeds as set forth in Section 7.2 Insurance of this Lease.

LESSEE shall commence preliminary steps toward performing repairs, restoration, or replacement of the Premises within thirty (30) days of the occurrence of the fire or any damage, and shall complete the required repairs, restoration, or replacement within a reasonable time. CITY may determine an equitable deduction in the minimum annual rent requirement for the period or periods that the Premises are untenantable by reason of the damage.

## **SECTION 8: IMPROVEMENTS/ALTERATIONS/REPAIRS**

- 8.1 Acceptance of Premises. By signing this Lease, LESSEE represents and warrants that it has independently inspected the Premises and made all tests, investigations, and observations necessary to satisfy itself of the condition of the Premises. LESSEE agrees it is relying solely on independent inspection, tests, investigations, and observations in entering into this Lease. LESSEE further acknowledges that the Premises are in the condition called for by this Lease, that CITY has performed all work with respect to the Premises, and that LESSEE does not hold CITY responsible for any defects whether apparent or latent, in the Premises, including the presence of any hazardous wastes.
- 8.2 Entry and Inspection. CITY reserves and shall always have the right, but not the obligation, to enter the 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 on the Premises. If entry or inspection by CITY discloses that the Premises are not in a decent, safe, healthy, and sanitary condition, CITY shall have the right, after ten (10) days written notice to LESSEE, to have any necessary maintenance work done at the expense of LESSEE, and LESSEE shall pay promptly any and all costs incurred by CITY in having the necessary maintenance work done, in order to keep the Premises in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that the Premises are not in a decent, safe, healthy, and sanitary condition, CITY may at its sole option, without additional notice, require LESSEE to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. The bond shall be in an amount adequate in the opinion of CITY to correct the unsatisfactory condition. LESSEE shall pay the cost of the bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this Lease imposed on CITY.
- 8.3 Maintenance. LESSEE shall assume full responsibility and cost for the operation and maintenance of the Premises throughout the Term. LESSEE 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 the Development Plan described in Section 8.12 Development

Plan of this Lease and with all applicable laws. All applicable codes and standards of CITY, state and federal agencies shall be observed in all maintenance, repairs, and replacements on the Premises.

- 8.4 Improvements/Alterations. LESSEE shall not construct any exterior improvements, structures, or installations on the Premises, or make any exterior alterations to the Premises without prior written approval by the City Manager. LESSEE shall not make major structural or architectural design alterations to approved improvements, structures, or installations on the Premises without prior written approval by the City Manager and that approval shall not be unreasonably withheld. LESSEE shall notify City Manager or his designee of improvement projects on the Premises and shall inform the permitting authority that the Premises is City-owned property. This provision shall not relieve LESSEE of any obligation under this Lease to maintain the Premises pursuant to Section 8.3 Maintenance. CITY shall not be obligated by this Lease to make or assume any expense for any improvements or alterations.
- 8.5 Utilities. LESSEE shall order, obtain, and pay for all utilities and service and installation charges in connection with the development and operation of the Premises. All utilities shall be installed underground in compliance with a City-approved plan. The utilities serving the Premises as of the date of this Lease are in compliance with the requirements of the CITY.
- 8.6 Construction Bond. Whenever there is any construction to be performed on the Premises, where City Manager approval is required, LESSEE shall deposit with CITY, prior to commencement of the construction, a faithful performance bond in the amount of one hundred percent (100%) of the estimated construction cost of the work to be performed. The bond may be in cash or may be a corporate surety bond or other security satisfactory to CITY. The bond shall insure that the construction commenced by LESSEE shall be completed in accordance with the plans approved by CITY or, at the option of CITY, that the uncompleted construction will 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.
- 8.7 Liens. LESSEE 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 claims, including reasonable attorney's fees.

If improvements, alterations, or repairs are made to the Premises by LESSEE or by any party other than CITY, and a lien or notice of lien is filed, LESSEE shall within five (5) days of the 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.
- 8.8 Taxes. LESSEE shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon LESSEE or the Premises, including the land, any buildings, structures, machines, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by LESSEE or levied by reason of the business or other LESSEE activities related to the Premises, including any licenses or permits. LESSEE recognizes and agrees that this Lease may create a possessory interest subject to property taxation, and that LESSEE may be subject to the payment of taxes levied on the leasehold interest, and that LESSEE shall pay all possessory interest taxes. LESSEE further agrees that payment for taxes, fees and assessments will not reduce any rent due CITY.
- 8.9 Signs. LESSEE shall not 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 unauthorized item(s) are found on the Premises, LESSEE shall remove the item at its expense within twenty-four (24) hours notice by CITY. At the expiration of the twenty-four (24) hour period, CITY may remove the item at LESSEE'S cost. The minimum cost of removal of any unauthorized item shall not be less than three hundred dollars (\$300). The signage on the Premises as of the date of this Lease is in compliance with CITY requirements and was approved by the CITY.
- 8.10 Ownership of Improvements and Personal Property.
- a. Any and all improvements, trade fixtures, structures, and installations or additions to the Premises now existing or constructed on the Premises by LESSEE shall at Lease expiration or Lease 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 Lease.
  - b. If CITY elects not to assume ownership of all or any improvements, trade fixtures, structures, and installations, CITY shall so notify LESSEE thirty (30) days prior to Lease termination or one hundred eighty (180) days prior to Lease expiration, and LESSEE shall remove all the improvements, structures and installations as directed by CITY at LESSEE'S sole cost on or before Lease expiration or Lease termination. If LESSEE fails to remove any improvements, structures, and installations as directed, LESSEE agrees to pay CITY the full cost of any removal.

- c. LESSEE shall remove LESSEE-owned machines, appliances, equipment (other than trade fixtures), and other items of personal property by the date of the expiration or termination of this Lease. Any items which LESSEE 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 the items at LESSEE'S expense.
  - d. If any removal of personal property by LESSEE results in damage to the remaining improvements on the Premises, LESSEE agrees to repair all damage.
  - e. For any necessary removal by either CITY or LESSEE which takes place beyond the Lease expiration or Lease termination, LESSEE shall pay rent to CITY at the rate in effect immediately prior to the Lease expiration or Lease termination.
  - f. Notwithstanding any of the foregoing, if LESSEE desires to dispose of any of its personal property used in the operation of the Premises upon Lease expiration or Lease termination, then CITY shall have the first right to acquire or purchase the personal property.
- 8.11 Unavoidable Delay. If the performance of any act required of CITY or LESSEE 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, the 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 rent pursuant to this Lease. If LESSEE or CITY claims the existence of a delay, the party claiming the delay shall notify the other party in writing of the fact within ten (10) days after the beginning of the claimed delay.
- 8.12 Development Plan. LESSEE shall develop the Premises in accordance with the General Development Plan approved by the City Manager and filed in the Office of the City Clerk which plan is incorporated by this reference. The general contents and provisions of the General Development Plan are described in Exhibit "C" of this Lease. The City Manager or his designee shall have the authority to authorize changes to the plan provided that the principal components as defined in the General Development Plan may not be modified without City Council approval and a document evidencing any approved changes shall be filed in the Office of the City Clerk. Failure by LESSEE to comply with the General Development Plan shall constitute a major default and subject this Lease to

termination by CITY, and all improvements shall become the property of the City free and clear of all liens.

8.13 Failure to Meet Development Schedule. If LESSEE fails to complete construction in accordance with the schedule of development of the General Development Plan of this Lease, CITY is entitled to damages in the amount of one hundred dollars (\$100) for every day of failure to meet the schedule of development until completion of development, this amount representing liquidated damages. If construction is not completed within eighteen (18) months following the date specified for completion in the Development Plan, CITY may, at its option, terminate this Lease. The City Manager, in his sole discretion, may approve an extension to the development schedule of up to one (1) year without further City Council approval.

8.14 Hazardous/Toxic Waste.

- a. LESSEE shall not allow the release of hazardous substances in, on, under, or from 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 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 into this Lease.
- b. If any release of a hazardous substance occurs, that is caused by LESSEE, LESSEE'S subtenants and licensees, invitees and agents, LESSEE shall be responsible for all costs of remediation and removal of the substances in accordance with all applicable rules and regulations of governmental authorities.
- c. LESSEE shall defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from LESSEE'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.
- d. If LESSEE knows or has reasonable cause to believe that any hazardous substance has been released on or beneath the Premises, LESSEE shall give written notice to the City Manager within ten (10) days of receipt of

the knowledge or cause for belief. Provided, however, if LESSEE knows or has reasonable cause to believe that the substance is an imminent and substantial danger to public health and safety, LESSEE shall notify the City Manager immediately upon receipt of this knowledge or belief and shall take all actions necessary to alleviate the danger. LESSEE shall notify the City Manager immediately of any notice of violation received or initiation of environmental actions or private suits relative to the Premises. In addition, LESSEE and LESSEE'S sublessees shall not utilize or sell any hazardous substance on the Premises without the prior written consent of CITY.

- e. At any time within the twelve (12) months before Lease expiration or Lease termination, LESSEE, at CITY'S sole option, shall cause an 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. The environmental assessment shall be obtained at the sole cost and expense of LESSEE 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 the 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 the remediation or removal. LESSEE shall cause the remediation and/or removal recommended in the environmental assessment so that compliance with environmental law is achieved and shall be solely responsible for all costs and expenses incurred.

- 8.15 Coastal Commission Approval. LESSEE shall comply with the California Coastal Act, at its sole cost, and apply to the California Coastal Commission or other authorized body for any necessary coastal development permit authorizing the construction of improvements in the Coastal Zone. LESSEE will proceed with diligence to obtain any necessary permits.

## **SECTION 9: CITY POLICY IMPLEMENTATION PROVISIONS**

- 9.1 Compliance with Law. LESSEE shall at all times in the construction, maintenance, occupancy, and operation of the Premises comply with all current and future applicable laws, statutes, ordinances, and regulations of CITY, county, state, and federal governments at LESSEE'S sole cost and expense. In addition, LESSEE shall comply with any and all notices issued by the City Manager or his

authorized representative under the authority of any law, statute, ordinance, or regulation.

- 9.2 CITY Approval. The approval or consent of CITY, wherever required in this Lease, shall mean the written approval or consent of the City Manager unless otherwise specified, without need for further resolution by the City Council.
- 9.3 Nondiscrimination. LESSEE shall not 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 LESSEE'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.
- 9.4 Compliance with CITY'S Equal Opportunity Contracting Program. LESSEE acknowledges and agrees that it is aware of, and will comply with, City Council Ordinance No. 18173 (San Diego Municipal Code Sections 22.2701 through 22.2708, as amended), EQUAL EMPLOYMENT OPPORTUNITY OUTREACH PROGRAM, a copy of which is attached as Exhibit "D" as may be amended from time to time. LESSEE and all of its subcontractors are individually responsible to abide by its contents.  
LESSEE shall 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. LESSEE will not discriminate against any employee or applicant for employment on any basis prohibited by law.

LESSEE shall submit a current Work Force Report or a current Equal Employment Opportunity (EEO) Plan as required by Section 22.2705 of the San Diego Municipal Code, which sets forth the actions that LESSEE will take to achieve the CITY'S commitment to equal employment opportunities.

LESSEE shall insert the foregoing provisions in all subcontracts for any work covered by this Lease so that the provisions will be binding upon each subcontractor. LESSEE agrees that compliance with EEO provisions flowing from the authority of both parties will be implemented, monitored, and reviewed by the CITY'S Equal Opportunity Contracting Program staff.

LESSEE 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 Lease and debarment from participating in CITY contracts for a period of not less than one (1) year.

- 9.5 Local Business and Employment. LESSEE acknowledges that the City of San Diego seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. LESSEE will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this Lease from local residents and firms as opportunities occur. LESSEE agrees to hire qualified local residents and firms whenever feasible.
- 9.6 CITY Employee Participation Policy. This Lease may, at the sole option of CITY, be unilaterally and immediately terminated by CITY if LESSEE employs an individual who, within the twelve months immediately preceding the 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 LESSEE. These provisions do not apply to members of the City Council.
- 9.7 Drug-free Workplace. LESSEE 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 LESSEE'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. LESSEE shall include in each sublease agreement language which indicates the sublessee's agreement to abide by the provisions of a drug-free workplace. LESSEE and sublessees shall be individually responsible for their own drug-free workplace programs.

9.8 Disabled Access Compliance.

- a. LESSEE shall at all times in the construction, maintenance, occupancy and operation of the Premises comply with the 1990 Americans with Disabilities Act ("ADA") and Title 24 California Code of Regulations ("Building Code") as defined in Section 18910 of California Health and Safety Code ("Title 24") and any other applicable federal, state or local laws and regulations hereafter enacted protecting the rights of people with disabilities. LESSEE acknowledges and agrees that the LESSEE is aware of and will comply with Council Policy 100-04, incorporated in this Lease by reference, adopted by Resolution No. R-282153, relating to the federally-mandated ADA. LESSEE will be responsible for administering its own ADA and Title 24 program. LESSEE'S compliance shall include but not necessarily be limited to the following:
- b. LESSEE 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.
- c. 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 LESSEE.
- d. LESSEE shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
- e. Where required by law, LESSEE 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 improvements and alterations shall be at the sole cost of LESSEE.
- f. LESSEE shall include language in each sublease agreement which indicates the sublessee's agreement to abide by the foregoing provisions. LESSEE and sublessees shall be responsible for sublessee's ADA employment programs.
- g. LESSEE 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 Lease.

9.9 Water Quality - Best Management Practices and Stormwater Pollution Prevention Plan. CITY and LESSEE are committed to the implementation of programs to manage activities on the Premises in a manner which aids in the protection of San

Diego's precious water resources. LESSEE shall comply with the Best Management Practices ("BMP") including the Stormwater Management Plan ("SWMP") approved by CITY'S Stormwater Management Program. LESSEE shall submit, within ninety (90) days of the Commencement Date of this Lease, BMP and SWMP that are satisfactory to the City Manager that will control erosion and reduce the amount of pollutants and other sediments discharged from the Premises. The BMP and SWMP will be reviewed periodically by CITY. Upon written notice from the City Manager requesting an update of the BMP, LESSEE shall submit updated BMP and SWMP that are satisfactory to the City Manager within ninety (90) days of receipt of notice. LESSEE shall implement any necessary changes to the BMP and SWMP as a result of any review by CITY to ensure compliance with any changes in laws or regulations. When the BMP and SWPPS have been developed and implemented by the LESSEE, it is crucial that the practices be enforced and maintained. It is LESSEE'S responsibility to inform employees, contractors, subcontractors, agents and vendors of the BMP and SWMP.

## **SECTION 10: GENERAL PROVISIONS**

### **10.1 Notices.**

- a. Any notice required or permitted to be given shall be in writing and may be served personally or by United States mail, postage prepaid, addressed to LESSEE at the Premises or at another address designated in writing by LESSEE; and to CITY as follows:

City Manager  
Attention Real Estate Assets Director  
City Administration Building  
202 "C" Street, M.S. 9B  
San Diego, CA 92101-4155

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

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

### **10.2 Partial Invalidity.** If any term, covenant, condition, or provision of this Lease is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.

- 10.3 Legal Fees. In the event of any litigation regarding this Lease, the prevailing party shall be entitled to an award of reasonable legal costs, including court and attorneys fees.
- 10.4 Number and Gender. Words of any gender used in this Lease shall include any other gender, and words in the singular number shall include the plural, when the tense requires.
- 10.5 Captions. The lease 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 Lease. The numbers of the paragraphs and pages of this Lease may not be consecutive. The lack of consecutive numbers is intentional and shall have no effect on the enforceability of this Lease.
- 10.6 Entire Understanding. This Lease contains the entire understanding of the parties. LESSEE, by signing this agreement, the operating sublease and the management agreements 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 Premises, advice from its own attorneys, and the warranties, representations, and covenants of the Lease itself. Each of the parties in this Lease 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 Lease.
- The failure or refusal of any party to read the Lease 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 Lease will be valid unless it is in writing and signed by all parties.
- 10.7 Time is of Essence; Provisions Binding on Successors. Time is of the essence of all of the terms, covenants, and conditions of this Lease, and, except as otherwise provided in this Lease, all of the terms, covenants, and conditions of this Lease shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.
- 10.8 Corporate Authority. Each individual executing this Lease on behalf of LESSEE represents and warrants that he/she is duly authorized to execute and deliver this Lease on behalf of the limited liability company, in accordance with the consent of the membership of the limited liability company or in accordance with the limited liability company Operating Agreement of Lessee, and that this Lease is binding upon the limited liability company in accordance with its terms, and that LESSEE is a duly qualified limited liability company and all steps have been

taken prior to the Commencement Date to qualify LESSEE to do business in the state where the Premises are situated.

- 10.9 Standard of Employees. LESSEE and its employees shall at all times conduct themselves and the operations on the Premises in a creditable manner.
- 10.10 Supersedure. It is mutually agreed that this Lease, upon execution, supersedes and annuls that certain Lease executed on February 9, 1987, between the City of San Diego and Islandia Associates, Ltd. (Document RR-267648), which is hereafter void and of no effect except as to any rentals and fees which may have accrued or any rights and remedies accrued or granted to CITY under that lease.
- 10.11 CITY'S Lease Administrator. This Lease shall be administered on behalf of City by the City Manager or the City Manager's authorized designee.
- 10.12 Administrative Fees/Cost Recovery. LESSEE shall pay all fees levied by CITY pursuant to the fee schedule mandated in Council Policy 100-05 and CITY'S Administrative Regulation 95.25. The fee schedule may be updated from time to time at the sole discretion of CITY.
- 10.13 Governing Law. The Lease shall be governed, construed and enforced in accordance with the laws of the State of California.

## **SECTION 11: MISSION BAY PARK PROVISIONS**

- 11.1 Transient Slip (or Mooring) Facilities. Five (5) slips (or moorings), depending on the type of facilities offered, or ten percent (10%) of the total number of slips (or moorings) maintained by LESSEE, whichever number is larger, shall be specially marked for use by transient boats. In no event shall these slips (or moorings) designated for transients be rented or occupied by the same person or boat for longer than seventy-two (72) consecutive hours. It is the intent of this Section 11.1 to provide overnight slips (or moorings) space for boats normally berthing outside the Mission Bay area. Any method of circumventing this provision in violation of the intent herein expressed shall be construed as a breach of this condition and shall result in termination of this Lease.
- 11.2 Live Bait. LESSEE may sell live bait in connection with the purpose of this Lease but may not maintain any live bait receivers within the water area of the Premises, as long as adequate supplies are available from other sources within Mission Bay in the opinion of the City Manager. Provided that LESSEE cannot obtain bait of sufficient quantity and/or quality, upon written permission from the City Manager, LESSEE may install, maintain, and operate bait receivers on the Premises or at such other sites as may be acceptable to the City Manager.

11.3 Damaged Equipment. LESSEE shall salvage within twenty-four (24) hours any property, real or personal, of LESSEE'S declared by CITY to be a menace to navigation or a nuisance within Mission Bay and to salvage or cause to be salvaged any sunken vessel or property upon the Premises, irrespective of ownership. CITY may require that any boats not kept in a clean and operable condition be removed from the Premises.

11.4 Enforcement of Live-Aboard Regulation. LESSEE shall be responsible for the enforcement, both within and in connection with the Premises, of the following live-aboard regulation:

No person shall remain overnight on board any watercraft or houseboat in Mission Bay Park unless the watercraft or houseboat has a self-contained toilet on board that does not discharge into the waters of Mission Bay. No owner of any watercraft or houseboat shall allow it to be occupied overnight in Mission Bay Park for a period of more than ninety (90) days, whether successive or cumulative, during any one calendar year. A watercraft or houseboat is presumed to be occupied overnight when there are one or more persons on board after midnight. The lessees of Mission Bay Park lands are primarily responsible for the enforcement of this subsection on the water abutting their Leased premises.

The above Live-Aboard Regulation is presently set forth in the San Diego Municipal Code Section 63.25.71 and is subject to amendment or modification by the City Council. LESSEE also agrees to comply or secure compliance with any such amendment or modification.

11.5 Trash and Refuse. LESSEE shall provide containers on or immediately adjacent to the Premises to receive trash and refuse generated aboard vessels using LESSEE'S docking or launching facilities. Refuse containers shall be located so as to be conveniently used by occupants of vessels using LESSEE'S facilities and shall be of sufficient size and number to contain the refuse generated aboard all vessels using LESSEE'S facilities. The containers shall be covered and emptied regularly enough to prevent them from overflowing or creating unhealthful, unsightly, or unsanitary conditions. The contents of the containers shall be disposed of by LESSEE or other acting pursuant to LESSEE'S direction at authorized landfills or other garbage reception areas as provided under law applicable at the time of collection.

11.6 Plastic Food Containers.

a. LESSEE shall not, provide to its customers any prepared food in polystyrene foam food packaging, nor shall LESSEE obtain or keep any polystyrene foam food packaging of a type, design, and condition suited

for providing prepared food to its customers for consumption off the Premises.

- b. LESSEE'S food packaging for prepared food to be consumed on the Premises or for takeout food shall be biodegradable, and LESSEE shall provide upon demand evidence in the form of paid invoices to indicate the purchase of biodegradable containers in amounts sufficient to indicate compliance with this section. LESSEE'S food packaging for prepared food to be consumed off the Premises shall be biodegradable unless LESSEE demonstrates to the satisfaction of CITY that biodegradable food packaging materials are not available for purchase in the quantities required by LESSEE. If biodegradable food packaging materials are not available for purchase in the quantities required by LESSEE, LESSEE may limit its use of such packaging to the amount actually available.
- c. For purposes of this Lease, the following definitions are applicable:
  - (1) "Prepared food" means foods or beverages which are prepared on the Premises by cooking, chopping, slicing, mixing, freezing or squeezing, and which require no further preparation to be consumed.
  - (2) "Food packaging" means all bags, sacks, wrapping, containers, bowls, plates, trays, cartons, cups, straws and lids which are not intended for reuse, on or in which any foods or beverages are placed or packaged on the Premises.
  - (3) "Takeout food" means prepared foods or beverages requiring no further preparation to be consumed and which are purchased in order to be consumed off the Premises.

11.7 Boat Rentals. For purposes of this Lease, "vessels" include ships of all kinds, motorboats, sailboats, personal watercraft, and every structure adapted to be navigated from place to place upon the water for recreation or for the transportation of merchandise or persons. LESSEE shall be permitted to rent vessels to the general public subject to prior written approval from the City Manager as to the number and type of vessels available for rent. The City Manager may, upon written notice to LESSEE and with reasonable cause, modify any approval previously given.

All vessels for rent which are required by law to be registered with the California Department of Motor Vehicles shall be currently registered as rental vessels and carry proper registration numbers and stickers. All vessels for rent shall be identified by LESSEE through the use of distinctive markings or logos. Each

rental vessel shall be equipped with a waterproof map detailing all current regulations and activity zones for Mission Bay, along with all safety equipment required by law. At any time that LESSEE is renting a vessel or vessels, LESSEE shall have at least one operational chase boat and staff to operate it available on the waters of Mission Bay. No rental vessel may be stored on public property outside the Leasehold. The City Manager or his designees shall have the authority to immediately terminate any rental activities which are not in conformance with the stipulations of this Lease or current boating regulations.

- 11.8 Pump Out Stations. LESSEE shall provide one or more holding tank pump out stations for use by the general boating public. These pump out stations shall be maintained by the LESSEE in good working condition and shall be specially marked for use by the general boating public. Pump out stations shall be located so as to be conveniently used by occupants of vessels using LESSEE'S facilities and the general boating public and shall be of sufficient size to at Lease contain the waste material generated aboard all vessels using LESSEE'S facilities. Pump out stations shall be enclosed, emptied, and serviced regularly enough to prevent them from overflowing or creating unhealthy, unsightly, or unsanitary conditions. The contents of the pump out station shall be disposed of into CITY'S sewer system by LESSEE or others acting pursuant to LESSEE'S direction, in a manner as provided under applicable law at the time of disposal. It is the intent of this Section 11.8 to provide sufficient opportunity for the general public to properly dispose of the waste material generated aboard their vessels.
- 11.9 Local Coastal Program. Should a local coastal program ("Local Coastal Program") ever be adopted for the Mission Bay Park segment of the CITY Local Coastal Program, and should the Local Coastal Program provide for the collection of a traffic impact mitigation fee from commercial lessees in Mission Bay Park in order to fund all or a portion of the cost of a beach shuttle or other substantially similar public access improvements. LESSEE agrees to contribute its fair and equitable share, as calculated pursuant to the Local Coastal Program, to such a traffic impact mitigation program; provided that the amount payable by LESSEE shall be reasonable and shall not exceed the amount payable by LESSEE shall be reasonable and shall not exceed the amount LESSEE would have paid had the entire amount to be funded by traffic impact mitigation fees been reasonably, equitably, and fairly apportioned among all of the commercial lessees in Mission Bay Park. This section shall not be altered or amended without the prior written approval of the California Coastal Commission or an amendment to California Coastal Permit No. 6-93-75/EL
- 11.10 Planting Strips. LESSEE shall be responsible, at its sole, cost, to landscape and maintain to the satisfaction of the City Manager all areas adjoining the Premises which are located between the Premises and the improved portion of adjacent streets.

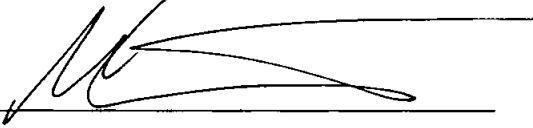
- 11.11 Schedule of Prices. All prices of merchandise, equipment and services of LESSEE and its sublessees shall be comparable with prices of like merchandise, equipment and services offered in Mission Bay or San Diego Bay. All prices charged by LESSEE and its sublessees shall be approved in writing by City Manager; provided, however, that LESSEE and its sublessees shall not be required to sell any merchandise at a loss.
- 11.12 Public Access. LESSEE shall allow the general public access to the perimeter walkways around the entire Premises at all times in so far as practicable unless closure is allowed with the City Manager's prior consent.

**SECTION 12: SIGNATURES**

- 12.1 Signature Page. This Lease is executed by CITY, acting by and through its City Manager by LESSEE, acting by and through its lawfully authorized officers.

**THE CITY OF SAN DIEGO**

Date 10/4/05

By 

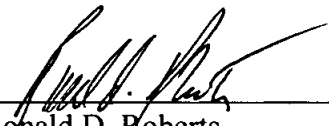
**KENCAL OWNERSHIP, LLC,**

**A CALIFORNIA LIMITED LIABILITY COMPANY**

By: KAREC California Development Program, LLC,  
a California limited liability company, its member

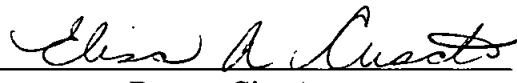
By: Kennedy Associates Real Estate Counsel, Inc.  
a Washington corporation, as Manager

Date 10/3/05

By   
Ronald D. Roberts  
Executive Vice President

APPROVED as to form and legality this 4<sup>th</sup> day of October, 2005.

**MICHAEL J. AGUIRRE, CITY ATTORNEY**

By   
Deputy City Attorney

## SECTION 13: EXHIBITS

### EXHIBIT "A" - Premises.

#### Legal Description

#### PARCEL

That parcel of land and adjoining water area in the City of San Diego, State of California, being a portion of the tidelands and submerged or filled lands of False Bay, also known as Mission Bay, including any portion of the Pueblo Lands of San Diego, according to Map thereof by James Pascoe, a copy of which is on file in the Office of the County Recorder of San Diego County and known as Miscellaneous Map No. 36, described as follows:

Beginning at the Southeast corner of Lot 24 of Block 10 in the Resubdivision of Blocks 7, 8, 10 and a portion of Block 9 and Lot "A" in Inspiration Heights, according to Map thereof No. 1700, filed in the Office of the County Recorder of San Diego County; thence along the Southerly line of said Lot, South  $89^{\circ}55'56''$  West (Record: North  $89^{\circ}59'00''$  West) 25.00 to a point of tangent curve in the boundary of said Lot; thence South  $00^{\circ}04'04''$  East, 2.00 feet to a line which is parallel with and 2.00 feet Southerly at right angles from the Southerly line of said Block 10; thence along said parallel line North  $89^{\circ}55'56''$  East, 249.70 feet; thence North  $05^{\circ}30'02''$  West, 104.06 feet to the United States Coast and Geodetic Survey, Triangulation Station "Old Town"--the Lambert Grid Coordinates California Zone 6 for said Station "Old Town" are X equals 1,712,415.69 and Y equals 213,820.33--said Station "Old Town" being the point of origin for the San Diego City Engineer's Mission Bay Park Coordinate System; thence North 5,160.53 feet and West 16,030.79 feet to Mission Bay Park Coordinates North 5,160.53 feet and West 16,030.79 feet, being also the TRUE POINT OF BEGINNING; thence South  $15^{\circ}55'11''$  West, 675.05 feet to Mission Bay Park Coordinates North 4,511.37 feet and West 16,215.95 feet; thence North  $89^{\circ}28'36''$  West to Mission Bay Park Coordinates North 4,517.60 feet and West 16,898.48 feet; thence North  $08^{\circ}09'38''$  West, 143.45 feet to Mission Bay Park Coordinates North 4,659.60 feet and West 16,918.84 feet; thence North  $57^{\circ}31'13''$  West, 109.37 feet; thence North  $08^{\circ}09'38''$  West, 338.66 feet to the beginning of a tangent 364.56-foot radius curve, concave Easterly; thence Northerly along said curve 226.18 feet through a central angle of  $38^{\circ}09'38''$ ; thence tangent to said curve North  $30^{\circ}00'00''$  East, 139.21 feet to the beginning of a tangent 171.29-foot radius curve, concave Southerly; thence Easterly along said curve 249.34 feet through a central angle of  $83^{\circ}24'14''$ ; thence tangent to said curve South  $66^{\circ}35'46''$  East, 763.14 feet to the TRUE POINT OF BEGINNING.

The above-described Parcel 1 contains approximately 358,063.80 square feet of land area and approximately 397,223.64 square feet of water area.

PARCEL 2

All that portion of Pueblo Lot 214, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe, a copy of which is on file in the Office of the Recorder of San Diego County and is known as Miscellaneous Map No. 36, described as follows:

Beginning at the Northeasterly corner of abovesaid Parcel 1, said corner being Mission Bay Park Coordinates North 5,160.53 feet and West 16,030.79 feet; thence along the Northerly boundary of said Parcel 1 North 66°35'46" West, 746.30 feet; thence North 23°24'14" East, 60.00 feet; thence South 66°35'46" East, 321.40 feet to the TRUE POINT OF BEGINNING; thence North 23°24'14" East, 84.65 feet to a point in a non-tangent 2,006.00-foot radius curve concave Northeasterly, a radial line to said point bears South 30°06'41" West; thence Northwesterly along said curve through an angle of 09°51'14", an arc distance of 345.00 feet; thence tangent to said curve North 50°02'05" West, 157.33 feet; thence South 39°57'55" West, 60.13 feet to the beginning of a tangent 110.00-foot radius curve, concave Easterly; thence along said curve through an angle of 106°33'41", an arc distance of 204.58 feet; thence tangent to said curve South 66°35'46" East, 400.00 feet to the TRUE POINT OF BEGINNING.

The above-described Parcel 2 contains approximately 65,775.00 square feet.

Site Map

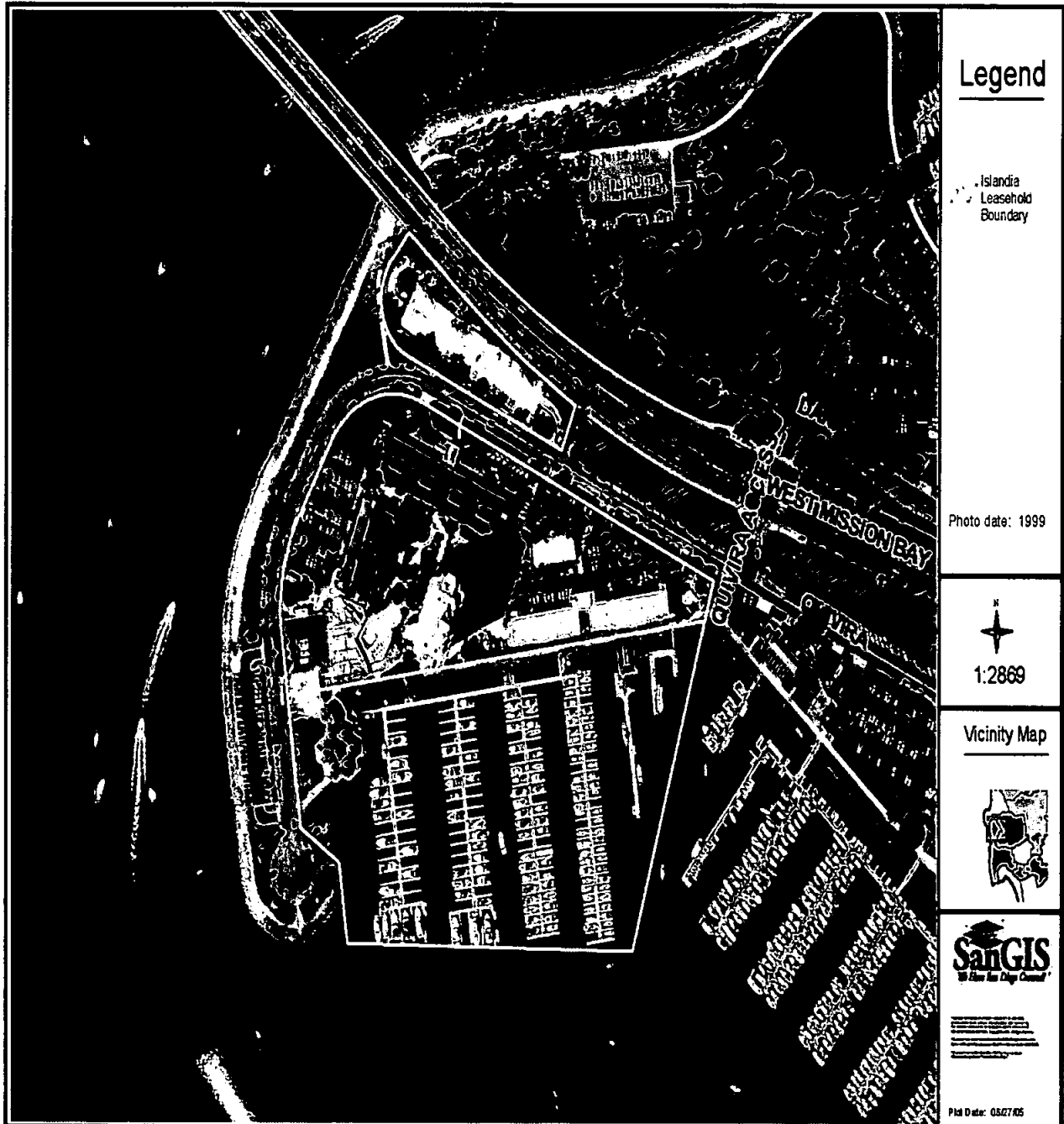


EXHIBIT "B" – Memorandum of Commencement Date.

The CITY OF SAN DIEGO ("CITY"), a municipal corporation, as Lessor, and KenCAL Ownship LLC, a California limited liability company ("LESSEE"), executed that certain Percentage Lease dated as of October 4, 2005 (the "Lease").

The Lease contemplates that this document shall be delivered and executed as set forth in Section 2.1. This Lease Memorandum shall become part of the Lease.

CITY and LESSEE agree as follows:

The Commencement Date of the Lease is \_\_\_\_\_, 2005.

The end of the Lease term and the date on which this Lease will expire is

\_\_\_\_\_.  
The Lease is in full force and effect as of the date of this Lease Memorandum.

Dated:

CITY:

The City of San Diego, a municipal corporation

By:

Name:

Its:

Dated:

LESSEE:

KenCal Ownership LLC, a California limited liability company

By:

Name:

Its:

EXHIBIT "C" – General Development Plan.

**GENERAL DEVELOPMENT PLAN**

**THIS GENERAL DEVELOPMENT PLAN ("Plan")** made this 4th day of October, 2005, by KenCal Ownership LLC, a California limited liability company ("**KenCal**") in favor of the City of San Diego, California ("**City**").

**RECITALS:**

A. The City and KenCal entered into a lease agreement ("**Ground Lease**") dated October 4, 2005 for the project commonly known as the "Hyatt Regency Islandia" located in San Diego, California ("**Project**") which consists of hotel, marina, restaurant and related facilities.

B. Contemporaneous with the effective date of the Ground Lease, KenCal will acquire the assets of Islandia Associates, Ltd ("**Islandia**") who had a leasehold interest in the Project pursuant to that certain Percentage Lease, filed in the Office of the City Clerk on February 9, 1987 ("**Percentage Lease**"), which Percentage Lease will be replaced by the Ground Lease.

[Acquisition of such assets and execution of the Ground Lease shall be referred to herein as the "**Acquisition.**"]

C. Following consummation of the Transaction, KenCal will make certain improvements and renovations to the Project (collectively "**Improvements**"). The City has requested KenCal to evidence certain aspects of these Improvements via a "General Development Plan".

D. This Plan shall operate as KenCal's General Development Plan.

**NOW, THEREFORE,** KenCal states as follows:

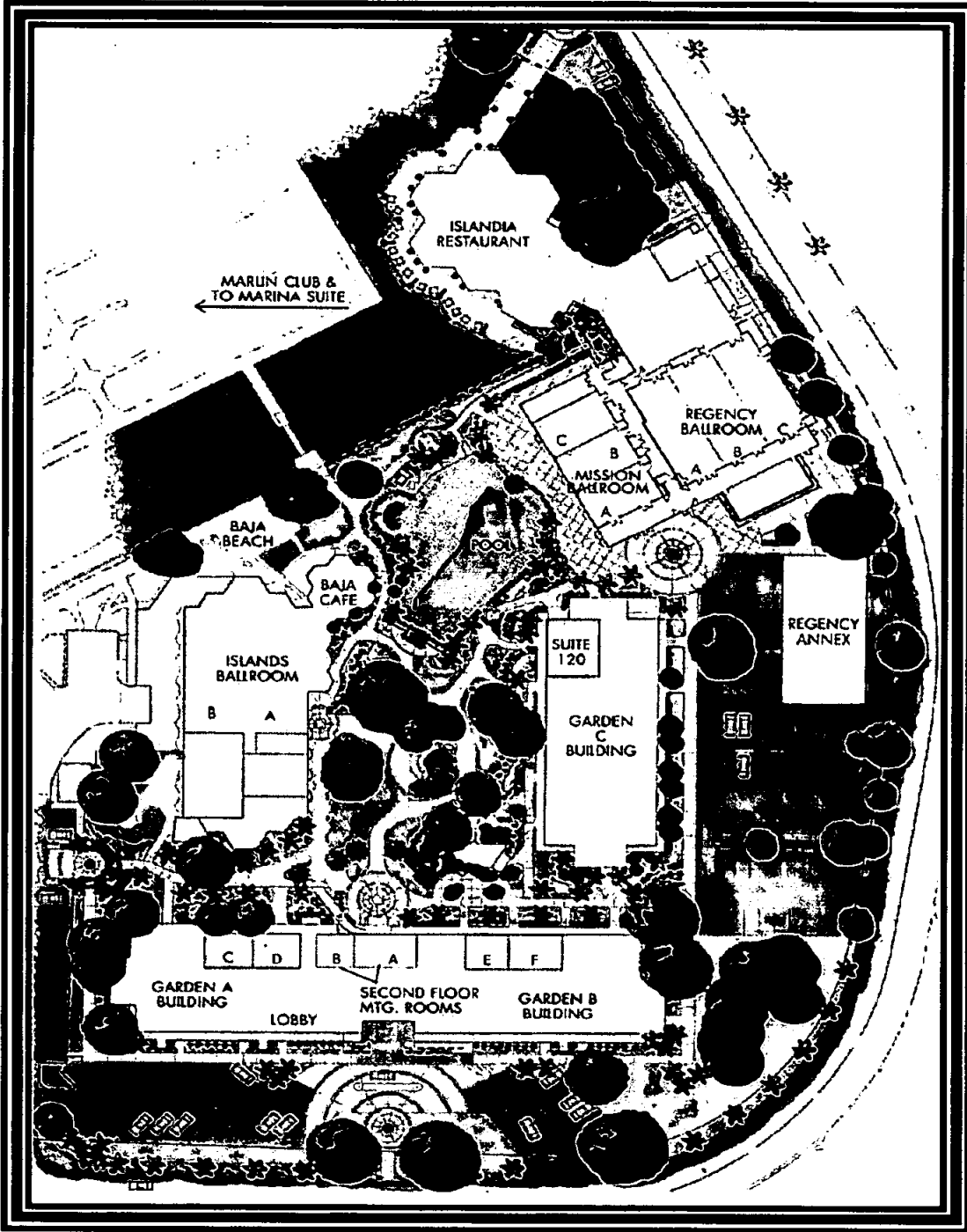
1. Contingencies and Commencement Date. This Plan is contingent on consummation, to KenCal's satisfaction, of the Transaction. To the extent the Transaction does not occur and KenCal does not acquire the assets of Islandia, this Plan shall be deemed null and void. The Commencement Date of this Plan is the date of the closing of the Transaction.
2. Plot Plan. The plot plan is set forth in Schedule A.
3. Development Schedule. The Improvements will be constructed substantially in accordance with the schedule set forth in Schedule B.

4. Estimated Construction Costs. The estimated construction costs of the Improvements are set forth in Exhibit C.

5 Landscape Plan. A landscaping plan is set forth as Exhibit D.

SCHEDULE A

Plot Plan



## SCHEDULE B

### Improvement Schedule

| <u>Item</u>                      | <u>Timing</u>                                                                                                                                                                                                                                         |
|----------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Design Development               | 90-120 days following the Commencement Date (“ <b>Design Development Period</b> ”).                                                                                                                                                                   |
| Submission of Permit Application | 30 days following expiration of Design Development Period (“ <b>Permit Application Period</b> ”).                                                                                                                                                     |
| Completion of Improvements       | Approximately 18 months following expiration of the Permit Application Period. Completion of the improvements per this schedule is subject to timely receipt of permits, timely consent of applicable governmental agencies and force majeure events. |

**SCHEDULE C**  
**Estimated Improvement Costs**

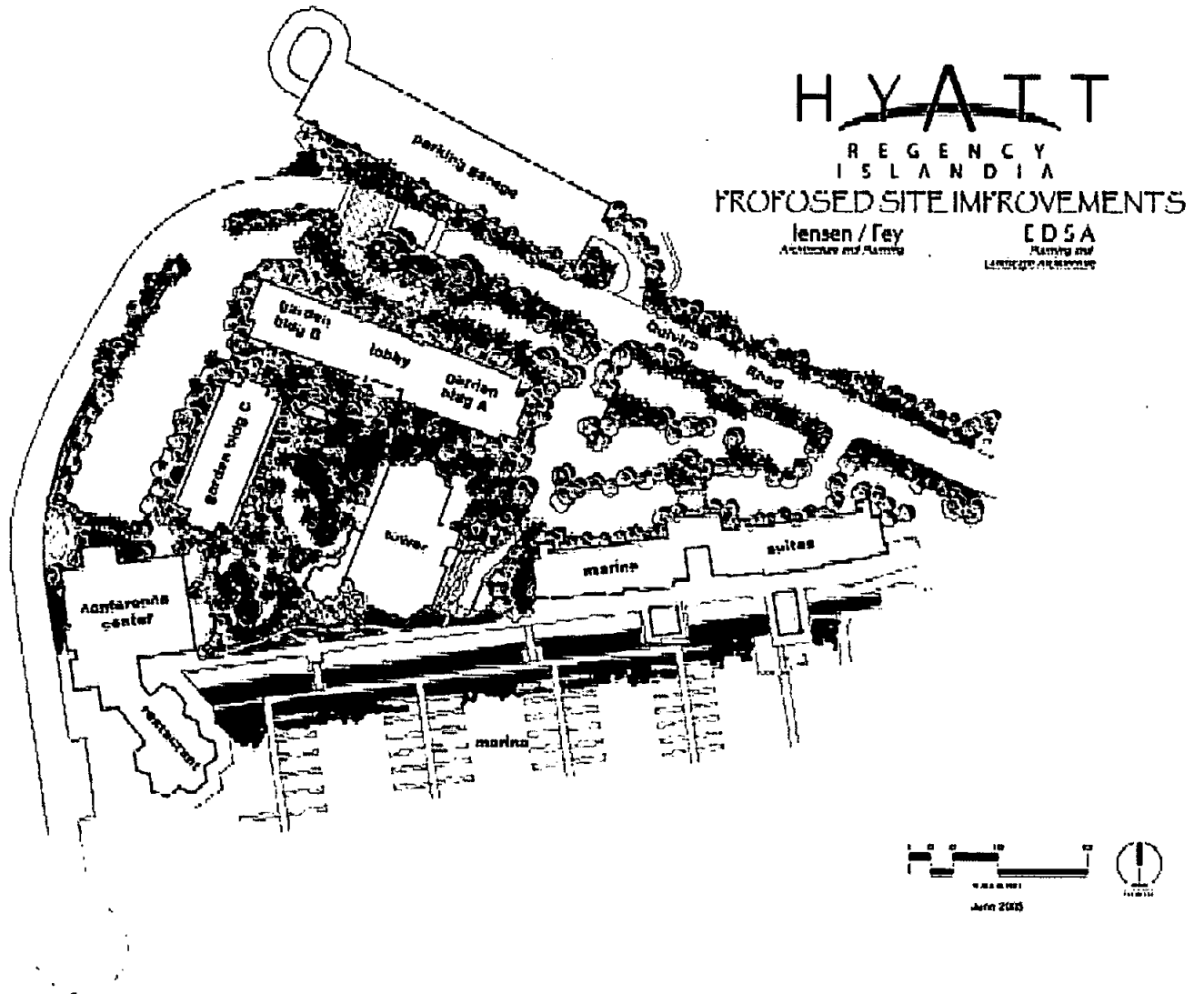
Project Title: Hyatt Regency Islandia  
Project Address: 1441 Quivira Road, San Diego CA

**Revised Dev Budget**

|                                          |                     |
|------------------------------------------|---------------------|
| <b>I Construction/Misc Capital</b>       | <b>\$18,006,000</b> |
| <b>II Property Costs/Acquisition</b>     | <b>\$61,833,000</b> |
| <b>III Permits, Licenses, Fees</b>       | <b>\$100,000</b>    |
| <b>IV Design Consultants</b>             | <b>\$1,759,000</b>  |
| <b>V Financing/Legal</b>                 | <b>\$1,848,000</b>  |
| <b>VI Development</b>                    | <b>\$900,000</b>    |
| <b>VII Guestroom Furnishings</b>         | <b>\$6,144,000</b>  |
| <b>VIII Public Area Furnishings</b>      | <b>\$897,000</b>    |
| <b>IX Technology</b>                     | <b>\$50,000</b>     |
| <b>X Operating Equip. &amp; Supplies</b> | <b>\$250,000</b>    |
| <b>XI Preopening Expenses</b>            | <b>\$50,000</b>     |
| <b><i>SUBTOTAL</i></b>                   | <b>\$91,837,000</b> |
| <b>XII Contingency</b>                   | <b>\$4,159,00</b>   |
| <b><i>DEVELOPMENT TOTAL</i></b>          | <b>\$95,996,000</b> |
| <b>XIII Operating Costs</b>              | <b>\$300,000</b>    |
| <b><i>GRAND TOTAL</i></b>                | <b>\$96,296,000</b> |

# SCHEDULE D

## Landscaping Plan



## Exhibit "C" – Equal Employment Opportunity Outreach Program

### **Division 27: Equal Employment Opportunity Outreach Program**

#### **§22.2701 Purpose & Intent**

The overall objective of the City's Equal Employment Opportunity ("EEO") Program is to ensure that contractors doing business with or receiving funds from the City will not engage in unlawful discriminatory employment practices prohibited by State or Federal law. Such employment practices include, but are not limited to, the following: employment, promotion or upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rate of pay or other forms of compensation, and selection for training, including apprenticeship.

*(Amended 5-1-1995 by O-18173 N.S.)*

#### **§22.2702 Definitions**

Unless stated otherwise, the following definitions apply to this Division:

"City" means The City of San Diego and those agencies, boards, commissions and corporations authorized to act on behalf of, or as an agent for, the City of San Diego.

"Contract" means an agreement to provide labor, materials, supplies or services in the performance of a contract, franchise, concession or lease granted, let or awarded by or on behalf of the City.

"Contractor" means any person, firm, partnership, corporation, or combination thereof, who is selected to enter into, or actually enters into a contract with department heads and officers empowered by law to enter into contracts on behalf of the City for public works or improvements to be performed, or for a franchise, concession or lease of property, or for goods, services or supplies to be purchased, at the expense of the City or to be paid out of moneys deposited in the treasury or out of trust moneys under the control of, or collected by, the City.

"Equal Employment Opportunity Plan" means a document prepared by a Contractor in accordance with a form and format supplied by the City which describes the Contractor's plan of action.

"Gender" means the character of being male or female.

*Ch. Art. Div.*

**2 2 27**

#### **San Diego Municipal Code Chapter 2: Government**

(6-2000)

"Program Manager" means the Program Manager for the City's Equal Opportunity Contracting Program or his or her designee.

"Work Force Analysis" means a comparison of a Contractor's Work Force Report with applicable County Labor Force Availability Data.

"Work Force Report" means a report, in a format supplied by the City but compiled by the Contractor, of the Contractor's total work force which indicates the number of males and females in each identified ethnic group by occupational category.

*(Amended 5-1-1995 by O-18173 N.S.)*

#### **§22.2703 Scope**

Except as provided in Section 22.2704, this Division applies to all Contractors except:

(a) Contractors and subcontractors who do less than a total of \$10,000 worth of business with the City during the preceding twelve (12) months or who have less than a total of fifteen (15) employees, except that Contractors exempted by this Subsection shall be subject to audits pursuant to Section 22.2707 to determine if unlawful discriminatory employment practices are occurring.

(b) Contracts to which any City (other than The City of San Diego), county, district or other political subdivision, or any joint powers authority created under authority of law, or other public entity, or any other group or combination of the foregoing acting as a unit, is a party.

(c) Nonprofit charitable, educational, or religious associations or corporations, as evidenced by records on file with the City to be compiled for purposes of this Division in accordance with procedures established by the City Manager.

(d) Emergency Contracts, if a written partial or full waiver is granted by the City Manager, except that Contractors exempted by this Subsection shall be subject to audits pursuant to Section 22.2707 to determine if unlawful discriminatory employment practices are occurring. The City Manager may grant a partial or full waiver from the requirements of this Division for an emergency contract only to the limited extent necessary in order to expedite the award of such Contract. For purposes of this Section, the term "emergency" has the same meaning as in San Diego City Charter section 94.

*(Amended 5-1-95 by O-18173 N.S.)*

*Ch. Art. Div.*

**2 2 27**

**San Diego Municipal Code Chapter 2: Government**

(6-2000)

#### **§22.2704 Mandatory Nondiscrimination Contract Clause**

Notwithstanding the provisions of Section 22.2703, every Contract shall contain a nondiscrimination clause which shall read as follows:

Contractor shall not discriminate against any employee or applicant for employment on any basis prohibited by law. Contractor shall provide equal opportunity in all employment practices. Prime Contractors shall ensure that their subcontractors comply with this program. Nothing in this Section shall be interpreted to hold a prime contractor liable for any discriminatory practice of its subcontractors.

*(Amended 5-1-1995 by O-18173 N.S.)*

#### **§22.2705 Duty to Submit Reports**

(a) If a Contract is competitively solicited, after the lowest responsible bidder has been determined and prior to the execution of the contract, the apparent low bidder shall submit to the Equal Opportunity Contracting Program a Work Force Report, on a City form, or an Equal Employment Opportunity Plan approved by the Program Manager.

If a Contract is not competitively solicited, the Contractor shall submit to the Equal Opportunity Contracting program a Work Force Report or an Equal

Employment Opportunity Plan approved by the Program Manager prior to tendering the signed Contract documents to the City for signature.

(b) Staff will conduct a work force analysis on all Work Force Report submittals to determine whether or not an Equal Employment Opportunity Plan is required. If an Equal Employment Opportunity Plan is required, the Contractor will submit a plan for approval by the Program Manager.

(c) Any Equal Employment Opportunity Plan approved by the City shall not include quotas, goals or timetables for increasing women and minority employment and will not require terminating or laying off existing employees.

(d) If the apparent low bidder or Contractor does not submit either a Work Force Report or Equal Employment Opportunity Plan as required by this section, for purposes of awarding the Contract only, the City Manager will ensure an administrative hearing is conducted by an independent hearing officer to determine if the contract should be awarded in accordance with City, State, and Federal law.

*(Retitled to "Duty to Submit Reports" and amended 5-1-1995 by O-18173 N.S.)*

*Ch. Art. Div.*

**2 2 27**

## **San Diego Municipal Code Chapter 2: Government**

(6-2000)

### **§22.2706 Duty To Comply With Equal Employment Opportunity Plan**

A Contractor for whom an Equal Employment Opportunity Plan has been approved by the City shall use best efforts to comply with that Equal Employment Opportunity Plan.

*(Retitled to "Duty To Comply With Equal Employment Opportunity Plan" and amended 5-23-1995 by O-18173 N.S.)*

### **§22.2707 Reviews**

(a) The Program Manager shall conduct periodic reviews of Contractors to ensure that unlawful discrimination is not being practiced and Equal Employment Opportunity Plans are implemented.

(b) If the City Manager determines, after review, that the Contractor has not implemented their Equal Employment Opportunity Plan and/or practices unlawful discrimination and corrective action has not occurred by the Contractor after sufficient notice, the City Manager may recommend termination of the contract and debarment to the City Council.

*(Retitled to "Reviews" and amended 5-1-1995 by O-18173 N.S.)*

### **§22.2708 Policies And Procedures**

The City Manager shall promulgate policies and procedures necessary to implement this Division.

*(Retitled to "Policies And Procedures" and amended 5-1-1995 by O-18173 N.S.)*

RESOLUTION NUMBER R- 300863

ADOPTED ON SEP 27 2005

AN RESOLUTION AUTHORIZING THE CITY MANAGER TO  
EXECUTE A FIFTY-YEAR LEASE AGREEMENT WITH  
KENCAL OWNERSHIP LLC FOR THE HYATT REGENCY  
ISLANDIA HOTEL AND MARINA

WHEREAS, on February 9, 1987, pursuant to Resolution Number R-267648, The City Council approved a 50-year lease agreement with Islandia Associates, Ltd. [Islandia Associates] which commenced in December 1998, for the development and operation of a resort hotel in the Quivira Basin area of Mission Bay Park; and

WHEREAS, the leasehold consists of 9.73 acres of land for the hotel, restaurant and two parking garages, and 9.119 acres of water for the 179 slip marina with a fuel dock and sport fishing operations; and

WHEREAS, Islandia Associates entered into a management agreement with California Hyatt Corporation; and

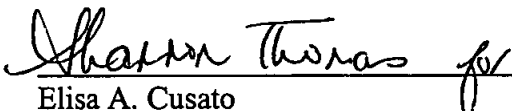
WHEREAS, Islandia Associates has negotiated the sale of its leasehold interest to KAREC California Development Program LLC, which will assign the leasehold interest to KenCal Ownership LLC, a separate entity being formed by KAREC; and

WHEREAS, KenCal proposes to own and manage the hotel and marina through an operating sublease and management agreements with the Hyatt Corporation and JG Management; and

WHEREAS, an independent review by a consultant and MAI appraiser specializing in hospitality properties confirmed that the proposed rent structure for the lease reflects the upper end of the market rates for properties of this type and location; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, that the City Manager is authorized to execute, for and on behalf of the City of San Diego, a fifty-year lease agreement with KenCal Ownership LLC, a California limited liability company, for the Hyatt Regency Islandia Hotel and Marina on 9.73 acres of land and 9.119 acres of water of City-owned property in the Quivira Basin area of Mission Bay Park at an annual rental of \$1.9 million after a one-year construction period rental of \$1 million, under the terms and conditions set forth in that lease agreement on file in the office of the City Clerk as Document No. RR- 300863.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By   
Elisa A. Cusato  
Deputy City Attorney

EAC:SMT:nda  
06/24/05  
Or.Dept:READ  
R-2005-1387  
MMS#2144

Passed and adopted by the Council of San Diego on September 27, 2005 by the following vote:

**YEAS: PETERS, ATKINS, YOUNG, MAIENSCHIN, FRYE, MADAFFER**

**NAYS: NONE.**

**NOT PRESENT: NONE.**

**VACANT: DISTRICT 2, District 8, MAYOR.**

**AUTHENTICATED BY:**

**TONI ATKINS**

Deputy Mayor of The City of San Diego, California

**ELIZABETH S. MALAND**

City Clerk of The City of San Diego, California

(SEAL)

By: Manuel E. Ketcham, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of  
RESOLUTION NO. **R-300863**, passed and adopted by the Council of The City of San Diego,  
California on September 27, 2005.

**ELIZABETH S. MALAND**

City Clerk of The City of San Diego, California

(SEAL)

By: Manuel E. Ketcham, Deputy  
Manuel E. Ketcham

RESOLUTION NUMBER R- 300863

ADOPTED ON SEP 27 2005

AN RESOLUTION AUTHORIZING THE CITY MANAGER TO  
EXECUTE A FIFTY-YEAR LEASE AGREEMENT WITH  
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WHEREAS, Islandia Associates has negotiated the sale of its leasehold interest to KAREC California Development Program LLC, which will assign the leasehold interest to KenCal Ownership LLC, a separate entity being formed by KAREC; and

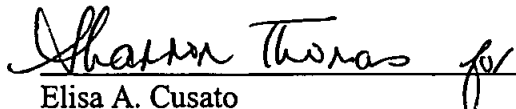
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WHEREAS, an independent review by a consultant and MAI appraiser specializing in hospitality properties confirmed that the proposed rent structure for the lease reflects the upper end of the market rates for properties of this type and location; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, that the City Manager is authorized to execute, for and on behalf of the City of San Diego, a fifty-year lease agreement with KenCal Ownership LLC, a California limited liability company, for the Hyatt Regency Islandia Hotel and Marina on 9.73 acres of land and 9.119 acres of water of City-owned property in the Quivira Basin area of Mission Bay Park at an annual rental of \$1.9 million after a one-year construction period rental of \$1 million, under the terms and conditions set forth in that lease agreement on file in the office of the City Clerk as Document No. RR- 300863.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By

  
Elisa A. Cusato  
Deputy City Attorney

EAC:SMT:nda  
06/24/05  
Or.Dept:READ  
R-2005-1387  
MMS#2144

Passed and adopted by the Council of San Diego on September 27, 2005 by the following vote:

**YEAS: PETERS, ATKINS, YOUNG, MAIENSCHIN, FRYE, MADAFFER**

**NAYS: NONE.**

**NOT PRESENT: NONE.**

**VACANT: DISTRICT 2, District 8, MAYOR.**

**AUTHENTICATED BY:**

**TONI ATKINS**

Deputy Mayor of The City of San Diego, California

**ELIZABETH S. MALAND**

City Clerk of The City of San Diego, California

(SEAL)

By: Manuel E. Ketcham, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of  
RESOLUTION NO. **R-300863**, passed and adopted by the Council of The City of San Diego,  
California on September 27, 2005.

**ELIZABETH S. MALAND**

City Clerk of The City of San Diego, California

(SEAL)

By: Manuel E. Ketcham, Deputy  
Manuel E. Ketcham

WHEN RECORDED MAIL TO:

City Clerk  
City of San Diego  
202 C Street, 2<sup>nd</sup> Floor, M. S. 2A  
San Diego, CA 92101

SPACE ABOVE THIS LINE FOR RECORDER'S USE  
NO DOCUMENTARY TAX DUE - R&T 11922 (amended)  
Presented for record by the CITY OF SAN DIEGO  
APN 315-490-33

### QUITCLAIM DEED

For valuable consideration, receipt of which is acknowledged, KenCal Ownership LLC, a California Limited Liability Company, releases, and quitclaims to the City of San Diego, a municipal corporation, all right, title, and leasehold interest in and to the following described real property situated in the City of San Diego, County of San Diego, State of California:

See attached Exhibit "A".

This is to certify that the interest in real property conveyed by this instrument to the City of San Diego, a municipal corporation, is hereby accepted by the undersigned officer on behalf of the City of San Diego pursuant to authority conferred by Resolution No. 250320, adopted by the Council of the City of San Diego on October 1, 1979, and the grantee consents to recordation thereof by its duly authorized officer.

Dated \_\_\_\_\_ By \_\_\_\_\_  
Deputy Director

KenCal Ownership LLC, a California Limited Liability Company

By: KenCal Delaware LLC, a Delaware limited liability company, its Manager

By: Karec California Development Program LLC, a California limited liability company, its Manager

By: Kennedy Associates Real Estate Counsel, Inc., a Washington Corporation, its Manager

By: Jack van Hantersvelt

Name: Jack van Hantersvelt

Title: S.R. - U.P.

Date: 3/7/06

PARCEL 2

All that portion of Pueblo Lot 214, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe, a copy of which is on file in the Office of the Recorder of San Diego County and is known as Miscellaneous Map No. 36, described as follows:

Beginning at the Northeasterly corner of abovesaid Parcel 1, said corner being Mission Bay Park Coordinates North 5,160.53 feet and West 16,030.79 feet; thence along the Northerly boundary of said Parcel 1 North 66°35'46" West, 746.30 feet; thence North 23°24'14" East, 60.00 feet; thence South 66°35'46" East, 321.40 feet to the TRUE POINT OF BEGINNING; thence North 23°24'14" East, 84.65 feet to a point in a non-tangent 2,006.00-foot radius curve concave Northeasterly, a radial line to said point bears South 30°06'41" West; thence Northwesterly along said curve through an angle of 09°51'14", an arc distance of 345.00 feet; thence tangent to said curve North 50°02'05" West, 157.33 feet; thence South 39°57'55" West, 60.13 feet to the beginning of a tangent 110.00-foot radius curve, concave Easterly; thence along said curve through an angle of 106°33'41", an arc distance of 204.58 feet; thence tangent to said curve South 66°35'46" East, 400.00 feet to the TRUE POINT OF BEGINNING.

The above-described Parcel 2 contains approximately 65,775.00 square feet.

EXHIBIT "A" - Premises.

Legal Description

PARCEL

That parcel of land and adjoining water area in the City of San Diego, State of California, being a portion of the tidelands and submerged or filled lands of False Bay, also known as Mission Bay, including any portion of the Pueblo Lands of San Diego, according to Map thereof by James Pascoe, a copy of which is on file in the Office of the County Recorder of San Diego County and known as Miscellaneous Map No. 36, described as follows:

Beginning at the Southeast corner of Lot 24 of Block 10 in the Resubdivision of Blocks 7, 8, 10 and a portion of Block 9 and Lot "A" in Inspiration Heights, according to Map thereof No. 1700, filed in the Office of the County Recorder of San Diego County; thence along the Southerly line of said Lot, South  $89^{\circ}55'56''$  West (Record: North  $89^{\circ}59'00''$  West) 25.00 to a point of tangent curve in the boundary of said Lot; thence South  $00^{\circ}04'04''$  East, 2.00 feet to a line which is parallel with and 2.00 feet Southerly at right angles from the Southerly line of said Block 10; thence along said parallel line North  $89^{\circ}55'56''$  East, 249.70 feet; thence North  $05^{\circ}30'02''$  West, 104.06 feet to the United States Coast and Geodetic Survey, Triangulation Station "Old Town"--the Lambert Grid Coordinates California Zone 6 for said Station "Old Town" are X equals 1,712,415.69 and Y equals 213,820.33--said Station "Old Town" being the point of origin for the San Diego City Engineer's Mission Bay Park Coordinate System; thence North 5,160.53 feet and West 16,030.79 feet to Mission Bay Park Coordinates North 5,160.53 feet and West 16,030.79 feet, being also the TRUE POINT OF BEGINNING; thence South  $15^{\circ}55'11''$  West, 675.05 feet to Mission Bay Park Coordinates North 4,511.37 feet and West 16,215.95 feet; thence North  $89^{\circ}28'36''$  West to Mission Bay Park Coordinates North 4,517.60 feet and West 16,898.48 feet; thence North  $08^{\circ}09'38''$  West, 143.45 feet to Mission Bay Park Coordinates North 4,659.60 feet and West 16,918.84 feet; thence North  $57^{\circ}31'13''$  West, 109.37 feet; thence North  $08^{\circ}09'38''$  West, 338.66 feet to the beginning of a tangent 364.56-foot radius curve, concave Easterly; thence Northerly along said curve 226.18 feet through a central angle of  $38^{\circ}09'38''$ ; thence tangent to said curve North  $30^{\circ}00'00''$  East, 139.21 feet to the beginning of a tangent 171.29-foot radius curve, concave Southerly; thence Easterly along said curve 249.34 feet through a central angle of  $83^{\circ}24'14''$ ; thence tangent to said curve South  $66^{\circ}35'46''$  East, 763.14 feet to the TRUE POINT OF BEGINNING.

The above-described Parcel 1 contains approximately 358,063.80 square feet of land area and approximately 397,223.64 square feet of water area.

EXHIBIT "B"

MEMORANDUM OF COMMENCEMENT DATE

The CITY OF SAN DIEGO ("CITY"), a municipal corporation, as Lessor, and KENCAL OWNERSHIP LLC, a California limited liability company ("LESSEE"), executed that certain Percentage Lease Agreement dated as of October 4, 2005 (the "Lease").

The Lease contemplates that this document shall be delivered and executed as set forth in Section 2.1. This Lease Memorandum shall become part of the Lease.

CITY and LESSEE agree as follows:

1. The Commencement Date of the Lease is January 9, 2006.
2. The end of the Lease Term and the date of which this Lease will expire is January 31, 2056.
3. The Lease is in full force and effect as of the date of this Lease Memorandum.

Dated: 3-14-06

CITY:

The City of San Diego, a municipal corporation

By: Michael J. Boyle

Name: MICHAEL BOYLE

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

Dated: 3-7-06

LESSEE:

KenCal Ownership LLC, a California limited liability company

By: Jack vanHant

Name: JACK VAN HANTSVELT

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

OPERATING LEASE

by and between

KenCal Ownership LLC, a California  
limited liability company

("Sublandlord")

and

KenCal Operating LLC, a California  
limited liability company

("Operating Subtenant")

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THIS OPERATING LEASE ("Operating Lease") is entered into as of the 9th day of January, 2006, (the "Lease Date") by and between KenCal Ownership LLC, a California limited liability company ("Sublandlord"), and KenCal Operating LLC, a California limited liability company ("Operating Subtenant").

## **SECTION A: BACKGROUND**

A.1. On the Lease Date, Sublandlord entered into a Ground Lease with the City of San Diego ("Ground Lease") for the Land, the Hotel and the Personal Property. All capitalized terms used in this Operating Lease are defined in Section 1 below.

A.2. Sublandlord intends to lease the Property as rental property for the realization of rental income, and does not intend to manage or operate a hotel business in the Hotel. Sublandlord intends to renovate the Hotel, and Sublandlord intends to furnish and equip the Hotel with FF&E (Sublandlord).

A.3. Operating Subtenant intends to open and operate a hotel business in the Hotel and to furnish and equip the Hotel with FF&E (Tenant). Sublandlord is willing to grant the Operating Subtenant a sublease of the Property to enable Operating Subtenant to open and operate a hotel business.

A.4. Sublandlord and Operating Subtenant desire to set forth in writing the grant of the lease to Operating Subtenant, the duration of that grant, the terms and conditions of that grant, and the agreements to be performed and observed by the Operating Subtenant.

## **SECTION 1: DEFINITIONS**

The following definitions apply in this Operating Lease:

"Additional Rent" means any payment or obligation of Operating Subtenant, which this Operating Lease refers to or characterizes as Additional Rent.

"Affiliate" means any Person directly or indirectly controlling, controlled by, or under common control with the Person in connection with which this term is used.

"Auditor" has the meaning set forth in paragraph 7.3.

"Available Cash" has the meaning set forth in paragraph 5.6.

"Base Rent" has the meaning set forth in paragraph 5.1.3.

"Capital Reserve" has the meaning set forth in paragraph 8.1.

"Capital Reserve Contributions" means the amounts required by paragraph 8.2 to be set aside and contributed monthly into the Capital Reserve.

"Code" means the Internal Revenue Code of 1986, as amended or restated, together with final and proposed regulations promulgated under it.

"Condemnation" has the meaning set forth in paragraph 11.1.

"Default" means any violation or breach as described in one or more subparagraphs of Section 13, without regard to whether any requirement for the giving of notice, the lapse of a cure or grace period, both of the foregoing, or any other event, condition or occurrence has been satisfied.

"Encumbrances" has the meaning set forth in paragraph 16.16.

"Event of Default" has the meaning set forth in Section 13, and including where applicable, as specified in Section 13, the giving of notice, the lapse of a cure or grace period or both notice and the lapse of a cure or grace period.

"FF&E" means FF&E (Sublandlord) and FF&E (Tenant), individually and collectively.

"FF&E (Sublandlord)" means the furniture, fixtures, equipment, furnishings, artwork and other items of personal property owned by Sublandlord, at any time in the future incorporated into the Hotel or installed, placed or located on or in the Hotel and intended to be included in the Property leased by this Operating Lease.

"FF&E (Tenant)" means the furniture, fixtures, equipment, furnishings, artwork and other items of personal property owned by Operating Subtenant, at any time in the future incorporated into the Hotel or installed, placed or located on or in the Hotel.

"FF&E Specifications" means the plans, drawings and specifications for the FF&E to be purchased, installed, placed or located on or in the Hotel.

"Force Majeure Event" means any of the following: (a) fire, flood, explosion, earthquake, acts of God or any other similar events or circumstances affecting the Hotel beyond the reasonable control of the party identified in connection with this term; (b) acts of public enemies which directly and adversely impact the Hotel; (c) unreasonable delays in obtaining Governmental Authorizations, unless such delays are the result of Operating Subtenant's action or inaction as determined by Sublandlord's sole reasonable discretion; (d) insurrections or riots at or near the Hotel; (e) a strike of union trades performing labor for the Hotel and not the result of acts or omissions of Operating Subtenant; and (f) weather of unusual severity or extended duration if such weather prevents the operation of the Hotel.

"GAAP" means Generally Accepted Accounting Principles and, with respect to the operation of the Hotel Business, includes the Uniform System of Accounts.

"Governmental Requirements" means any and all building, zoning, subdivision, traffic, parking, land use, environmental, occupancy, safety, health, access for the disabled, air navigation, or other applicable laws, ordinances, regulations, decrees, rules or conditions of any federal, state, county, municipal or other governmental or quasi-governmental authority or agency, pertaining to the subject matter described in the sentence or paragraph in which this term is used. This term is intended to include any requirement imposed as a condition to the granting of governmental approvals, consents, variances, permits or actions applicable to such subject matter. It shall

include any and all of the foregoing, whether foreseen or unforeseen, ordinary or extraordinary, or now or later in force and effect.

"Gross Revenues" is as defined in the Management Contract.

"Gross Rooms Revenue" means that portion of Gross Revenues derived from or generated by the rental, sale, use or occupancy of transient guest rooms in connection with the Hotel Business.

"Hazardous Substances" means any chemical, material, element, compound, solution, mixture, substance or other matter of any kind whatsoever which is defined, classified, listed, designated or regulated (either absolutely or if in specified quantities or concentrations) as hazardous, toxic, radioactive, a contaminant or a pollutant by any federal statute, regulation, order, rule, directive or listing or the State of California or any board, agency or body associated with any of the foregoing or any quasi governmental body or agency with jurisdiction over such matters and having jurisdiction over the Land, the Property or the operation of a hotel or office business within the Hotel. Without limiting the generality of the preceding sentences, this term shall include (a) PCB's and materials containing PCB's, (b) asbestos and materials containing asbestos, (c) petroleum and petroleum-based chemicals and substances, (d) urea formaldehyde, and (e) lead and lead-based paints and wall coverings.

"HEOS" means hotel equipment, inventory and operating supplies which under GAAP are not considered to be capital assets, are not part of the FF&E and must be purchased by the Operating Subtenant for the operation of the Hotel Business.

"Hotel" means the structures, fixtures and other improvements on the Land, including specifically, that certain hotel located thereon having a street address of 1441 Quivira Road containing approximately 421 guest rooms, marina, restaurants and related facilities all comprising the Hyatt Regency Islandia, San Diego, California.

"Hotel Business" means the operation in the Hotel by Operating Subtenant and Manager (or any substitute manager if Manager is replaced for any reason) of a hotel business in a manner consistent with the standard provided under the Management Contract.

"Impositions" means the following: (a) all real property taxes or payments in lieu of such taxes imposed in or attributable to the Lease Term with respect to the Subleasehold Estate; (b) all taxes during the Lease Term imposed, directly or indirectly, upon the Property or any part or portion of it, or the Rents payable to Sublandlord, but excluding federal, state or local net income taxes or franchise taxes based on net income of general application and federal unrelated business income tax or taxes levied under Code Section 4975; (c) all taxes during the Lease Term imposed on or with respect to FF&E (Sublandlord) and other tangible and intangible personal property, if any, owned by Sublandlord and included in the Property; (d) all general or special assessments, levies or charges of any kind or nature imposed by or under any private or quasi-public association, district or body against the Property, Sublandlord or the Subleasehold Estate and payable during the Lease Term; (e) all general or special assessments, levies or charges for public improvements or benefits (regardless of when commenced or completed) imposed on the Property or the Subleasehold Estate, payable during the Lease Term; (f) all other assessments, levies or charges payable during the Lease Term in connection with sidewalks, paving, lighting, electrical service,

sewers, vaults, public improvements and like facilities associated with the Property; and (g) all other utility or public improvement rents, rates, charges, excises, levies, license fees and other charges, whether general or special, ordinary or extraordinary, foreseen or unforeseen, of every character (including interest and penalties thereon), which at any time during or in respect of the Lease Term may be assessed, levied, confirmed or imposed on or in respect of or be a lien upon the Property or the Subleasehold Estate or any part, of either, or any estate, right or interest in the Property or the Subleasehold Estate, or any occupancy, use or possession of or activity conducted on the Property or the Subleasehold Estate, or any part of either. To the extent of any such levy, assessment, charge or cost is payable in installments only the installments due during the Lease Term shall be payable and the Impositions shall be subject to proration between Sublandlord and Operating Subtenant as of the Lease Termination Date.

“Insurance Requirements” means all of the terms and conditions of the insurance policies referred to in Section 9, and all requirements of the issuer of any such policy.

“KenCal Operating Agreement” has the meaning set forth in Paragraph 5.6.

“Land” means that certain tract or parcel of land situated in the City of San Diego, California, more particularly described on Attachment 1.

“Sublandlord Investment” has the meaning set forth in subparagraph 5.1.2.

“Lease Date” has the meaning set forth in the first paragraph of this Operating Lease.

“Lease Term” has the meaning set forth in Section 3.

“Lease Termination Date” means the date on which this Operating Lease expires, terminates, or is terminated in accordance with its terms or is terminated by agreement of Sublandlord and Operating Subtenant. A Lease Termination Date shall include (a) a termination of this Operating Lease by Sublandlord following and caused by an Event of Default; (b) any termination of this Operating Lease occurring as described in paragraphs 10.1 (pertains to casualty), 11.1 (11.1 pertains to Condemnation) or 14.1 (pertains to sale of the Property); and (c) the expiration of the Lease Term as specified in Section 3.

“Lease Year” means each calendar year during the Lease Term, except that the first Lease Year shall be for that partial calendar year beginning with the Lease Date and ending on December 31, 2006. Should a Lease Termination Date be other than on December 31, then the last Lease Year shall also be a partial calendar year beginning on January 1 and ending on the Lease Termination Date.

“Leasehold Estate” means collectively, as may now or in the future exist, the Sublandlord’s leasehold interest in the Property granted by the Ground Lease.

“Loan Payment” means the installment of interest, principal or any other sum due from Sublandlord during any month of the Lease Term for loan financing procured by Sublandlord. The documents and agreements pursuant to which Sublandlord procured the Loan, as in effect from time to time, are referred to as the “Sublandlord Loan Documents.”

"Management Contract" means the Hotel Management Contract by and between Operating Subtenant and Manager, and any amendments thereto.

"Manager" means Hyatt Corporation.

"Marina Management Agreement" means that certain Marina and Sport Fishing Facility Administration and Supervision Agreement by and between Operating Subtenant and Marina Manager, and any amendments thereto.

"Marina Manager" means Marina Bay Management, LLC.

"Note" means that certain Secured Demand Promissory Note in the original principal amount of \$776,000 made by Operating Subtenant in favor of Sublandlord, as in effect from time to time. The documents and agreements described in the Note as the "Loan Documents," as each is in effect from time to time, are referred to as the "Operating Subtenant Loan Documents."

"Operating Lease" means this document entered between Sublandlord and Operating Subtenant, and any amendments to it.

"Operating Plan and Budget" has the meaning set forth in paragraph 6.5.

"Operating Subtenant" has the meaning set forth in the first paragraph of this Operating Lease.

"Operating Subtenant LLC Agreement" means the Operating Agreement of Operating Subtenant dated as of the Lease Date pertaining to the formation, capitalization and operation of Operating Subtenant, as amended, supplemented, related or otherwise modified from time to time.

"Person" means an individual, corporation, partnership, limited liability company, association, trust or other entity or organization, including a government or political subdivision or an agency or instrumentality of it.

"Property" means a collective reference, as such may now or in the future exist, to Sublandlord's right, title and interest in and to (a) the Land; (b) the Hotel; (c) all easements, licenses, permits, rights and privileges appurtenant to or associated with the real property or interests in real property described in clauses (a), (b), and (c); and (d) the FF&E (Sublandlord).

"Property Sale" has the meaning set forth in paragraph 14.1.

"Renew or Renewal" means the refurbishment, renewal or improvement of the Hotel or the replacement, rehabilitation or renewal of the FF&E (Sublandlord), or both of such actions, proposed by Operating Subtenant which are capital expenditures under GAAP and which are approved by Sublandlord or for which Sublandlord is required to grant its approval, as more particularly specified in subparagraph 6.5.2. This term shall exclude routine cleaning, repairs or maintenance or rehabilitation of the Hotel, or cleaning, repair, maintenance, rehabilitation, replacement or renewal of the FF&E (Tenant) or the FF&E (Sublandlord) necessary in the ordinary course of the operation of the Hotel Business which are wholly Operating Subtenant's responsibility under this Operating Lease.

"Renovation Costs" means the costs associated with the design, construction, renovation, furnishing and equipping of the Hotel.

"Renovation Plans" means the plans and specifications agreed to by Sublandlord and Operating Subtenant for the renovation of the Hotel.

"Renovation Property" means the right, title and interest acquired by Sublandlord in Governmental Authorizations, Renovation Plans, FF&E Specifications, studies and reports and other properties, data or information necessary to or associated with the renovation of the Hotel, the furnishing of FF&E (Sublandlord) to the Hotel and the installation of FF&E (Sublandlord) in the Hotel.

"Rent" means an individual reference to each category or item of rent due and payable under this Operating Lease and a collective reference to all such categories and items of rent.

"Reporting Statement" means all financial reports and statements required to be prepared by the Manager and delivered to the Operating Subtenant as identified in the Management Contract.

"Subleasehold Estate" means collectively, as may now or in the future exist, the Operating Subtenant's leasehold interest in the Property granted by this Operating Lease.

"Title Policy" means any title insurance policy insuring the title to any portion of the Property.

"Uniform System of Accounts" means the latest edition of the Uniform System of Accounts for the Lodging Industry that is published by the Hotel Association of New York City, Inc. and approved by the American Hotel & Motel Association (currently the 9th Revised Edition, 1996).

"Union Requirement" has the meaning set forth in paragraph 6.7.

## **SECTION 2: LEASE GRANT**

2.1 Grant. Subject to the terms set forth in this Operating Lease, Sublandlord leases to Operating Subtenant and Operating Subtenant accepts and leases from Sublandlord, for the Lease Term, the Property as it exists on the Lease Date.

2.2 Management Contract. Operating Subtenant shall cause the Manager to carry out its functions and operations under the Management Contract at all times consistent with the provisions of this Operating Lease. Notwithstanding the delegations by Operating Subtenant under the Management Contract, Operating Subtenant shall continue to be responsible to Sublandlord for due and proper performance of Operating Subtenant's obligations under this Operating Lease.

2.3 Incorporation of Management Contract Provisions. This Operating Lease, in one or more paragraphs, references the provisions of the Management Contract. If the Management Contract is terminated, then the relevant provisions of this Operating Lease remain in full force and effect without termination or deletion.

2.4 No Modification to Management Contract. Operating Subtenant shall ensure that Operating Subtenant does not modify, amend, or waive any rights under the Management Contract without Sublandlord's prior written consent.

2.5 Performance of Operating Subtenant Loan Documents. Operating Subtenant covenants to fully and timely perform its obligations under the Operating Subtenant Loan Documents.

### **SECTION 3: LEASE TERM**

The term of this Operating Lease ("Lease Term") begins on the Lease Date and expires at 5:00 p.m. on that date that is Twenty Nine (29) years after the Lease Date unless the term of this Operating Lease is earlier terminated as set forth in this Operating Lease.

### **SECTION 4: RENOVATION AND EQUIPPING OF HOTEL**

4.1 FF&E Specifications. An outline of FF&E Specifications for FF&E (Sublandlord) and FF&E (Tenant) for the Hotel appear in Parts A and B, respectively, of Attachment 2. Sublandlord and Operating Subtenant have approved Parts A and B. Sublandlord and Operating Subtenant shall diligently and cooperatively participate in the development of the final FF&E Specifications for both FF&E (Sublandlord) and FF&E (Tenant). Operating Subtenant and Manager shall substitute a listing of the final FF&E Specifications for both FF&E (Sublandlord) and FF&E (Tenant), as approved by Sublandlord, for and as a replacement of such FF&E Specifications listed on the substitute Attachment 2. Any other FF&E Specifications so developed and approved, whether or not listed on Attachment 2, are within the definition of FF&E Specifications. Part A of Attachment 2 describes FF&E (Sublandlord) and Part B of Attachment 2 describes FF&E (Tenant). The approval given to the FF&E Specifications and to the items and categories of FF&E is effective for the normal service life of each item or category of items of FF&E.

4.2 Operating Subtenant's Purchase of FF&E (Tenant), HEOS, and Other Operating Properties. Operating Subtenant shall purchase and install at Operating Subtenant's cost, (a) FF&E (Tenant), (b) all HEOS and (c) any furniture, furnishings and equipment necessary to the Hotel to the extent not included in (1) the FF&E (Sublandlord) or (2) the FF&E (Tenant); provided that the aggregate purchase price thereof does not exceed the sum of \$970,000, in which case Operating Subtenant shall only be required to purchase that portion of the FF&E (Tenant) with a cost of \$970,000 and the remaining FF&E (Tenant) shall be reallocated to FF&E (Sublandlord). Operating Subtenant shall coordinate purchases and installations of the FF&E (Tenant) with the work and installations being performed by or on behalf of Sublandlord so as not to interfere with or delay the renovation of the Hotel or the installation of the FF&E (Sublandlord). Under no circumstances shall Sublandlord have any responsibility for the Renewal of the items of property described in this paragraph nor shall any sums in the Capital Reserve be available to Operating Subtenant for repairs or replacements of items of property described in clauses (b) or (c) of this paragraph.

## SECTION 5: RENT

### 5.1 Base Rent

5.1.1 For each month during the Lease Term, Operating Subtenant shall pay Rent ("Base Rent"), in arrears, on the first day of the second month following such month and on the Lease Termination Date. For example, Base Rent for August is due on October 1. The Base Rent for each month shall equal the amount of money necessary to pay Sublandlord a return at the applicable percentage rate on Sublandlord's Investment (as defined below), as it is outstanding from time to time during the calendar month for which the Base Rent is due. The applicable annual percentage rate on Sublandlord's Investment for purposes of Base Rent are as follows: (i) Year 1, Ten Percent (10%) per annum, (ii) Year 2, Ten Percent (10%) per annum, (iii) Year 3, Eleven Percent (11%) per annum; and (iv) Year 4 and each year thereafter during the term of the Lease, Twelve Percent (12%) per annum. Thus, for example, the Base Rent payment for the first month of the Fourth Year of the Lease would be determined by multiplying one twelfth (1/12) of Twelve Percent (12%) interest, which equals One Percent (1%) by the then current Sublandlord's Investment to arrive at the monthly rent figure for the first month of the third Lease year which, per the terms of this Section would be due on the first day of the third month of said year.

*\$96,296.00  
per Schedule  
C of the Lease*

5.1.2 "Sublandlord Investment" means the aggregate of (a) all of the Renovation Costs that were paid by Sublandlord; plus (b) any additional investment by Sublandlord with respect to the Property before the Lease Term, including all costs and payments made by Sublandlord to acquire, or in connection with the acquisition of, the Property; plus (c) any additional investment by Sublandlord with respect to the Property during the Lease Term, including Renewals and other capital improvements, as and when so made, but exclusive of any expenditure of cash funded by moneys held in the Capital Reserve; plus (d) the commitment, origination or similar fees paid by the Sublandlord with respect to loan financing procured by Sublandlord to fund the acquisition, improvement or other action in connection with the Property. Under the preceding sentence, the Sublandlord Investment (a) is deemed decreased upon, and in the amount of, any insurance, Condemnation, or Title Policy proceeds or awards received by Sublandlord in accordance with the ratio and terms set forth in subparagraph 11.1.3, as applicable, and (b) is deemed increased upon, and in the amount of, any reinvestment in the Property of insurance, Condemnation or Title Policy proceeds or awards received by Sublandlord. To the extent of any additional investment by Sublandlord during any month of the Lease Term, the total Sublandlord Investment is increased as of the day of such increase or increases. If there is a dispute between Operating Subtenant and Sublandlord over the amount of the Sublandlord Investment, the amount submitted by Sublandlord shall be utilized for Base Rent computation and payments pending resolution of the dispute.

5.1.3 The Rent payable under subparagraphs 5.1.1 and 5.1.2 is termed "Base Rent."

5.2 Reporting Statements. Operating Subtenant shall provide, or shall cause to be provided, to Sublandlord copies of all Reporting Statements upon receipt from Manager. If a substitute manager replaces the Manager at the Hotel, then the Operating Subtenant shall cause such substitute manager to provide all Reporting Statements under any substitute Management

Contract. Operating Subtenant acknowledges and agrees that Sublandlord may use for any purpose any Reporting Statements acquired by or provided to Sublandlord.

### 5.3 Additional Rent Obligations.

5.3.1 During the Lease Term, Operating Subtenant shall pay all Impositions on or before the due date for each Imposition or installment of an Imposition. Operating Subtenant shall provide Sublandlord written evidence of the payment of Impositions.

5.3.2 Operating Subtenant shall pay or cause to be paid all premiums on the insurance policies referred to in paragraph 9.1 of this Operating Lease.

5.3.3 Operating Subtenant is solely liable for, and shall pay directly, prior to delinquency during the Lease Term, all charges for public and private utility services supplied to and used in connection with the operation of the Hotel, including water, natural gas, heating, ventilating and air conditioning, chilled water, steam, electricity, telephone service, and sewer service. Connection fees and charges for such utility services for connections made during (but not before) the Lease Term are the responsibility of Operating Subtenant and Operating Subtenant shall pay the same.

5.3.4 All sums and obligations payable under subparagraphs 5.3.1 and 5.3.3 are Additional Rent and a category of Rent payable under this Operating Lease. If Operating Subtenant defaults in the payment of any such obligations, such default is a Default in the payment of Rent under this Operating Lease and Sublandlord has all the rights and remedies for Rent default provided in this Operating Lease, by law and in equity, subject to such notice and grace periods, if any, as are provided for by law and in this Operating Lease.

### 5.4 General Rent Provisions.

5.4.1 Except for any deferment of Rent authorized by paragraph 5.6, Operating Subtenant shall pay to Sublandlord Rent in full without notice, demand, abatement, deduction, diminution, offset, suspension or deferment. Operating Subtenant shall pay Rent in full regardless of any claim Operating Subtenant may have against Sublandlord under this Operating Lease or otherwise and of any failure or claimed failure of Sublandlord to perform or comply with any provision of this Operating Lease or any other agreement or undertaking by Sublandlord. Operating Subtenant shall pay Rent in immediately available funds which are lawful money of the United States of America and at such place as Sublandlord may from time to time specify in writing.

5.4.2 Except as otherwise specifically provided in this Operating Lease or upon a Force Majeure Event, no happening, event, occurrence or situation during the Lease Term and no present or future law, ordinance, resolution, regulation or order of any municipal, county, state or federal government or other governmental body, board, agency or other authority now or hereafter having jurisdiction over the Subleasehold Estate or the Property, whether foreseen or unforeseen, and however extraordinary, shall relieve, abate, or diminish Operating Subtenant's liability to pay Rent as specified in this Operating Lease or shall otherwise relieve Operating Subtenant, in whole or in part, from its obligations under this Operating Lease. To the extent permitted by law, Operating Subtenant waives any rights now or later conferred upon it by

statute, proclamation, decree, order, or otherwise to any abatement, diminution, offset, or suspension of payment or performance on account of any such event, happening, occurrence or situation. Upon the happening of a Force Majeure Event, Operating Subtenant's obligation hereunder, other than the duty to pay Rent, are suspended as reasonably necessary.

5.5 Renegotiation of Rent. Operating Subtenant acknowledges that Sublandlord's sole member is an entity owned by a partnership, whose interest holders include tax-exempt organizations under the Code. The parties intend that the Rent paid to Sublandlord under this Operating Lease will be wholly exempt from federal income taxes when passed through to and received by each such tax-exempt organization. If, at any time during the Lease Term, the Code is amended or interpreted or any other fact or circumstance exists so that all or any significant portion of any component of Rent will be deemed unrelated business taxable income to such beneficiaries, the Sublandlord and Operating Subtenant shall renegotiate the affected Rent provisions so that, to the extent which can be reasonably accomplished with no more than de minimis adverse consequences (economic or otherwise) to Operating Subtenant, the Sublandlord will not be required to report and pass through to said tax exempt interest holders unrelated business taxable income under the Code with respect to the Rent derived by Sublandlord from this Operating Lease.

5.6 Limited Deferral of Rent Payments. In the event that Operating Subtenant does not have sufficient Available Cash to make a Base Rent installment when due and payable then the payment of such Base Rent installment may be deferred to the extent and subject to the limitations set forth in Section 5.6.1 below. Notwithstanding anything in this Operating Lease to the contrary, Base Rent installments otherwise subject to deferral under the preceding sentence are due and payable absolutely and unconditionally up to an amount equal to the Loan Payment due for the Month. As used in this Section 5, the term "Available Cash" shall mean for the Month or Lease Year in question, the aggregate of (a) Gross Revenues, minus (b) Operating Expenses as defined in the Management Contract, minus (c) the fees payable and other amounts required to perform Operating Subtenant's obligations under the Management Contract, minus (d) Impositions, minus (e) insurance premiums payable under subparagraph 5.3.2, minus (f) Capital Reserve Contributions, minus (g) an annual payment or distribution to Operating Subtenant's owner in an amount not to exceed Seventy Five Thousand Dollars (\$75,000.00) for each twelve (12) month period from the Lease Date through the date on which calculation of Available Cash is made (whether or not paid), minus (h) a one time payment equal to the net tax liability incurred by Operating Subtenant's direct or indirect owner(s) as a result of that certain \$194,000 service fee paid to Operating Subtenant in fiscal 2006 (after giving effect to any deductions and losses allocated from Operating Subtenant to such direct or indirect owner(s) in fiscal 2006), minus (i) amounts which have been demanded to be repaid under the Note (whether or not paid) and (j) ordinary and necessary out-of-pocket expenses incurred by Operating Subtenant in connection with its operation in accordance with that certain KenCal Operating LLC Operating Agreement in effect from time to time (the "KenCal Operating Agreement").

5.6.1 Operating Subtenant may defer up to (i) fifty percent (50%) of each installment of Base Rent otherwise due and payable on account of the Lease Year starting on the Lease Date; (ii) eighty-five percent (85%) of each installment of Base Rent otherwise due and payable on account of the Lease Year starting on January 1, 2007; and (ii) fifty percent (50%) of each installment of Base Rent otherwise due and payable on account of each subsequent Lease

Year commencing in the Lease Year starting on January 1, 2008 and thereafter throughout the term of the Lease.

5.6.2 If and to the extent any such Base Rent installment is properly not paid in the full cash amount because of insufficient Available Cash, the unpaid difference between the amount payable with respect to any such Rent installment and the amount paid from Available Cash shall cumulate, and the cumulative, unpaid amount shall be paid to the extent funds remain from Available Cash after payment of all currently payable Rent on each subsequent Rent payment date. Any and all such cumulated, unpaid Base Rent shall be paid in full, absolutely, unconditionally and without regard to whether Available Cash exists, on the earlier to occur of (a) a Lease Termination Date, or (b) Ten Years after the Lease Date.

## **SECTION 6: USE AND OPERATION**

6.1 Operation of the Hotel. Operating Subtenant shall cause the Manager to manage and operate the Hotel during the Lease Term so as to satisfy the operational requirements of the applicable Management Contract. Operating Subtenant shall cause the Manager to adhere to the provisions of the Management Contract. To the extent permitted by law, Operating Subtenant waives all rights and interests Operating Subtenant may have under applicable local and federal law, and all other statutes pertaining to notification, storage, recovery, repossession, compensation or other claim or action Operating Subtenant may have against Sublandlord or any third party respecting personality or improvements remaining at the Property after Operating Subtenant has otherwise vacated, left or abandoned the Property.

6.2 Operating Subtenant's Maintenance. Operating Subtenant shall maintain and operate the entirety of its Subleasehold Estate in a safe condition and so as to conform to Governmental Requirements and Insurance Requirements. Operating Subtenant's obligation under the preceding sentence shall extend to all adjoining or appurtenant public and private streets, alleys, ways, passageways, easements, vaults, sidewalks and curbs to the extent that such were included in the Subleasehold Estate, are otherwise appurtenant to the Subleasehold Estate or are the subject of obligations imposed by Governmental Requirements on the Sublandlord or operator of the Hotel. Operating Subtenant shall keep the Hotel, the FF&E (Sublandlord), the remainder of the Property included in the Subleasehold Estate, the FF&E (Tenant), and the HEOS in good condition and repair and at all times during the Lease Term, and shall clean, maintain, manage and operate the same so as to conform to the operating standards set forth in the Management Contract. Operating Subtenant's obligations under this paragraph shall include and extend to that cleaning, repair, renewal and replacement as may be necessary in the ordinary course of the operation of the Hotel of individual items of HEOS, or FF&E that break, become unserviceable or disappear. Such repair, replacement, cleaning and renewal shall not be considered within the definition of Renewals.

6.3 Sublandlord is Free of Maintenance Responsibilities. Subject only to the provisions of Section 6 concerning Renewals or capital improvements undertaken by Sublandlord, Sublandlord has no duties, responsibilities or obligations during the Lease Term for (a) operation or management of the Subleasehold Estate or the Hotel, or (b) the costs or expense of such management or operation. All of such duties, responsibilities, obligations, cost and expense are the Operating Subtenant's obligation and responsibility under this Operating Lease.

If Sublandlord pays any cost or expense for which the Operating Subtenant has responsibility under this or any other provision of this Operating Lease, Operating Subtenant, within fifteen (15) days after demand by Sublandlord, shall reimburse Sublandlord for such cost or expense as Additional Rent under this Operating Lease. Operating Subtenant acknowledges that the Base Rent payable to Sublandlord is intended to be absolutely net of any cost, expense, or investment by Sublandlord during the Lease Term except as may be required of or voluntarily undertaken by Sublandlord pursuant to paragraph 6.6.

6.4 Operating Expenses and Working Capital. Except as otherwise provided in this Operating Lease, Operating Subtenant shall: (a) pay all expenses and costs associated with the management and operation of the Hotel, including sums payable under the Management Contract; and (b) provide all working capital required of it by the Management Contract or otherwise reasonably necessary to the operation of the Hotel. This provision is subject only to Sublandlord's obligations under paragraph 6.6.

6.5 Operating Plan and Budget.

6.5.1 Operating Subtenant shall punctually deliver to Sublandlord copies of (a) each Operating Plan and Budget (as defined in the Management Contract) proposed by Manager and (b) the final Operating Plan and Budget as approved by Operating Subtenant. Delivery of such documents is informational only and Sublandlord's approval to the Operating Plan and Budget is not required unless otherwise specified in subparagraph 6.5.2.

6.5.2 Sublandlord's consent is required for any expenditure by Manager on behalf of Sublandlord for a Renewal or other capital expenditure.

6.6 Conformance of and Payment for Work. Any repair, refurbishment, Renewal, other capital improvement or restoration required of or performed by either party under this Operating Lease shall (a) be in conformity with the provisions of Governmental Requirements, Insurance Requirements and the Management Contract; (b) be performed by contractors meeting the requirements set forth in paragraph 6.7 (the "Union Requirement"); (c) be constructed with due diligence; (d) constructed and carried out in a good and workmanlike manner; and (e) be free of material defects in design, materials or workmanship. Any material alteration or addition to, disposition of or replacement of any material part or material item of the Hotel, the FF&E (Sublandlord) or the FF&E (Tenant) shall require Sublandlord's approval as to its specifics, whether or not the activity and its cost were proposed in the Operating Plan and Budget; provided, however, that in the event Sublandlord fails to approve and no commercial reasonable alternative exists, the failure of Operating Subtenant to take such action shall not be deemed a breach of this Operating Lease. In case any item of FF&E is replaced by a new item of like kind and utility, the replaced item may be disposed of by Operating Subtenant and such proceeds may be applied to the cost of such replacement. In the case of any disposition without a replacement or substitution of FF&E (Sublandlord), the net proceeds of any such disposition shall be disbursed to Sublandlord or, with the reasonable approval of Sublandlord, used to improve the Property. Disbursements of Sublandlord's funds or funds on deposit in the Capital Reserve shall be made under procedures specified by the Sublandlord to match such disbursements with progress in the work, to provide for adequate retainage and to afford protection against lien claims. Nothing in this paragraph shall require notice to and approval by Sublandlord of

Operating Subtenant or Manager action to remedy or correct an emergency posing an immediate threat to persons or property.

6.7 Contracting Requirement. GENERAL CONTRACTORS, PRIME CONTRACTORS OR SUBCONTRACTORS OF ANY TIER PERFORMING ANY REPAIR, RENEWAL, CAPITAL IMPROVEMENT, RECONSTRUCTION OR OTHER CONSTRUCTION WORK IN, ON, OR ABOUT THE HOTEL THAT ARE TO BE PAID FROM FUNDS SUPPLIED BY LANDLORD OR OPERATING TENANT, WHETHER CONTRACTED BY LANDLORD, OPERATING TENANT, A SUBTENANT OR CONCESSIONAIRE OF OPERATING TENANT, MANAGER OR BY A CONTRACTOR OR SUBCONTRACTOR OF ANY TIER, SHALL (A) BE LICENSED TO THE EXTENT REQUIRED BY GOVERNMENTAL REQUIREMENTS TO PERFORM SUCH WORK, (B) BE A PARTY TO OR BOUND BY A COLLECTIVE BARGAINING AGREEMENT WITH A LABOR ORGANIZATION AFFILIATED WITH THE BUILDING AND CONSTRUCTION TRADE DEPARTMENT, AFL-CIO, OR WITH AN INDEPENDENT, NATIONALLY RECOGNIZED LABOR ORGANIZATION OR ONE OF ITS AFFILIATED LOCALS, APPLICABLE TO WORK PERFORMED IN SAN DIEGO, CALIFORNIA, AND (C) SHALL EMPLOY ONLY MEMBERS OF SUCH LABOR ORGANIZATIONS TO PERFORM WORK WITHIN THEIR RESPECTIVE JURISDICTIONS. IF A SUBTENANT OR CONCESSIONAIRE OF OPERATING TENANT CONTRACTS FOR ANY REPAIR, RENEWAL, CAPITAL IMPROVEMENT, RECONSTRUCTION OR OTHER CONSTRUCTION WORK IN, ON, OR ABOUT THE SPACE LEASED TO SUCH SUBTENANT OR CONCESSIONAIRE, THEN OPERATING TENANT SHALL ENCOURAGE SUCH SUBTENANT OR CONCESSIONAIRE TO USE GENERAL CONTRACTORS, PRIME CONTRACTORS OR SUBCONTRACTORS OF ANY TIER TO PERFORM THE WORK THAT ARE A PARTY TO OR BOUND BY A COLLECTIVE BARGAINING AGREEMENT WITH A LABOR ORGANIZATION AFFILIATED WITH THE BUILDING AND CONSTRUCTION TRADE DEPARTMENT, AFL-CIO OR WITH AN INDEPENDENT, NATIONALLY RECOGNIZED LABOR ORGANIZATION OR ONE OF ITS AFFILIATED LOCALS, APPLICABLE TO WORK PERFORMED IN SAN DIEGO, CALIFORNIA.

6.8 Notices, Bonds and Liens for Construction.

6.8.1 Under no circumstance shall Operating Subtenant cause Sublandlord to incur or suffer any debt, liability, obligation, indebtedness, lien or encumbrance with respect to repair or Renewal or any capital improvement performed or caused to be performed by Operating Subtenant under this Operating Lease beyond the amount approved or required to be funded by Sublandlord under paragraph 6.6. Operating Subtenant shall neither cause nor suffer any claim of lien to be filed against any part of or interest in the Property for labor done or materials furnished to or contracted for Operating Subtenant or alleged to have been so done or furnished. In the event that any such claim shall nevertheless be so filed, Operating Subtenant shall discharge or adequately bond against such claim within thirty (30) days after the filing of it; provided, however, that Operating Subtenant shall not be in default of this subparagraph 6.8.1 and shall not be required to provide any such discharge or bond, if any such claim is filed against the Property due to the fault of Sublandlord, including Sublandlord's failure to fund any

Renewals or other capital improvements if and to the extent required to be funded by Sublandlord or approved for funding by Sublandlord under the terms of subparagraph 6.6.

6.8.2 Operating Subtenant shall indemnify, defend and hold harmless Sublandlord and the Property from and against all claims, demands, loss, actions, liabilities, cost or expense (including reasonable attorneys' fees and expenses of legal proceedings) arising as a consequence of Operating Subtenant's breach of any subparagraph of this paragraph 6.8.

6.9 Hazardous Substances. During the Lease Term, Operating Subtenant shall not permit Hazardous Substances to be stored, used, sold, released, generated or disposed of in, on or about the Property other than (a) Hazardous Substances which are ordinary household or office cleaning and maintenance products or (b) Hazardous Substances normally used in the conduct of the businesses lawfully being conducted at the site in quantities reasonable to the uses, so long as the products and materials described in clauses (a) and (b) are kept, used, stored and disposed of in accordance with the requirements of Governmental Requirements, the instructions of the manufacturer of such products and materials, and Insurance Requirements. Any exception to the requirements of this paragraph must be specifically approved by Sublandlord in writing. Sublandlord shall have any and all legal, equitable and other remedies with respect to a violation of this paragraph, including the right to enjoin a violation of it. If, notwithstanding the first sentence of this paragraph, Hazardous Substances are so stored, used, sold, released, generated or disposed of in, on or about the Property, Operating Subtenant shall deliver to Sublandlord notice of such event and Sublandlord shall formulate and implement the plan for removal, cleanup or remediation of such Hazardous Substances. Sublandlord shall consult with Operating Subtenant concerning such plan and its implementation and shall exert reasonable efforts to minimize adverse impacts on the operation of the Hotel arising from the implementation of such plan. If any such removal, cleanup or remediation arises from Operating Subtenant's violation of the first sentence of this paragraph, Operating Subtenant shall indemnify, defend and hold harmless Sublandlord and the Property from and against all claims, demands, loss, actions, liabilities, cost or expense (including reasonable attorneys' fees and expenses of legal and administrative proceedings) caused by such violation.

6.10 Inventories. Operating Subtenant shall maintain at its cost during the entire Lease Term HEOS, and other inventories and supplies at levels and in a condition necessary for (a) the efficient and effective operation of the Hotel and (b) conformity to the operating standards set forth in the Management Contract. Operating Subtenant shall not allow such property to be depleted or to deteriorate even where a notice of termination of this Operating Lease is delivered to Operating Subtenant by Sublandlord.

6.11 Licenses and Permits.

6.11.1 Operating Subtenant shall maintain in full force and effect throughout the Lease Term all licenses, approvals or contractual rights owned by Operating Subtenant, which are necessary for the operation of the Hotel.

6.11.2 Operating Subtenant shall procure and maintain or cause Manager to procure and maintain in full force and effect during the Lease Term each and every liquor license and any other licenses, permits and approvals that are Governmental Requirements for the

operation of the Hotel by Operating Subtenant. Sublandlord shall take such reasonable actions and execute such necessary documents and otherwise cooperate with Operating Subtenant at Operating Subtenant's expense to assist as reasonably necessary for Operating Subtenant to obtain such licenses, permits and approvals.

6.11.3 To the extent permitted by law, Operating Subtenant grants to Sublandlord, a security interest in each liquor license and each and every other governmental license, permit, approval or authorization held by or in the name of Operating Subtenant and procured for the Hotel to secure each and all of Operating Subtenant's obligations under this Operating Lease. This Operating Lease constitutes a security agreement under the Uniform Commercial Code in effect in California. On request of Sublandlord, Operating Subtenant shall execute such further security agreements, financing statements, continuation statements and other documents as may be necessary or convenient to the grant and perfection of the security interests described in this subsection (if and to the extent such security interest legally may be granted or perfected). Operating Subtenant warrants that upon its acquisition of each such license, permit, approval or authorization, if any, Operating Subtenant will have title to it free and clear of all liens, claims, encumbrances and rights of third parties. Operating Subtenant shall not sell, contract to sell, lease, encumber or otherwise dispose of any such license, permit, approval or authorization without the prior written consent of Sublandlord.

6.11.4 Operating Subtenant shall pay when due all fees, assessments or charges, if any, that might at any time, either in accordance with or in violation of the terms of this Operating Lease, affect the liquor licenses or the other licenses, approvals, permits or contractual rights described in this paragraph 6.11. Notwithstanding the preceding sentence, Operating Subtenant shall have the right to delay payment of any such fee, assessment or charge if and so long as (a) Operating Subtenant has contested in good faith the fee, assessment or charge in accordance with an applicable administration or judicial procedure, (b) Operating Subtenant promptly commences such contest and continuously pursues such contest with diligence through completion of the procedure, (c) the non-payment when due of the fee, assessment or charge during the period of contest does not jeopardize or invalidate such license, approval, permit or contractual right or Operating Subtenant's ability to operate the Hotel, does not expose the Property to any lien, encumbrance or attachment, and does not expose Sublandlord or the Property to any fines, penalties or assessments, (d) Operating Subtenant notifies Sublandlord prior to such contest of Operating Subtenant's intention to contest the fee, assessment or charge and the grounds for the contest, and (e) Operating Subtenant is not in Default in any payment or performance due under this Operating Lease. In the event of any Default, Sublandlord may exercise all rights and remedies of a secured party with respect to Sublandlord's security interest, all of which rights and remedies are cumulative. Operating Subtenant hereby waives any right to require Sublandlord to proceed against any other person or entity or to exhaust Sublandlord's rights against any collateral or to pursue any other remedy in Sublandlord's power on an Event of Default.

6.12 Entry by Sublandlord. Sublandlord and its designees may, on reasonable advance notice (except in the case of emergency in which case no prior notice shall be required) enter in or about the Hotel during the Lease Term. Sublandlord shall carry out such activities so as to cause the least interference reasonably possible with the Hotel. Sublandlord shall conduct such activities at such times as approved by Operating Subtenant, which approval shall not be

unreasonably withheld or delayed. In the event of an emergency where the Property is jeopardized or there is risk to health and safety, immediately following a Default by Operating Subtenant in any performance required of it under this Operating Lease, Sublandlord may enter without notice and at other than normal business hours.

## **SECTION 7: MANAGEMENT REPORTS AND FINANCIAL REPORTING**

7.1 **Books and Records.** Operating Subtenant shall keep or cause to be kept full, complete and proper books, records and accounts with respect to the management and operation of the Hotel. Operating Subtenant shall maintain such books, records and accounts (a) currently on an accrual basis, and (b) in accordance with GAAP.

### **7.2 Operating Subtenant's Financial Statements.**

7.2.1 Operating Subtenant and Manager shall make available to Sublandlord all of their books of account and other financial records at all reasonable times for examination, audit, inspection, and copying. Upon the expiration or termination of this Operating Lease, Operating Subtenant shall deliver to Sublandlord all of such books of account, financial and operating records (including those pertaining to reservations and hotel guest lists) forthwith so as to ensure the orderly continuance of the operation of the Hotel in the Hotel by a successor tenant or a purchaser of the Hotel. Sublandlord shall retain all of such information and make it available to Operating Subtenant at the Hotel, at all reasonable times, for inspection, audit, examination, and copying (at Operating Subtenant's or Manager's expense) for at least five (5) years subsequent to the Lease Termination Date.

7.2.2 Operating Subtenant shall deliver to Sublandlord copies of any and all reports, which Manager is obligated to deliver to Operating Subtenant under the applicable Management Contract promptly upon Operating Subtenant's receipt from the Manager.

7.2.3 The requirements of this paragraph 7.2 shall be in addition to and shall not limit the requirements of paragraph 5.2 dealing with the delivery of the Reporting Statements contemplated by that paragraph.

7.3 **Audit Rights.** Not more than once during any twelve (12) month period (unless Sublandlord has a reasonable basis to make a more frequent request), Sublandlord may, cause an audit of the Operating Subtenant's (and Manager's to the extent permitted by the Management Contract) books, records and accounts relevant to the computation of any item or category of Rent payable under this Operating Lease. Sublandlord's shall cause such audit to be performed either by (a) a certified public accounting firm of generally recognized national standing selected by Sublandlord; or (b) an asset manager selected by Operating Subtenant, as its agent (the "Auditor"). Operating Subtenant shall cooperate fully (and shall cause the Manager to cooperate to the extent required under the Management Contract) with the persons performing any audit described in this paragraph 7.3 and shall make available to such persons at Operating Subtenant's offices all books, records, accounts, and supporting data from Operating Subtenant, Manager, sublessees and concessionaires as may be necessary or appropriate to the audit. Operating Subtenant shall deliver to Sublandlord any and all reports prepared by the Auditor and shall cause Manager to retain a copy of any such report with the books and records pertaining to

the Hotel. Sublandlord shall pay for the Sublandlord's audit at its sole cost and expense. If, however, Sublandlord discovers during its audit that Operating Subtenant has underpaid or underreported any item or category of Rent by five percent (5%) or more, then Operating Subtenant shall bear all costs and expenses of Sublandlord's audit. Any discrepancies noted in any audit shall be promptly corrected.

7.4 Sublandlord Statement of Sublandlord Investment. From time to time, as desired by Sublandlord or reasonably requested by Operating Subtenant, Sublandlord shall provide Operating Subtenant with a brief statement of the then current Sublandlord Investment amount with sufficient detail to document recent increases or decreases in the amount. Sublandlord shall not be bound by any inaccuracies in a Sublandlord Investment report and may correct the same at a later date without waiver or penalty.

## **SECTION 8: CAPITAL RESERVE AND WORKING CAPITAL RESERVES**

8.1 Creation of Capital Reserve. Prior to the receipt of any Capital Reserve Contributions, Sublandlord shall or shall cause Manager to open a separate interest-bearing bank account in Operating Subtenant's name in a banking institution selected by Sublandlord for the purposes of receiving and holding Capital Reserve Contributions. The moneys in the account shall be for the purpose of reserving against and providing funds for Renewals. This bank account and funds on deposit in it is termed "Capital Reserve". Disbursements may be made from the Capital Reserve (a) only to pay for Renewals and other capital improvements approved by Sublandlord and (b) in accordance with the procedures set forth in paragraph 6.5.2; provided, however, in the event Sublandlord fails to approve the use of funds from the Capital Reserve for appropriate Renewals and other capital improvements, Operating Subtenant shall not be obligated to perform such Renewals or capital improvements and shall not have liability hereunder for failure to maintain the Property resulting therefrom.

8.2 Capital Reserve Contributions. Unless otherwise reasonably directed by Sublandlord, if at any time Manager shall cease to fully fund the Fund for Replacement of and Additions to Furnishings and Equipment" in the manner and as described in Section 5.4 of the Management Contract Operating Subtenant shall set aside from cash from operations, on the fifteenth (15<sup>th</sup>) of the month (in arrears) , amounts equal to four percent (4%) of Gross Revenues for the preceding month. Such amounts set aside by Operating Subtenant shall be deposited into the Capital Reserve. The contents of the Capital Reserve are deemed the property of Sublandlord.

## **SECTION 9: INSURANCE**

### **9.1 Insurance Policies.**

9.1.1 Operating Subtenant, during the Lease Term, shall procure and maintain or cause the Manager to procure and maintain the insurance coverages described in the Management Contract. Deductibles under the property/casualty insurance specified in the Management Contract shall be reasonable and satisfactory to Sublandlord. All insurance required to be carried under the Management Contract must be issued by companies with a Best's Key Rating Guide of A- VII or better. Owner reserves the right to require terrorism

insurance, or such other insurance, so long as such insurance is commercially available at commercial reasonable rates.

9.1.2 Operating Subtenant shall procure and maintain its own physical hazard coverage covering FF&E, HEOS, and other personal property owned by Operating Subtenant located in or about the Hotel and all replacements, renewals and substitutions. The separate policy shall have coverages, limits and deductibles satisfactory to Sublandlord.

9.1.3 Liability insurance policies procured under this Section 9 shall name as additional insureds the Sublandlord and such additional Persons as Sublandlord may reasonably designate.

9.2 Evidence of Insurance. Copies of the policies of insurance and other evidence of the existence of and the provisions of such policies of insurance shall be delivered by a party required to procure and maintain the insurance to the other party.

9.3 Waivers of Subrogation. Sublandlord and Operating Subtenant each waive and release any right of recovery which it may acquire against the other with respect to any loss or damage, including consequential damage, to it or the insured property caused by any peril (including negligent acts) covered by a policy of insurance required to be procured and maintained under this Operating Lease to the extent insurance proceeds are received by the party claiming the loss or damage free of the claims or interests of third parties. This waiver and release does not apply to any deductibles under any such policy. Sublandlord and Operating Subtenant shall cause their respective insurance carriers to consent to such waiver and to waive all rights of subrogation against the other party.

9.4 Indemnification of Sublandlord.

9.4.1 Except as limited by paragraph 9.3, to the maximum extent permitted by applicable law and to the extent insurance coverage does not exist or is insufficient in amount, Operating Subtenant shall indemnify, defend and save Sublandlord harmless from and against any and all loss, liability, claims and expense (including reasonable attorneys' fees and expenses of legal proceedings) associated with claims of third parties arising from or incidental to (a) Operating Subtenant's own negligent acts or omissions or willful misconduct in connection with the operation and management during the Lease Term of the Hotel, or (b) any repairs, rehabilitation, Renewals or other construction performed directly by Operating Subtenant or Operating Subtenant's contractors during the Lease Term. If any action or proceeding is brought against Sublandlord alleging such liability, Operating Subtenant shall, at the request of Sublandlord, defend it at Operating Subtenant's expense with counsel reasonably satisfactory to Sublandlord.

9.4.2 Except as limited by paragraph 9.3, to the maximum extent permitted by applicable law and to the extent insurance coverage does not exist or is insufficient in amount, Sublandlord shall indemnify, defend and save Operating Subtenant harmless from and against any and all loss, liability, claims and expense (including reasonable attorneys' fees and expenses of legal proceedings) associated with claims of third parties arising from or incidental to (a) Sublandlord's own negligent acts or omissions or willful misconduct in connection with its

ownership of the Property during the Lease Term, or (b) any Renewals or other capital improvements performed directly by Sublandlord or Sublandlord's contractors during the Lease Term.

#### **SECTION 10: CASUALTY**

10.1 **Casualty**. Within ten (10) days following any casualty causing damage to or destruction of all or any material part of the Property (a "**Casualty Event**"), Operating Subtenant shall notify Sublandlord of such damage.

10.1.1 If more than fifty percent (50%) of the Property is damaged and as a result, Sublandlord is not able to rebuild the Property at commercially reasonable rates within twelve (12) months, then Sublandlord may, in its sole discretion, elect not to rebuild the Property.

10.1.2 If fifty percent (50%) or less of the Property is damaged or Sublandlord is able to rebuild the Property at commercially reasonable rates within twelve (12) months or Sublandlord elects to rebuild the Property, then, within a reasonable time following damage or destruction, then Sublandlord shall restore the Property, including the FF&E (Sublandlord), and Operating Subtenant shall restore the FF&E (Tenant), HEOS, and other furniture, furnishings and equipment owned by it. Sublandlord may apply proceeds of the insurance policies described in Section 9 and the Capital Reserve to such restoration.

10.2 **No Abatement**. If Sublandlord does not rebuild by reason of a casualty described in paragraph 10.1, then Base Rent shall continue to be computed and due as specified in this Operating Lease without abatement, and such Casualty Event shall not be considered a Force Majeure Event.

10.3 **Waiver**. Except as otherwise expressly provided in this Operating Lease, Operating Subtenant hereby waives any right it may have to terminate this Operating Lease in the event of a casualty and waives the provisions of all applicable local or federal law, and any similar law, statute or ordinance now or hereafter in effect.

#### **SECTION 11: CONDEMNATION; TITLE INSURANCE PROCEEDS**

11.1 **Condemnation**. "**Condemnation**" means a temporary or permanent taking, or conveyance in lieu of or under threat of taking, of any interest in, part of or item of the Property by condemnation proceedings, by any right of eminent domain or similar power of any governmental agency or for any public purpose, or by any voluntary conveyance or agreement under threat of the exercise of any such proceedings, power or taking.

11.1.1 If during the Lease Term, there is a Condemnation of all of the Property or, in the reasonable discretion of Sublandlord, a substantial portion as would render the balance of the Property not suitable for the use by Operating Subtenant contemplated by this Operating Lease, then this Operating Lease shall terminate on the date that possession is surrendered to the condemning authority.

11.1.2 If during the Lease Term, there is a Condemnation of less than all of the Property or, in the reasonable discretion of Sublandlord, less than a substantial portion as would render the balance of the Property not suitable for the use by Operating Subtenant as contemplated by this Operating Lease, then, within a reasonable time following the Condemnation, Sublandlord shall restore the Hotel and the FF&E (Sublandlord) and Operating Subtenant shall restore the FF&E (Tenant), HEOS, and other furniture, furnishings and equipment owned by it to a condition as near as possible to their condition immediately prior to the Condemnation, but Sublandlord's and Operating Subtenant's obligations under this subparagraph 11.1.2 shall not exceed the amount of the award paid to them respectively for such restoration.

11.1.3 All proceeds or awards of Condemnation of the Property shall be paid to and become the sole property of Sublandlord, except that, if there is a Condemnation of less than all the Property and this Operating Lease is not terminated, Sublandlord shall make those proceeds allocated to the FF&E (Tenant) available to Operating Subtenant for purposes of restoring FF&E (Tenant). Operating Subtenant waives any other right or claim to any proceeds or awards of Condemnation. The Manager shall be entitled to pursue and receive a condemnation award for the loss of the Management Contract as it pertains to the condemned Property so long as no such award reduces the award payable to the Sublandlord.

11.2 No Abatement. If Sublandlord does not rebuild by reason of a Condemnation described in this paragraph, then Base Rent shall continue to be computed and due as specified in this Operating Lease without abatement, and such Condemnation shall not be considered a Force Majeure Event.

11.3 Title Insurance Proceeds. For purposes of this Section 11, the Proceeds of any Title Policy received by Sublandlord or Operating Subtenant shall be distributed pursuant to Section 11.1.3.

## **SECTION 12: ASSIGNMENT AND SUBLETTING**

12.1 Assignment and Subletting. Other than for the delegations to Manager under the Management Contract, and the assignments and delegations by Manager permitted under such document, Operating Subtenant shall not assign, delegate or otherwise transfer all or any part of or interest in this Operating Lease to any Person without first obtaining the Sublandlord's consent, which may be granted, conditioned or withheld in its absolute discretion. Except to the extent specifically allowed by the Management Contract, Sublandlord's advance approval is required, in its absolute discretion, for any sublease of all or any part of the Subleasehold Estate, or a sublease to an operator of the restaurant or for the sublease or delegation of any function of the Hotel. Sublandlord and Operating Subtenant agree that Sublandlord has reserved its rights under all applicable local and federal law, and any similar, successor or related provision of law with respect to a transfer of Operating Subtenant's Subleasehold Estate in violation of this Operating Lease. Sublandlord's consent or waiver with respect to one or more assignments, delegations or subleases under this paragraph shall not be deemed a consent or waiver with respect to any other transfer hereunder, and Sublandlord expressly reserves its right hereunder and pursuant to applicable local and federal law, to object and enforce its rights with respect to each such transaction.

12.2 Personal Performance. Operating Subtenant acknowledges that (a) this Operating Lease contemplates performances by Operating Subtenant and its delegee Manager in the management and operation of the Hotel that are personal and unique, (b) Sublandlord is relying to a material extent on the expertise and capabilities of Operating Subtenant's and Manager's business organization, (c) all such factors and expectations were a material inducement to Sublandlord's entry of this Operating Lease, and (d) the restrictions and provisions in this Section 12 are reasonable, appropriate and justified.

12.3 Sublandlord's Assignment. Sublandlord, in its absolute discretion and without any requirement for Operating Subtenant's consent, may assign all or any part of its right, title and interest in this Operating Lease at any time during the Lease Term. If Sublandlord's entire interest in this Operating Lease is assigned to a Person purchasing Sublandlord's interest in the Property, Sublandlord shall not be liable for any claim or occurrence in connection with the Property arising after such transfer or assignment. Sublandlord shall not make any such assignment that would be inconsistent with the provisions of the Management Contract if during the period it remains in force and effect.

### **SECTION 13: EVENTS OF DEFAULT**

13.1 Events of Default. Operating Subtenant is in Default hereunder upon the following (each, an "Event of Default"):

13.1.1 A failure of Operating Subtenant to pay, or contribute, when due the entire amount of any item, category or increment of Rent or other payment due to Sublandlord as required by this Operating Lease, which failure continues for a period of five (5) calendar days following written notice of it from Sublandlord to Operating Subtenant.

13.1.2 Where there has been a Default or failure by Operating Subtenant (a) to obtain or continue in effect any of the insurance policies and coverages required to be obtained by it under this Operating Lease; (b) to timely pay any insurance premium required to be paid by it under this Operating Lease on or before its due date and such failure continues for a period of five (5) calendar days after notice thereof by Sublandlord or the insurance provider to Operating Subtenant; or (c) to pay or discharge any claim, lien or encumbrance on or affecting any part of or interest in the Property caused or incurred by or for Operating Subtenant which is not discharged or bonded against as required by subparagraph 6.8.1.

13.1.3 If Operating Subtenant shall vacate or close all or any material part the Hotel, shall abandon the management and operation of all or any material part of the Hotel or shall close, suspend or withdraw from such management and operation where the previously described actions violate paragraph 6.1 of this Operating Lease, which violation is not cured within five (5) calendar days after notice thereof by Sublandlord.

13.1.4 Any assignment that is a Default under Section 12 or upon any sublease the entry of which is a Default and where the sublease is not terminated or other action is not taken to remedy the Default to Sublandlord's satisfaction within fifteen (15) days after notice of such sublease Default is delivered to Operating Subtenant.

13.1.5 Where there has been a Default by Operating Subtenant in any performance due or in the observance of any obligation under this Operating Lease (other than one which is already an Event of Default under subparagraphs 13.1.1 to 13.1.4), which Default continues for a period of fifteen (15) calendar days, or more, after notice of such Default is delivered to Operating Subtenant. If the Default is incapable of cure in such fifteen (15) calendar day period and if the Operating Subtenant commences to cure the Default during such fifteen (15) calendar day period, an Event of Default will not occur so long as (a) Operating Subtenant is diligently and continuously pursuing the cure, the cure of the Default has not become impossible, and the delay in curing the Default will not jeopardize or materially and adversely affect the Property, or (b) six (6) months has not elapsed since notice of the Default.

13.1.6 To the extent permitted by law as now or in the future in effect, if Operating Subtenant shall (a) file a voluntary case under applicable bankruptcy, insolvency, debtor relief, or any other similar law now or hereafter in effect; (b) shall consent to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or similar official) of all or a substantial part of Operating Subtenant's property or the Subleasehold Estate; (c) make a general assignment for the benefit of creditors; (d) shall fail generally to pay its debts as they become due; or (e) shall take any action in furtherance of the foregoing.

13.1.7 To the extent permitted by law as now or in the future in effect, if (a) a court having jurisdiction shall enter a decree or order for relief in respect to Operating Subtenant in any involuntary case brought under any bankruptcy, insolvency, debtor relief or similar law now or hereafter in effect and any such involuntary case shall not be dismissed within a period of ninety (90) calendar days following its commencement; (b) Operating Subtenant shall consent to or shall fail to oppose any such proceeding; (c) any such court shall enter a decree or order appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of all or any substantial part of Operating Subtenant's property or the Subleasehold Estate, which appointment is not discharged within ninety (90) days after the entry of such order; or (d) any such court shall order the winding-up or liquidation of the affairs of Operating Subtenant.

13.1.8 If there is an attachment or judicial seizure caused or suffered by Operating Subtenant of (a) any material part of or interest in the Subleasehold Estate or (b) any material part of the assets of the Operating Subtenant and, in any such case, the attachment or judicial seizure is not removed or discharged within sixty (60) calendar days.

13.1.9 If for any reason whatsoever Operating Subtenant shall allege or claim in any legal or administrative proceeding (including one described in subparagraphs 13.1.6 and 13.1.7) that the legal relationship between Operating Subtenant and Sublandlord is other than that of landlord and tenant in accordance with the provisions of this Operating Lease.

13.1.10 Upon the failure of Operating Subtenant to expend funds for the renovation and equipping of the Hotel as specified in Section 4, which failure continues for a period of five (5) calendar days following written notice of it from Sublandlord to Operating Subtenant; provided, however, in the event Operating Subtenant has not responded to Sublandlord's initial notice, Sublandlord shall give Operating Subtenant five (5) calendar days notice, after which the cure period shall lapse without further action by Sublandlord.

13.1.11 Upon any default by Operating Subtenant under the Management Agreement, beyond applicable cure periods, or upon any modification or amendment of the Management Agreement without the prior written consent of Sublandlord.

13.1.12 Upon any Event of Default (as defined in the Note) or breach of any of the Operating Subtenant Loan Documents which, in any case, is not cured within the cure period, if any, set forth therein.

13.2 Sublandlord Default. Sublandlord is in Default under this Operating Lease upon any Default by Sublandlord of its obligations under this Operating Lease which Default continues for a period of fifteen (15) calendar days, or more, after notice of such Default is delivered to Sublandlord. If the Default is incapable of cure in such fifteen (15) calendar day period and if the Sublandlord commences to cure the Default during such fifteen (15) calendar day period, an Event of Default will not occur so long as (a) Sublandlord is diligently and continuously pursuing the cure and the cure of the Default has not become impossible, or (b) six (6) months has not elapsed.

13.3 Notice and Waiver. The notices set forth in this Operating Lease shall be in lieu of, and not in addition to, any notice required pursuant to all applicable local, state and federal, law, or any other similar, successor or related provision of law providing for Operating Subtenant's right to satisfy any judgment in order to prevent a forfeiture of this Operating Lease or requiring Sublandlord to deliver written notice to Operating Subtenant of any reletting of the Property.

13.4 General Statement of Remedies.

13.4.1 If any Event of Default occurs, the rights and remedies of Sublandlord are as described in subparagraphs 13.4.2 through 13.4.4.

13.4.2 If Operating Subtenant or Manager remains in possession or control of all or any part of the Subleasehold Estate, Sublandlord may (a) continue this Operating Lease in full force and effect, but take possession of the Property, or (b) re-enter and take possession of the Property and immediately terminate this Operating Lease, the Option and the Subleasehold Estate. Possession may be taken by a successor in ownership to the Property without the limitations of the Management Contract, if the Management Contract is terminated when possession is taken.

13.4.3 If both Operating Subtenant and Manager have surrendered to Sublandlord possession and control of all of the Subleasehold Estate, then Sublandlord is required to accept such surrender, Operating Subtenant's right to the Subleasehold Estate shall terminate and this Operating Lease shall terminate.

13.4.4 On the termination of this Operating Lease and the occurrence of the Lease Termination Date, Sublandlord shall have the right to compel specific performance of the Operating Subtenant's obligations under paragraph 15.1 of this Operating Lease. It is acknowledged by Operating Subtenant that (a) it is of critical importance that Sublandlord have ownership and possession of Hotel on the Lease Termination Date, with all furnishings, fixtures

and equipment necessary to some other Person's operation of the Hotel in order to protect and preserve the Property and (b) Sublandlord will not have an adequate remedy in damages at law.

13.4.5 Operating Subtenant agrees that the payment of Rent required hereunder is a covenant independent of any obligation of Sublandlord under this Operating Lease and hereof, Operating Subtenant hereby waives any right it may have to abate, withhold, or setoff its Rent payments, including, without limitation, any right it may have under all applicable local and federal law to make repairs to the Hotel or other improvements on or at the Property, and to deduct the expense therefor from the amount of Rent then due under this Operating Lease.

13.5 Re-Entry and Re-Letting.

13.5.1 Should Sublandlord re-enter the Subleasehold Estate, the following subparagraphs 13.5.2 through 13.5.4 shall apply.

13.5.2 Sublandlord may re-enter the Subleasehold Estate without notice or demand. Sublandlord may do what is necessary (but may not breach the peace) to effect entrance without liability for prosecution or damages for such re-entry or the manner of making entry, to the extent permitted by law. The Operating Subtenant releases and discharges Sublandlord from any claims, actions, suits, damages or penalties on account of any lawful entry, distraint, levy or sale, including without limitation, from the provisions set forth in applicable local, state and federal law governing abandonment by a lessee of real property; forcible entry and forcible detainer as set forth in local and federal law, respectively, unlawful detainer as set forth in all applicable local and federal law; and any similar laws, statutes or ordinances now or hereafter in effect.

13.5.3 Sublandlord shall have no duty or obligation to Operating Subtenant to relet the Property or operate the Property as a hotel business. Sublandlord shall not be liable in any way whatsoever for a failure to relet the Property, for reletting the Property on any terms and conditions Sublandlord deems appropriate or for failing to itself operate the Property as a hotel business, whether with or without a contract or relationship with a professional hotel manager.

13.5.4 Operating Subtenant shall reimburse Sublandlord for such reasonable expenses as Sublandlord may incur in (a) re-entry, including reasonable attorneys' fees, expenses of legal proceedings, other re-entry and repossession costs, and (b) expenses of remedying a breach of Operating Subtenant's obligations under this Operating Lease with respect to cleaning and maintaining the Hotel and the remainder of the Subleasehold Estate.

13.6 Damages on Termination Following an Event of Default. Termination of this Operating Lease shall not extinguish the right of Sublandlord to recover damages arising and accruing from the occurrence of an Event of Default under this Operating Lease prior to the Lease Termination Date. Sublandlord shall recover any and all Rent and other sums under this Operating Lease due to and through the Lease Termination Date, the expenses of re-entry as described in paragraph 13.5, and damages arising from the occurrence of an Event of Default on or prior to the Lease Termination Date.

13.7 Rent and Obligations Under This Operating Lease If No Termination. If Sublandlord elects to continue this Operating Lease in full force and effect and not terminate for

an Event of Default as described in clause (a) of subparagraph 13.4.2, it may from time to time enforce, by legal proceedings or otherwise, every term and provision of this Operating Lease. Sublandlord need not await the expiration of the Lease Term or any particular time to enforce its rights, but may enforce every term and provision of this Operating Lease as it becomes due, payable or required. Without waiving the foregoing, and in a manner consistent with all applicable local and federal law, Sublandlord may accept any partial payment of Rent without waiving its right to sue Operating Subtenant for the remainder of the Rent due Sublandlord. Operating Subtenant agrees that Sublandlord may apply such payment to the oldest Rent due or in any manner Sublandlord, in its absolute discretion, deems appropriate. Sublandlord hereby reserves the right to certain recoveries under all applicable local and federal law, and any similar, successor or related provision of law.

13.8 Sublandlord's Right to Protect Revenue. Sublandlord may apply to any court without notice to Operating Subtenant for the appointment of a receiver in aid of enforcement of its rights under this Section or in aid of realization proceedings with respect to Sublandlord's security interests, with power and authority in such receiver to take possession of the Subleasehold Estate or the Property as to which such security interest pertains and, if Sublandlord so elects, in its absolute discretion, to operate the Subleasehold Estate pending the completion of litigation or legal proceedings and to collect Gross Revenues and apply it in accordance with the provisions of this Operating Lease and applicable law. No such appointment shall be deemed to have terminated this Operating Lease.

13.9 Payment by Sublandlord of Operating Subtenant's Defaulted Payments. In case of an Event of Default on the part of Operating Subtenant for failure to pay any money, or render any other performance required of it under this Operating Lease, Sublandlord may, at its option exercised in its absolute discretion, without notice to Operating Subtenant, pay any or all sums, render such performance, or incur any expense to remedy the failure of Operating Subtenant to perform. Following demand by Sublandlord, Operating Subtenant shall promptly repay any sum paid, advanced or incurred by Sublandlord, with interest as specified in 13.11. Notwithstanding the requirement for there being an Event of Default, Sublandlord may take the actions specified upon a Default if (a) an emergency exists which threatens the safety of occupants of the Hotel or the public, (b) the Property is in imminent danger of suffering permanent or irreparable harm, (c) the Property is in jeopardy or in danger of being materially and adversely affected, or (d) the Sublandlord may be subject to criminal or civil penalties as a result of Operating Subtenant's Default.

13.10 Late Charge. If any payment of Rent or any other sum due under this Operating Lease is overdue for a period in excess of ten (10) calendar days from the due date, the Operating Subtenant shall pay to Sublandlord, in addition to all other sums due and owing, a late charge equal to five cents (\$0.05) for each one dollar (\$1.00) overdue. The late charge due under this paragraph is intended to cover the administrative costs and expense associated with the handling of overdue payments, is in addition to and does not limit the accrual of default interest under paragraph 13.11, and shall not prevent the occurrence of an Event of Default. Operating Subtenant shall pay the late charge as Additional Rent with the next installment of Rent.

13.11 Default Interest. If any payment of Rent or any other sum due under this Operating Lease remains overdue for such period that there is an Event of Default, the sum

remaining due and unpaid shall bear interest from the date of Default until paid at an annual rate of six percent (6%) over the LIBOR rate (as quoted by the Wall Street Journal for British Bankers' Association average of interbank offered rates for dollar deposits of one month in duration in the London market), fixed on the first day of each calendar month during which such sum remains owing. Notwithstanding any other provision herein to the contrary, the total liability for interest payments shall not exceed the limits, if any, imposed by the usury laws of the State of California. Sublandlord shall refund to Operating Subtenant any interest paid in excess of those limits by application of the amount of excess interest paid against any sums outstanding in any order that Sublandlord requires. If the amount of excess interest paid exceeds the sums outstanding, Sublandlord shall refund, in cash, to Operating Subtenant, the portion exceeding those sums. To ascertain whether any interest payable exceeds the limits imposed, any nonprincipal payment (including late charges) shall be deemed, to the extent permitted by law, to be an expense or a fee, premium, or penalty rather than interest.

13.12 No Waivers. No failure by any party to insist upon the full and strict performance of any provision of this Operating Lease, to exercise within any time period any right, power or remedy consequent to any Event of Default, or to take action within any time period following an Event of Default shall constitute a waiver of any such breach, Default, remedy, right, power, Event of Default or any such provision. Nor shall the Sublandlord's acceptance of Rent, or a portion of Rent, or any partial payment of any other obligation due under this Operating Lease, waive any Default, Event of Default, right or remedy. No waiver of any Default or Event of Default shall affect or alter this Operating Lease, which shall continue in full force and effect. Nor shall any such waiver of the rights of any party with respect to a Default or Event of Default waive any other then existing or subsequent Default or Event of Default.

13.13 Rights Cumulative. Each right and remedy of Sublandlord or Operating Subtenant provided for in this Operating Lease is cumulative and in addition to every other right or remedy provided for in this Operating Lease or by law, whether arising in equity, by statute or otherwise, and whether now existing or later arising. The exercise or beginning of the exercise by Sublandlord or Operating Subtenant of any one or more of such rights or remedies shall not preclude the simultaneous or later exercise by Sublandlord or Operating Subtenant of any or all other such rights or remedies. The exercise of any one or more of such rights or remedies shall not impair all rights and remedies of Sublandlord under all applicable local and federal law, and any similar, successor or related provision of law.

#### **SECTION 14: TERMINATION ON SALE AND TERMINATION PAYMENTS**

14.1 Termination by Sublandlord on Sale. This Operating Lease and the Lease Term may be terminated by Sublandlord effective on a Lease Termination Date arising in connection with a bona fide sale of Sublandlord's entire interest in the Property to an unaffiliated third party purchaser (a "Property Sale") at any time if Sublandlord delivers notice to Operating Subtenant as described in this paragraph. The notice shall advise Operating Subtenant of (a) Sublandlord's election to sell the Hotel and the remainder of the Property, (b) the estimated closing date of the sale and the estimated Lease Termination Date. The Lease Termination Date shall be the date of the closing of such sale. The notice shall be delivered to Operating Subtenant at least ninety (90) days in advance of the Lease Termination Date. In the event Sublandlord fails to provide Operating Subtenant with at least ninety (90) days advance notice of such Lease Termination

Date, Sublandlord shall indemnify, hold harmless and defend Operating Subtenant from and against any liabilities or claims based on failure to provide the advance notice to employees of the Hotel which is required under applicable federal, state or local law in order to terminate their employment. Termination of this Operating Lease shall not impair or reduce Operating Subtenant's obligation to pay Rent for any period prior to such termination.

**14.2 Termination Payments on Lease Termination Date.**

14.2.1 Upon a Lease Termination Date, Sublandlord shall, subject to the following sentence, make a termination payment to Operating Subtenant equal to the aggregate amount payable under the subparagraphs of this paragraph 14.2. Notwithstanding the foregoing, Sublandlord shall not be required to make any payment to Operating Subtenant, and the following provisions of this Section 14.2 shall not apply, if the Lease Termination Date results from a termination of this Lease due to an Event of Default or other breach of this Lease by Operating Subtenant where such Event of Default or breach was caused by the gross negligence, recklessness or willful misconduct of Operating Subtenant's Member of Member-Manager (as those terms are defined in the KenCal Operating Agreement).

14.2.2 If a termination of the Management Contract occurs on such Lease Termination Date, Sublandlord shall make a termination payment to Operating Subtenant equal to the amount, if any, that Operating Subtenant is obligated to pay Manager under the Management Contract as a result of such termination.

14.2.3 Sublandlord shall make a termination payment to Operating Subtenant equal to \$75,000 for each twelve (12) month period commencing on the Lease Date and ending on the Lease Termination Date (prorated for any partial period), less any amount previously paid or distributed by Operating Subtenant pursuant to Section 5.6(g).

14.2.4 Sublandlord shall make a termination payment to Operating Subtenant equal to the amount, if any, that Operating Subtenant is obligated to pay (i) Marina Manager under the Marina Management Agreement (ii) any other third party not affiliated with Operating Subtenant pursuant to any contract or agreement for the provision of goods or services to the Hotel, in each case to the extent such obligation arose prior to Sublandlord's receipt of notice of the Lease Termination Date or as a consequence of any termination of any such contract or agreement arising out of the termination of this Operating Lease; and (iii) the ordinary and necessary out-of-pocket expenses that Operating Subtenant incurs or reasonably expects to incur in connection with Operating Subtenant's operation in accordance with the KenCal Operating Agreement through the end of the calendar year in which the Lease Termination Date occurs.

14.2.5 Sublandlord shall make a termination payment to Operating Subtenant equal to the outstanding principal and interest under the Note.

14.2.6 Sublandlord shall make a termination payment to Operating Subtenant equal to the amount by which (a) the total of the payments or distributions to Operating Subtenant's owner, as permitted by Section 5.6(g), made during the period beginning on the

Lease Date and ending on the Lease Termination Date is less than (b) the sum of \$194,000 plus a return of eight percent (8%) per annum on \$194,000 for the period beginning on the Lease Date and ending on the Lease Termination Date

14.2.7 Sublandlord shall make a termination payment to Operating Subtenant equal to all Base Rent deferred under Section 5.6 (together with the payments contemplated by Sections 14.2.2, 14.2.3, 14.2.4, 14.2.5, and 14.2.6 the "Base Amount").

14.2.8 Sublandlord shall make a termination payment to Operating Subtenant equal to (a) the fair market value of the Subleasehold Estate as of the Lease Termination Date less (b) the Base Amount (if any). If the fair market value of the Subleasehold Estate as of the Lease Termination Date is less than or equal to the Base Amount, then Sublandlord shall pay Operating Subtenant the Base Amount and no additional payment shall be made to Operating Subtenant. Sublandlord shall send Operating Subtenant a notice with Sublandlord's estimate of the fair market value of the Subleasehold Estate and appropriate termination payment. In the event that Sublandlord and Operating Subtenant cannot agree upon such amount of such fair market value within thirty (30) days after the earlier of the Lease Termination Date or the date of delivery of Landlord's Notice as described herein, then the fair market value of the Subleasehold Estate shall be determined as follows:

(a) Unless the parties are able to agree on one appraiser, each party shall, within thirty (30) days of written request by either party, specify by written notice to the other the name and address of an appraiser to act on behalf of such party. If by such date one party has failed to nominate an appraiser, the other party may give a notice requiring such party to nominate an appraiser within five business days from the effective date of that notice. If the party receiving that notice does not nominate an appraiser within the five business days provided, the appraiser nominated by the party giving the notice shall be the sole appraiser used hereunder, and such appraiser's determination of the fair market value of the Hotel shall be binding on all of the parties hereto.

(b) Within ten (10) days after the date the last appraiser is selected by a party, the two appraisers shall appoint a third appraiser. If the two appraisers are unable to agree upon a third appraiser such ten (10) day period, then the parties themselves shall select a third appraiser within a further period of ten (10) days. If the parties are unable to agree within such ten (10) day period, then either party, on behalf of both, may request the then presiding judge of the San Diego Superior Court, acting in his personal, private capacity, or his designee, to appoint the third appraiser and the other party shall not raise any objection to such judge's full power and jurisdiction to entertain the application and make the appointment. The appraisers chosen in accordance with the foregoing provisions shall undertake the appraisal of the matter to be determined hereunder.

(c) Each appraiser shall, within thirty (30) days after the appointment of the third appraiser, render an opinion in writing setting forth his determination of the fair market value as of the Lease Termination Date. A counterpart original of the decision of each appraiser shall be delivered to each party. Each appraisal rendered hereunder shall be binding and conclusive upon the parties for the purpose of determining such matter, absent fraud or gross error.

(d) All appraisers appointed hereunder (i) shall be qualified by professional training to appraise the Hotel, (ii) shall have generally recognized current competence in the valuation of hotel properties similar to the Hotel, which would qualify that appraiser as an expert witness to give opinion testimony in a court of competent jurisdiction, (iii) shall be members of the American Institute of Real Estate Appraisers, and (iv) in the case of the third appraiser, shall not be a person or entity who has acted in any substantial capacity for either party within two years of the date the appraiser is appointed.

(e) Such fair market value shall be determined in accordance with sound, customary (except to the extent otherwise provided herein), and usual appraisal practices, consistently applied, taking into account the standards and assumptions herein specified. The appraisers shall have the right to consult experts and competent authorities with respect to factual information or evidence pertaining to the fair market value, but any such consultation shall be made in the presence of both parties, or their representatives, with full right on their part to cross-examine. In addition, either party shall have the right to submit relevant information and documentation to each appraiser so long as not less than ten (10) days prior to doing so, such party notifies the other party and supplies copies of such information and documentation intended to be delivered to the appraiser in order to allow the other party to prepare and concurrently submit any relevant counter-information or documentation to the appraisers. All such information and documentation shall then be submitted jointly by the parties to each appraiser.

(f) Upon receipt of the appraisals, the parties shall average the results determined by each appraiser to determine the mean result. If none of the determinations established by the appraisers is more than ten percent (10%) higher or lower than such mean, then such mean shall be the fair market value. If the determination as established by any appraiser is more than ten percent (10%) higher or lower than such mean, then such appraisal shall be eliminated and the remaining appraisals shall be re-averaged, and the mean so determined shall constitute the fair market value for purposes hereof; provided, however, that if two of the three appraisals are more than ten percent (10%) higher or lower than the mean, then both of such appraisals shall be eliminated and the remaining appraisal shall be the fair market value. The averaging hereunder shall be made within ten days after the date the appraisals are submitted to the parties.

(g) All costs and fees of the appraisers hereunder, including reasonable attorney fees for counsel retained with the prior authorization of the parties, and all other expenses of the proceedings hereunder, shall be split equally between Sublandlord and Operating Subtenant. All costs and expenses incurred by a party to retain its own attorneys, other independent consultants or expert witnesses in connection with the appraisal procedure hereunder shall be borne by such party.

14.2.9 Amounts payable by Sublandlord under Section 14.2 may be netted against amounts owed to Sublandlord by Operating Subtenant pursuant to the last section of Section 14.1 hereof. Sublandlord may also, in lieu of making payments of the Base Amount (or any portion thereof) to Operating Tenant, directly pay the third parties who are entitled to the payments included in the Base Amount (e.g. the Manager).

## **SECTION 15: ACTIONS ON TERMINATION OF LEASE**

15.1 **Surrender of Property.** On the expiration or any other termination of this Operating Lease, Operating Subtenant shall peaceably surrender possession of the Property to Sublandlord on the Lease Termination Date.

15.2 **Transfer of Tangible and Intangible Property.** On a Lease Termination Date, Operating Subtenant shall without further consideration or payment assign and transfer to the Sublandlord or to a Person designated by Sublandlord, free and clear of all liens, security interests and other adverse interests the Operating Subtenant's entire ownership interest in and to: (a) the FF&E (Tenant); (b) usable HEOS, (c) other inventory and tangible personal property, (d) service contracts for the Property which Sublandlord has notified the Operating Subtenant that Sublandlord or Sublandlord's designee wishes to continue in force and effect after such Lease Termination Date; (e) all inventory and other tangible personal property owned by Operating Subtenant and relating to the operation of the Hotel; (f) the liquor license, licenses and permits owned by Operating Subtenant or Manager for the Hotel (excluding rights to brands and names, service marks and trade dress which are not owned by Operating Subtenant); and (g) where applicable, undisbursed proceeds of Condemnation or property insurance paid to Operating Subtenant. With regard to any of the foregoing which represents tangible personal property, Operating Subtenant shall deliver the same, in good condition and repair, without additional consideration or payment to a location specified by Sublandlord within five (5) days after the Termination or Expiration of the Lease.

15.3 **Confirming Documentation.** On a Lease Termination Date and on request of either party, the other party shall execute, deliver and, where appropriate, acknowledge (a) any documents, in recordable form, recognizing and confirming the termination of this Operating Lease; and (b) a bill of sale and other documents making the assignments, transfers and confirmations described in paragraph 15.2.

15.4 **Impositions, Utilities and Other Additional Rent Items.** Impositions, insurance premiums, amounts due under maintenance contracts and other Additional Rent items shall be pro rated and adjusted as of the Lease Termination Date. Utility charges, to the extent metered, shall be adjusted based on meter readings as of the Lease Termination Date; otherwise, they shall be prorated as described in the first sentence. Rents or payments due under subleases or concession agreements allowed to continue in force and effect shall be prorated as of the Lease Termination Date.

15.5 **Nondisturbance of Management Contract.** On the Lease Termination Date, Owner shall at the time of or prior to Lease Termination Date either (a) elect not to take either of the actions described in clause (b) below, in which case all of Operating Subtenant's rights, benefits, privileges and obligations under the Management Contract with respect to the periods after the Lease Termination Date shall automatically revert to Owner, or (b) cause a new operating tenant to (i) succeed to and assume Operating Subtenant's rights and obligations under the Operating Lease and the Management Contract, or (ii) enter into a new operating lease as may be negotiated between Owner and such operating tenant, provided such changes do not materially and adversely restrict, limit or interfere with the rights of Manager or under the

Management Contract. Any such new operating tenant shall satisfy the requirements set forth in Section 13.2 of the Management Contract for an assignee of Operating Subtenant.

#### **SECTION 16: GENERAL PROVISIONS**

16.1 **Quiet Enjoyment.** So long as no Event of Default exists, Operating Subtenant shall peaceably and quietly enjoy the Property for the Lease Term on and subject to the provisions for termination and to its performance of its obligations and to the other terms and provisions set forth in this Operating Lease. This paragraph shall not be violated nor shall the Operating Subtenant be deemed to be constructively dispossessed from the Property in the event of (a) a failure of utility service to the Property, (b) a casualty, (c) a Force Majeure Event, or (d) any other event or occurrence which is not a breach of this Operating Lease by Sublandlord. Sublandlord covenants to fully and timely perform its obligations under the Ground Lease and the Loan Documents, except to the extent such failure is caused by an Event of Default or breach of this Operating Lease by Operating Tenant or an event or circumstance outside the reasonable control of Sublandlord.

16.2 **Binding Effect.** The covenants and agreements contained in this Operating Lease shall extend to and be obligatory upon the successors and assigns of the respective parties to this Operating Lease but only to the extent such succession or assignment is authorized to Operating Subtenant under Section 12.

16.3 **Notices.** All notices, consents, determinations, requests, approvals, demands, reports, objections, directions, and other communications required or permitted to be given under this Operating Lease shall be in writing and shall be deemed to have been duly given and to be effective on the date on which such communications are delivered by personal delivery, by facsimile transmission, by express courier service or by the United States Postal Service or its successor after being deposited as Express Mail or as registered or certified matter, postage prepaid, return receipt requested, addressed to the Sublandlord or Operating Subtenant, as the case may be, at the respective designated addresses set forth opposite their signatures, or at such other address as the party to whom the notice is sent has designated in accordance with this paragraph. Notwithstanding the requirement for copies to the respective counsel for a party, only those communications which reflect a notice of breach or a demand for a performance by a party shall require a copy to the counsel designated to receive a copy.

16.4 **Attorneys' Fees and Expenses of Litigation.** If either party brings suit to enforce or interpret this Operating Lease, or if Sublandlord brings suit to procure or confirm the termination as provided in this Operating Lease or if Sublandlord or Operating Subtenant becomes the subject of proceedings had in bankruptcy, insolvency, receivership or similar debtor relief proceedings, the substantially prevailing party is entitled to a reasonable sum as attorneys' and paralegal fees (including such fees on appeal), and all reasonable costs and expenses in connection with such legal proceeding (including the reasonable cost of searching records to determine the condition of title and costs and expense incurred on appeal), which sum shall be included in any judgment, decree or order entered in the proceeding.

16.5 **Waiver, Amendment and Extension.** No waiver, amendment, extension or variation in the terms of this Operating Lease is valid against a party, unless in writing and

signed by such party, and then only to the extent specifically set forth in the writing. No failure or delay on the part of a party in exercising any right, power or privilege under this Operating Lease and no course of dealing between Sublandlord and Operating Subtenant will waive, amend or vary the terms of this Operating Lease.

16.6 Entire Understanding. This Operating Lease is the entire, complete and exclusive agreement between the parties with respect to the Property. Attachments referred to in this Operating Lease and other documents and instruments described by specific reference in this Operating Lease shall be deemed incorporated. All previous documents, instruments, discussions and negotiations between the parties are deemed superseded by the express terms and conditions of this Operating Lease. There have been no promises, agreements, representations, warranties or commitments between the parties with regard to this Operating Lease, other than as set forth in this Operating Lease.

16.7 Consent or Approval. Unless otherwise specifically provided, whenever this Operating Lease specifies or contemplates a consent, approval, decision or other action by Sublandlord, that consent, approval, decision or action is subject to Sublandlord's judgment or discretion exercised in good faith and shall not be unreasonably delayed. Sublandlord shall deliver its consent writing.

16.8 Counterparts. This Operating Lease may be executed in any number of counterparts, each of which shall be an original, but such counterparts shall constitute one and the same document.

16.9 Interpretation. This Operating Lease has been reviewed and negotiated by the parties and their respective counsel and shall be given a fair and reasonable interpretation in accordance with the words contained in it, without any weight being given to whether a given provision was drafted by a party or its counsel. Attachments to it and the documents incorporated in it shall be construed and interpreted as a whole and to harmonize and give effect to all of the provisions of such documents. Whenever this Operating Lease uses the term "including" or a word of similar meaning, the listing following shall be interpreted as illustrative and not all-inclusive. The words "shall," "will" or other words of a mandatory nature shall be interpreted as constituting an agreement to perform in accordance with the provision and shall not be limited to a condition to the continuation of this Operating Lease. Unless otherwise specified, the term "days" shall refer to calendar days.

16.10 Captions and Cross-References. Cross-references to Section, paragraph or subparagraph numbers appearing in this Operating Lease, unless otherwise specified, refer to this Operating Lease and not to any other document. The table of contents, Section and paragraph titles contained in this Operating Lease are for convenience only and are not a part of this Operating Lease or considered in its interpretation.

16.11 Relationship and Disclosure. The relationship between Sublandlord and Operating Subtenant is strictly that of landlord and tenant as set forth in this Operating Lease. Nothing contained in this Operating Lease is intended or shall be construed to create any other relationship, (including that of joint venturers, partners, or lender-borrower) or to constitute Sublandlord as the operator or owner of the Hotel. Sublandlord does not assume or undertake

liability for any of the debts, obligations or liabilities of the Operating Subtenant or the Manager. Nothing contained in this Operating Lease confers any rights, benefits or interests on any third party to this Operating Lease, except that Manager shall be a third party beneficiary of paragraphs 14.2.2, 14.3 and 15.5. Neither Sublandlord nor Operating Subtenant has the right to act as an agent for or to legally bind the other. Neither Operating Subtenant nor any party claiming by or through Operating Subtenant, shall acquire any lien or ownership interest on, in or to any part of or interest in the Property.

16.12 Covenant Compliance. The Operating Subtenant shall comply with all provisions, including, without limitation, any covenants, made by Sublandlord, of "Applicable Loan Documents" (as defined below) to the extent the same apply to the operation and maintenance of the Property (the "**Loan Operational Provisions**"), including without limitation, the delivery of any and all information, notices and or certificates required thereunder. The term "**Applicable Loan Documents**" shall mean loan documents executed by Sublandlord (i) pertaining to any loan encumbering the Property, (ii) evidencing any amendments to or replacements of the loan documents, and (iii) copies of which have been provided to Operating Subtenant by Sublandlord. Operating Subtenant hereby acknowledges that it has been provided with a copy of that certain Loan Agreement between Countrywide Commercial Finance, Inc. and Sublandlord dated January 9, 2006, together with copies of the Loan Documents (as defined therein) in effect on the date hereof. The limitations on Operating Subtenant's rights and obligations set forth herein and imposed pursuant to the Applicable Loan Documents shall be subject to any agreements made by the applicable lender and Operating Subtenant in any subordination or other agreement executed by such lender and Sublandlord with respect thereto.

16.13 Expiration of Time Period. Whenever any time period specified in this Operating Lease will otherwise expire on a Saturday, Sunday or legal holiday, the period shall be extended to the next business day following such original expiration date.

16.14 Governing Law. The laws of California shall govern the construction and interpretation of this Operating Lease.

16.15 Jurisdiction and Service of Process. Sublandlord and Operating Subtenant by execution of this Operating Lease, irrevocably consent and agree that any legal action, suit, or proceeding arising out of or in any way in connection with this Operating Lease may be instituted or brought in any state or federal court sitting in the county and state where the Land is located. By execution and delivery of this Operating Lease, Sublandlord and Operating Subtenant irrevocably accept and submit to, for themselves and in respect of their property, generally and unconditionally, the nonexclusive jurisdiction of any such court, and to all proceedings in such courts. In addition to any method provided by applicable law, the parties each irrevocably consent to service of any summons or legal process or both by registered or certified United States mail, postage prepaid, to such party's address set forth at the end of this Operating Lease, such method of service to constitute, in every respect, sufficient and effective service of process in any such legal action or proceeding. Nothing in this Operating Lease or elsewhere shall affect either party's right to serve process in any other manner permitted by law or limit the right of either party to bring actions, suits or proceedings in the courts of any other jurisdiction. To the extent not prohibited by law, the parties agree that final judgment in any such legal action, suit or proceeding shall be conclusive and may be enforced in any other

jurisdiction, within or outside the United States of America, by suit on the judgment. A certified or exemplified copy of the final judgment shall be conclusive evidence of the fact and the amount of the liability. LANDLORD AND OPERATING TENANT EACH WAIVE TRIAL BY JURY IN ANY ACTION OR PROCEEDING WITH RESPECT TO THIS OPERATING LEASE.

16.16 Estoppel Certificates. Operating Subtenant and Sublandlord at any time, and from time to time, upon not less than fifteen (15) days notice from the other party shall execute, acknowledge, and deliver to the other a statement in writing addressed to any party specified in such notice, certifying that this Operating Lease is unmodified (or, if there have been modifications, stating the modifications), and stating whether or not to the knowledge of the signer of such certificate, there exists as of the date of the certificate any Default by the requesting party in the performance of any covenant, agreement, term, provision, or condition contained in this Operating Lease, and, if so, specifying each such Default of which the signer may have knowledge.

16.17 Subordination and Attornment. This Operating Lease is subject and subordinate to (a) the lien of any future mortgages, deeds of trust, or other encumbrances ("Encumbrances") of the Hotel and Property; (b) all renewals, extensions, modifications, consolidations, and replacements of the items described in subparagraph (a); and (c) all advances made or hereafter to be made on the security of the Encumbrances. Notwithstanding any other provision of this paragraph 16.16, any Encumbrance holder may elect that this Operating Lease be senior to and have priority over that Encumbrance whether this Operating Lease is dated earlier or later the date of the Encumbrance. The foregoing notwithstanding, this Operating Lease shall not be subordinate to any such Encumbrance unless the holder of such Encumbrance has entered into a mutually acceptable subordination, non-disturbance and attornment agreement with Operating Subtenant.

16.18 General Assurance and Duty of Cooperation. Sublandlord agrees that it will, at any time and from time to time, upon reasonable request of and at the sole cost and expense of Operating Subtenant, do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all such further acts, deeds, assignments, transfers, conveyances and assurances as may reasonably be required for the Operating Subtenant to carry out its obligations under this Operating Lease, provided that the same do not impose any liability on Sublandlord beyond that provided in this Operating Lease.

16.19 Limitations on Recourse. No officers, directors, shareholders, agents, members, partners, owners, managers or employees of any party hereto, nor any of its or their respective officers, directors, shareholders, agents, members, partners, owners, managers, employees, heirs, successors or assigns shall have any personal liability of any kind or nature for any obligation or liability under this Operating Lease.

Designated Addresses for Sublandlord:

Kennedy Associates Real Estate Counsel, Inc.  
Attn: Jack vanHartesvelt  
1215 Fourth Avenue, Suite 2400  
Seattle, WA 98161  
Telecopy No.: 206-682-4769  
Telephone No.: 206-623-4739

with copies to:

Cairncross & Hempelmann, PS  
Attn: John Stokke  
524 Second Ave.  
Suite 500  
Seattle, WA 98104

Designated Addresses for Operating Subtenant:

c/o FST HRI LLC  
3435 Carillon Point  
Kirkland, WA 98033  
FAX: 425.739.9564  
Attention: Manager

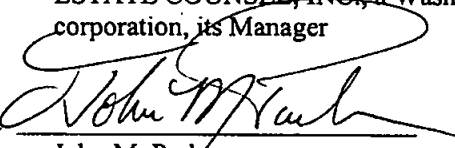
LANDLORD:

KENCAL OWNERSHIP LLC,  
a California limited liability company

By: KENCAL DELAWARE LLC, a Delaware  
limited liability company, its Manager

By: KAREC CALIFORNIA DEVELOPMENT  
PROGRAM LLC, a California limited  
liability company, its Manager

By: KENNEDY ASSOCIATES REAL  
ESTATE COUNSEL, INC., a Washington  
corporation, its Manager

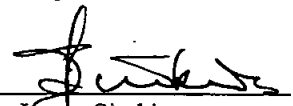
By:   
Name: John M. Parker  
Title: Executive Vice President

OPERATING SUBTENANT:

KENCAL OPERATING LLC,  
a California limited liability company

By: FST HRI LLC, a Washington limited  
liability company, its Member Manager

By: MTM Management, L.L.C.  
a Washington limited liability company,  
Member and Manager

By:   
Name: James Simkins  
Title: Manager

**ATTACHMENT 1**  
**TO OPERATING LEASE**

**Legal Description**

PARCEL 1:

THAT PARCELS OF LAND AND ADJOINING WATER AREA IN THE CITY OF SAN DIEGO, STATE OF CALIFORNIA, BEING A PORTION OF THE TIDELANDS AND SUBMERGED OR FILLED LANDS OF FALSE BAY, ALSO KNOWN AS MISSION BAY, INCLUDING ANY PORTION OF THE PUEBLO LANDS OF SAN DIEGO, ACCORDING TO MAP THEREOF BY JAMES PASCOE, A COPY OF WHICH IS ON FILE IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY AND KNOWN AS MISCELLANEOUS MAP NO. 36, DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF LOT 24 OF BLOCK 10 IN THE RESUBDIVISION OF BLOCKS 7, 8, 10 AND A PORTION OF BLOCK 9 AND LOT "A" IN INSPIRATION HEIGHTS, ACCORDING TO MAP THEREOF NO. 1700, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY; THENCE ALONG THE SOUTHERLY LINE OF SAID LOT, SOUTH 89° 55' 56" WEST (RECORD: NORTH 89° 59' 30" WEST) 35.00 TO A POINT OF TANGENT CURVE IN THE BOUNDARY OF SAID LOT; THENCE SOUTH 60° 04' 04" EAST, 2.00 FEET TO A LINE WHICH IS PARALLEL WITH AND 2.00 FEET SOUTHERLY AT RIGHT ANGLES FROM THE SOUTHERLY LINE OF SAID BLOCK 10; THENCE ALONG SAID PARALLEL LINE NORTH 89° 55' 56" EAST, 249.70 FEET; THENCE NORTH 05° 30' 02" WEST, 104.06 FEET TO THE UNITED STATES COAST AND GEODETIC SURVEY, TRIANGULATION STATION "OLD TOWN" - THE LAMBERT GRID COORDINATES CALIFORNIA ZONE 6 FOR SAID STATION "OLD TOWN" ARE X EQUALS 1,712,415.69 AND Y EQUALS 213,820.33 - SAID STATION "OLD TOWN" BEING THE POINT OF ORIGIN FOR THE SAN DIEGO CITY ENGINEER'S MISSION BAY PARK COORDINATE SYSTEM; THENCE NORTH 5,160.53 FEET AND WEST 16,030.79 FEET TO MISSION BAY PARK COORDINATES NORTH 5,160.53 FEET AND WEST 16,030.79 FEET, BEING ALSO THE TRUE POINT OF BEGINNING; THENCE SOUTH 15° 55' 11" WEST, 675.05 FEET TO MISSION BAY PARK COORDINATES NORTH 4,511.37 FEET AND WEST 16,215.95 FEET; THENCE NORTH 89° 25' 36" WEST TO MISSION BAY PARK COORDINATES NORTH 4,517.80 FEET AND WEST 16,998.48 FEET; THENCE NORTH 08° 09' 36" WEST, 143.45 FEET TO MISSION BAY PARK COORDINATES NORTH 4,659.60 FEET AND WEST 16,918.84 FEET; THENCE NORTH 57° 31' 13" WEST, 109.37 FEET; THENCE NORTH 08° 09' 38" WEST, 316.66 FEET TO THE BEGINNING OF A TANGENT 364.56' - FOOT RADIUS CURVE, CONCAVE EASTERLY; THENCE NORTHERLY ALONG SAID CURVE 226.18 FEET THROUGH A CENTRAL ANGLE OF 38° 09' 38"; THENCE TANGENT TO SAID CURVE NORTH 30° 00' 00" EAST, 139.21 FEET TO THE BEGINNING OF A TANGENT 171.29' - FOOT RADIUS CURVE, CONCAVE SOUTHERLY; THENCE EASTERLY ALONG SAID CURVE 249.34 FEET THROUGH A CENTRAL ANGLE OF 31° 24' 14"; THENCE TANGENT TO SAID CURVE SOUTH 66° 35' 45" EAST, 763.14 FEET TO THE TRUE POINT OF BEGINNING.

EXCEPTING ALL THE DEPOSITS OF MINERALS, INCLUDING OIL AND GAS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE AND REMOVE SUCH DEPOSITS AND TO OCCUPY AND USE SO MUCH OF THE SURFACE AS MAY BE REQUIRED THEREFOR, AS RESERVED BY THE STATE OF CALIFORNIA IN AN ACT OF THE LEGISLATURE APPROVED APRIL 27, 1945, STATUTES OF CALIFORNIA, CHAPTER 142, AND THE LEASE REFERRED TO HEREIN.

PARCEL 2:

ALL THAT PORTION OF PUEBLO LOT 214, IN THE CITY OF SAN DIEGO, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF MADE BY JAMES PASCOE, A COPY OF WHICH IS ON FILE IN THE OFFICE OF THE RECORDER OF SAN DIEGO COUNTY AND IS KNOWN AS MISCELLANEOUS MAP NO. 36, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEASTERLY CORNER OF ABOVE SAID PARCEL 1, SAID CORNER BEING MISSION BAY PARK COORDINATES NORTH 5,160.53 FEET AND WEST 16,030.79 FEET; THENCE ALONG THE NORTHERLY BOUNDARY OF SAID PARCEL 1 NORTH 66° 35' 46" WEST, 746.30 FEET; THENCE NORTH 23° 24' 14" EAST, 60.00 FEET; THENCE SOUTH 66° 35' 46" EAST, 321.40 FEET TO THE TRUE POINT OF BEGINNING; THENCE NORTH 23° 24' 14" EAST, 84.65 FEET TO A POINT IN A NON-TANGENT 2,006.00 - FOOT RADIUS CURVE

CONCAVE NORTHEASTERLY, A RADIAL LINE TO SAID POINT BEARS S00°10' 05" 41" WEST; THENCE NORTHWESTERLY ALONG SAID CURVE THROUGH AN ANGLE OF 09° 51' 14", AN ARC DISTANCE OF 147.10 FEET; THENCE TANGENT TO SAID CURVE NORTH 50° 05' 05" WEST, 157.13 FEET; THENCE SOUTH 39° 57' 55" WEST, 60.12 FEET TO THE BEGINNING OF A TANGENT 110.00 - FOOT RADIUS CURVE, CONCAVE EASTERLY; THENCE ALONG SAID CURVE THROUGH AN ANGLE OF 106° 33' 41" , AN ARC DISTANCE OF 204.58 FEET; THENCE TANGENT TO SAID CURVE SOUTH 66° 35' 46" EAST, 400.00 FEET TO THE TRUE POINT OF BEGINNING.

EXCEPTING ALL THE DEPOSITS OF MINERALS, INCLUDING OIL AND GAS, TOGETHER WITH THE RIGHT TO PROSPECT FOR, MINE, AND REMOVE SUCH DEPOSITS AND TO OCCUPY AND USE SO MUCH OF THE SURFACE AS MAY BE REQUIRED THEREFOR, AS RESERVED BY THE STATE OF CALIFORNIA IN AN ACT OF THE LEGISLATURE APPROVED APRIL 27, 1945, STATUTES OF CALIFORNIA, CHAPTER 142, AND THE LEASE REFERRED TO HEREIN.

APN: 760-029-02

**ATTACHMENT 2**  
**TO OPERATING LEASE**

**FF&E Specifications**

**Part A: FF&E (Sublandlord):**

None

**Part B: FF&E (Tenant):**

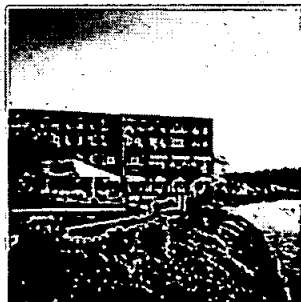
"Designated FF&E" means machinery, equipment, appliances, furniture, fittings, removable fixtures, tools and other articles of durable personal property of every kind and nature, including spare parts and reserve stock, which are owned or leased by or for the account of Seller and are used or useable in the operation of the Hotel, including, without limitation and subject to depletion and replacement in the Ordinary Course: (1) office furniture and equipment, (2) room furnishings, (3) art work and other decorative items, (4) televisions, radios, VCRs and other consumer electronic equipment, (5) telecommunications equipment, (6) computer equipment and software, (7) blankets, pillows, linens, towels and other bed clothing, (8) china, crystal, dishware, glassware, silverware, flatware and other "operating inventory" as that term is used in the Uniform System of Accounts, (9) kitchen appliances, cookware and other cooking utensils, (10) vehicles and (11) manuals, schematics, plans and other written materials pertaining to the use, operation, maintenance or repair of any item of FF&E; but excluding (a) personal effects owned by any Hotel guest and personal property owned by any tenant under the Tenant Leases (unless such person owns such property for the account or benefit of Seller), and (b) manuals, records and other like materials owned by (and proprietary to) the Hotel Manager under the terms of the Management Agreement, unless prepared or maintained solely for the Hotel, and (c) computer software licensed to Seller or Hotel Manager, unless such license is by its terms transferable in connection with the sale of the Hotel to Buyer.

Defined terms in this Exhibit shall have the meaning as set forth in that certain Purchase and Sale Agreement and Joint Escrow Instructions, dated March 22, 2005, by and between Islandia Associates, Ltd. and Karec California Development Program, LLC, a California limited liability company, as amended.



## OUR PROPERTIES

ABOUT MTM  
OUR PROPERTIES  
CONTACT US



**WOODMARK HOTEL AND SPA**  
Kirkland, Washington  
800.822.3700  
[www.thewoodmark.com](http://www.thewoodmark.com)



**WILLOWS LODGE**  
Woodinville, Washington  
877.424.3930  
[www.willowslodge.com](http://www.willowslodge.com)

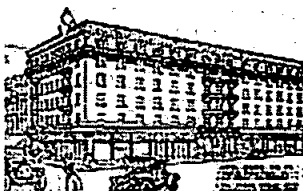


**FREESTONE INN**  
Mazama, Washington  
800.639.3809  
[www.freestoneinn.com](http://www.freestoneinn.com)



**ALDERBROOK RESORT & SPA**  
Union, Washington  
800.622.9370  
[www.alderbrookresort.com](http://www.alderbrookresort.com)

**CAVE B INN AT SAGECLIFFE**  
Quincy, Washington  
888.785.2283  
[www.cavebinn.com](http://www.cavebinn.com)

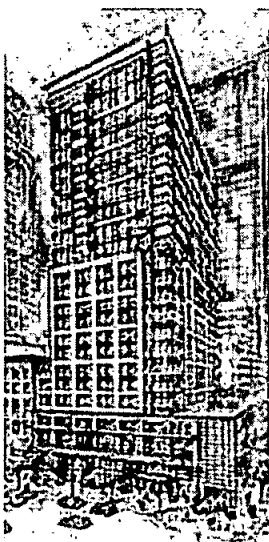


**THE MARYLAND HOTEL IN SAN DIEGO**

San Diego, California

Opening late fall 2006

[Property Information](#)



**HOTEL 1000**

Seattle, Washington

Opening June 2006

[www.hotel1000seattle.com](http://www.hotel1000seattle.com)



**BOSTON'S CHARLES STREET JAIL**

**CONVERSION TO A HOTEL**

Boston, Massachusetts

Opening Late Spring 2007

[Property Information](#)

(Image not available yet)

**THE BARDESSONO INN**

Yountville, Napa Valley, CA

Opening Spring 2008

[Property Information](#)

**TOP**

**FST**  
**ASSET MANAGEMENT****ABOUT FST****MANAGEMENT  
BIOGRAPHIES****CONTACT US**

FST Asset Management, L.L.C. is a lodging industry asset management company, specializing in upscale and luxury hotels, resorts, and inns. We are based in Seattle and are currently serving clients across the U.S., and are considering opportunities in Asia and Mexico. We have extensive knowledge and experience in both operations and asset management of high-end lodging facilities and real estate.

**THE FST STORY**

FST is an acronym for **F**inancial, **S**trategic, and **T**echnical asset management, and not coincidentally, the letters, FST are also the first initials of the three principals and executives of the company- Robert **F**ix, James **S**imkins and Jim **T**readway.

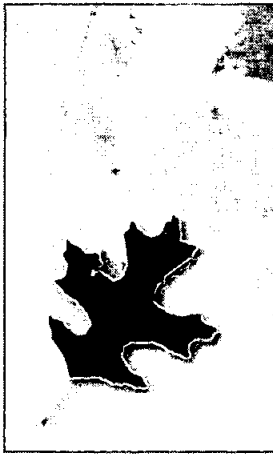
In early 1996, Jim Treadway, with two Seattle-based partners, formed a hotel management company called MTM Luxury Lodging. By 2002, six luxury, independent Northwest properties were under contract and MTM set its sights on the East Coast and California for expansion. In 2002, MTM took on the asset manager's role for The Madison Hotel in Washington, D.C. From that, other opportunities came to MTM for asset management. In 2003, Jim Treadway and his operating partner in MTM, James Simkins, decided to create a separate company with a different orientation and skills set to specialize solely in asset management. So Treadway and Simkins, created FST, and invited Rob Fix to join them.

Currently under contract with FST are the W Hotels of San Diego and Silicon Valley, the Loews Hotel in New Orleans, and The Madison Hotel in Washington, D.C.. In addition, FST fulfills the role of Operating Tenant at the Hyatt Islandia in San Diego.

Treadway's and Simkins' backgrounds include extensive experience in single and multi-unit upscale and luxury hotel management, as well as asset management. They're experienced in all areas of lodging, development (including acquisition and disposition), management, and asset management and acquisition, and have extraordinary skills in the areas of financial management, systems, technology, and engineering in addition to sales and marketing, rooms and food and beverage operation. Fix's background is centered around development, acquisitions and dispositions, and financial management.

So FST was born in May, 2003.

© 2006 FST Asset Management LLC

**FST**  
**ASSET MANAGEMENT****FST STORY****ABOUT FST****CONTACT US****MANAGEMENT BIOGRAPHIES****JAMES SIMKINS**

Co-founder and Principal of FST Asset Management, LLC has had a distinguished international career with Westin Hotels & Resorts and most recently, MTM Management, L.L.C.

Covering five countries on four continents, he began his career at The Carlton Hotel in Johannesburg, South Africa in 1972. During a period of 10 years, he gained considerable exposure in all operating and support functions of this trend-setting hotel, and rose to an executive position before being recruited away to be the Managing Director of a manufacturing company in 1980. Over the next three and a half years, he gained significant experience in the fields of clothing and textiles, printing, instrumentation distribution, and engineering services.

In 1984, Simkins returned to his favored hotel industry and in early 1987, accepted a company transfer to the Kowloon Shangri-la as Executive Assistant (Resident) Manager. Operated by Westin, this Hong Kong hotel was regularly ranked in the top 20 in the world, and operated at GOP levels of 57% - 61%, substantially ahead of its competitive set including the Peninsula, Mandarin and Regent hotels. This property was the "cash cow" that generated and financed much of Shangri-la's growth in the late '80's and established them as their own Management Company.

A later transfer to the 1473 room Westin Bonaventure in Los Angeles resulted in his promotion to Managing Director, with the specific mission of resurrecting this property from Chapter 11 bankruptcy protection and the impact of the LA Riots. Simkins assumed the lead role in coordinating the requisite financial and legal elements of this workout, while still maintaining and improving the operation of the hotel.

Having successfully achieved these objectives, in January 1993, Simkins was promoted to Vice President, Operations of Westin International Asia Pacific and General Manager of The Westin Tokyo. He successfully opened this \$620 million project in October 1994 and within 26 months, achieved the position of top performing luxury hotel in all of Japan. Of particular importance during the pre-opening period was the revision of the pre-opening "bubble era" budget (eliminating \$19.5 million in costs) and the development of a new salary/compensation system that was later also adopted by Sapporo, owner of the

hotel, in their mainstream beer brewing and distribution business.

During the same period, he provided operational oversight to all Westin properties in Asia with particular emphasis on the opening of The Westin Osaka, and assisted with due diligence work with the Starwood/Goldman Sachs joint venture that purchased Westin in 1995. A final assignment to Australia to open the landmark Westin Sydney was successfully accomplished prior to joining MTM Management, and provided further valuable insight into the development, space planning, value-engineering, and technical services functions.

James graduated with a business degree from the University of South Africa and attended the University of Witwatersrand where he studied Civil Engineering. Simkins also has the AH&MA Institute Diploma and has lectured in Engineering for Hospitality Management for that organization. In all locations, he has assumed a leadership role within the industry and was acknowledged in 1996 by Leaders magazine as one of the world's leading Hotel Managers. For some years, the opportunity of applying his analytical, technical, and operational skills in a company dedicated to innovative and entrepreneurial asset management of luxury hotels has been a goal for Simkins. Being a Principal of FST with his friend and colleague of many years, Jim Treadway, serves that objective.

James is married with two children and resides in Redmond.

#### **JIM TREADWAY**

Co-founder and Principal of FST Asset Management, L.L.C., is best known for his 23 years with Westin Hotels and Resorts and 10 years co-owning and operating MTM Luxury Lodging, a hotel management company specializing in luxury, independent hotels, resorts, and inns.

Treadway's career with Westin began in 1972. His managerial assignments included the Carlton Hotel in Johannesburg, Hotel Scandinavia in Oslo, and The Westin Peachtree Plaza in Atlanta. He served as managing director of The Olympic (now Four Seasons) in Seattle, The Westin Hotel in Seattle, The Westin Bonaventure in Los Angeles, and The Westin Kauai in Hawaii. In late 1990, he was promoted to senior vice president of operations for Westin, and in 1991 became president of the North American Division of Westin Hotels and Resorts, a position he held until the company was sold in mid-1995.

During Treadway's career with Westin, he was instrumental in orchestrating a closer alignment between Westin, the hotel management company, and its property owners. Prior to Treadway's leadership of Westin North America, Westin perceived its customers as its consumers. Treadway was instrumental in ensuring that Westin balanced the needs of its three customer constituencies: the owner, the consumer, and the employee.

Treadway is a third generation hotelier. He attended Dartmouth College and graduated from Cornell University in Hotel Administration at which his areas of emphasis were finance and accounting. Treadway is a respected leader in the U.S. hotel industry and has been a frequent speaker and/or panelist at industry events. He has guest lectured at Cornell, Florida State, Washington State, Nova University, and the University of Washington. He is a former board and executive committee member of the American Hotel and Motel Association, he is also a past president of Washington State's Hotel and Lodging Association. Additionally, he is an officer and director of the Seattle Convention and Visitors' Bureau and a founding member of Seattle's Lodging Roundtable. His other board position is with Merrill Gardens, L.L.C., which owns and operates 60 retirement and assisted living communities across the U.S.

Married, with three children and living in Bellevue, Washington, Treadway's passions in life are time with family and sports.

#### **MARC PUJALET**

Marc joined FST Asset Management, L.L.C. as a partner in October 2005. His primary responsibilities are for property operations, sales and marketing, and will be involved in the development of an accelerated growth plan for the collection/brand. He joins MTM with 30 years of hospitality experience, primarily in the areas of sales and marketing. He is best known in our industry for building strong management teams of enthusiastic, committed people.

Most recently, Marc was President of Noble House Hotels & Resorts, where he led all hotel operations efforts as well as strategic marketing activities for this \$200 million (revenue) company. He was recruited to Noble House as Chief Marketing Officer and was promoted to President after one year with the company. While at Noble House, he built new marketing tools, upgraded hotel operations infrastructure, raised quality standards and recruited a

stronger operations and marketing team for the company to the ultimate goal of improving company profits by repositioning the Brand from three-star to four-star quality. During his three year tenure with Noble House, the company was ranked highest in average rate and highest or second-highest in terms of revenue per available room generated by a US management company. Additionally, during this time, Noble House improved hotel owner relations, as well as associate and guest satisfaction levels, key personal objectives when he joined the company.

Before being recruited to Noble House, he was Senior Vice President of Marketing for Seattle's Convention and Visitors Bureau from 1999 until 2002. His responsibilities included oversight of convention and tourism sales and marketing, convention services, reservations and housing, public relations and communications. Pujalet had a leadership role in the aggressive re-branding of the Seattle destination, implementation of improved sales and housing technology, a new web site and a new advertising campaign.

Prior to this position, Pujalet was Senior Vice President, World-Wide Marketing for Westin Hotels & Resorts, capping a 21-year career with the upscale hotel chain. During his tenure with Westin, he led the revitalization of the hotel company's sales and marketing organization, created a dramatic, award-winning advertising campaign and a new frequent-guest program, all resulting in the improvement of delivery of business to hotels from the Westin flag from 38% to 55%. He started with Westin in 1977 as a management trainee at the Ilikai Hotel in Hawaii, spent 10 years in increasing responsibility at the St. Francis in San Francisco before being tagged to be the regional Director of Sales and Marketing at their headquarters in Seattle.

Pujalet lives with his wife of 27 years, Nikette, and their two sons (AJ-20 and Jordan-17). His passions are his family, fly-fishing, snow boarding, and wakeboarding.

#### **ROB FIX**

Vice President and unit holder of FST, was most recently the CFO of Trillium Corporation. Based in Bellingham, Washington, Trillium is a real estate holding and development company specializing in timber, and hospitality and commercial real estate. Trillium has holdings in Colorado, Alaska, Washington, Chile, Argentina, Peru, and Venezuela. As CFO, Rob was responsible for the finance/accounting department, negotiating and replacing debt,

negotiating real estate transactions, and structuring the recently completed joint venture involving Resort Semiahmoo. Trillium's hospitality holdings reported to Rob, as well.

Prior to transferring to Trillium's corporate headquarters, Rob was the Director of Finance for its subsidiary, Resort Semiahmoo. Rob joined Semiahmoo in early 1999, shortly after Trillium had acquired the 200-room inn, thereby unifying the ownership of the entire resort under Trillium's ownership. Rob was charged with consolidating the accounting for two golf courses, a marina, and extensive real estate and hotel operations. During his first year with the resort, he orchestrated a full systems conversion, including the hotel PMS, F & B POS, golf, spa, and health club POS.

Prior to joining Resort Semiahmoo, Rob worked in a development/acquisition capacity as Director of Development for Interstate Hotels. His development experience started with Red Lion as a development analyst and then as Director of Development for DoubleTree. During this time, he sourced new transactions, coordinated due diligence, and led analysis of new business opportunities, in addition to negotiating management agreements with various property owners.

Early in Rob's career, he held the position of Controller for several Pacific Northwest Red Lion properties, in addition to the West Coast Roosevelt Hotel in Seattle.

Rob is a graduate of Washington State University's Hotel and Restaurant School. Rob is married with two young children, and resides in Bellingham.

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**FOURTH AMENDMENT  
TO  
MANAGEMENT AGREEMENT**

**THIS FOURTH AMENDMENT TO MANAGEMENT AGREEMENT** (this "**Amendment**") is dated as of January 6, 2006, by and between **KENCAL OPERATING LLC**, a California limited liability company ("**Owner**") and **HYATT CORPORATION**, a Delaware corporation ("**Hyatt**").

**PRELIMINARY STATEMENT**

Hyatt currently operates and manages the Hotel pursuant to the Existing Agreement. Concurrently herewith, the Hotel is being purchased by KenCal Ownership LLC, a California limited liability company, and an affiliate of Owner ("**Landlord**") and Landlord is leasing the Hotel to Owner pursuant to a certain Operating Lease by and between Landlord and Owner (the "**Operating Lease**"). In addition, concurrently herewith, Landlord, Owner and Hyatt are entering into a certain Landlord, Tenant and Manager Non-Disturbance and Attornment Agreement (the "**Landlord Agreement**"). In connection therewith, the Owner's interest under the Management Agreement is being transferred and assigned to Landlord, and immediately thereafter being transferred and assigned to, and assumed by, Owner. Owner and Hyatt now desire to enter into this Amendment in order to amend the Management Agreement further.

**NOW, THEREFORE**, it is hereby agreed, by and between the parties hereto as follows:

1. **Definitions.** All terms used herein (including, without limitation, all terms used in the Preliminary Statement) which are defined in the Existing Agreement shall, except as otherwise herein expressly provided, have the meanings set forth therein. The definitions of any terms which are expressly defined herein and also defined in the Existing Agreement shall have their meaning set forth herein, and said definition shall, for all purposes of the Management Agreement be deemed to have been amended to conform to the definition thereof herein contained. For all purposes of this Amendment and the Management Agreement the following terms shall have the meanings set forth below:

*wrong date*  
"**City Lease**" shall mean that certain Lease Agreement as executed by the parties thereto as of ~~October 4, 2005~~, by and between KenCal Ownership LLC, a California limited liability company, as Lessee, and the City of San Diego, a California municipal corporation.

"**Existing Agreement**" shall mean, collectively, the following: (i) the Management Agreement, dated as of August 10, 1976, by and between Islandia Associates, Ltd. and California Hyatt Corporation pursuant to which, among other things, California Hyatt Corporation was designated and appointed as the agent for Islandia Associates, Ltd. to manage and operate the Hotel; (ii) Amendment to Management Agreement, dated as of June 29, 1978, by and between Islandia Associates, Ltd., and California Hyatt Corporation; (iii) Second Amendment to Management Agreement, dated as of November 17, 1989, by and between Islandia Associates, Ltd., and California Hyatt Corporation; (iv) Third Amendment to Management Agreement, dated as of August 27, 2002, by and

between Islandia Associates, Ltd. and Hyatt Corporation, as successor in interest to California Hyatt Corporation; and (v) letter dated June 6, 2002 from Hyatt Corporation to Islandia Associates, Ltd.

**“Hyatt System Costs”** shall mean the costs allocable to the Hotel of providing Hyatt System Services. Hyatt System Costs shall be allocated to the Hotel on the basis of the actual cost thereof to Hyatt without mark up, premium or profit, but may include an allocation of certain shared costs such as employee costs, occupancy costs, utilities and the like.

**“Hyatt System Services”** shall mean those services provided to Hyatt hotels in North America and the islands of the Caribbean by Hyatt or its Affiliates on a centralized basis, excluding, however, Chain Services. Attached hereto as Exhibit A is a brief description of Hyatt’s current Hyatt System Services (which shall be subject to revision, addition or deletion from time to time), setting forth those which are mandatory and will be applicable to the Hotel and those from which Owner may elect to be excluded, and setting forth the basis on which Hyatt System Costs are currently allocated to the Hotel.

**“Management Agreement”** shall mean the Existing Agreement as amended by this Amendment.

**“Renovation Program”** shall mean the program of renovation and rehabilitation of the Hotel, the scope of which is described on Exhibit B hereto, as more fully provided for in Section 3 of this Amendment.

**“Total Project Costs”** shall mean the sum of (i) the cost to Landlord (but not any subsequent purchaser or transferee) of acquiring the Hotel including, without limitation, the purchase price therefor (without regard to proration adjustments) and Landlord’s reasonable costs incurred in connection with the acquisition of the Hotel including, without limitation, attorney’s fees, appraisal charges, due diligence costs, recording fees, transfer taxes, title insurance, and the like to the extent actually paid to unaffiliated third parties by or on behalf of Landlord; plus (ii) the actual cost of the Renovation Program paid by or on behalf of Landlord or Owner to unaffiliated third parties. In order to enable Hyatt to make the necessary calculations which are dependent on the amount of Total Project Costs, Owner shall, from time to time, upon request of Hyatt, furnish to Hyatt in reasonable detail, the amount of its Total Project Costs incurred to the then current date, together with a full and complete report of Total Project Costs as soon as reasonably practicable after the completion of the Renovation Program. Hyatt shall have the right, from time to time, to examine and audit the books and records of Landlord, and its Affiliates, by itself or its auditors for the purpose of verifying the amount of the Total Project Costs and, in that connection, Owner shall, and shall cause Landlord, to cooperate in all reasonable respects with Hyatt, and to provide to Hyatt and its auditors the necessary books and records for such purpose. In the event Owner and Hyatt dispute the amount of Total Project Costs, the dispute shall be resolved by arbitration conducted in accordance with the provisions of the Management Agreement. The costs of verifying and auditing Owner’s and Landlord’s books and records shall be borne by Hyatt, and shall not be a Hotel expense, unless the amount of the Total Project Costs, as reported by

Owner, are less than the actual amount thereof as determined by audit or arbitration by three percent (3.0%) or more, in which event the costs incurred by Hyatt in connection with such examination and audit shall be borne and paid for by Owner and shall not be a Hotel expense.

2. **Term.** Section 2 of the Existing Agreement, as heretofore amended, is hereby further amended by providing that the Term of the Management Agreement shall be and hereby is extended for an additional period of ten (10) years ending at 11:59 pm, local time at the Hotel, on December 31, 2030.
3. **Renovation Program.** Owner and Hyatt agree that the Hotel, in order to enable it to meet the first-class hotel standard (as defined in Section 1.5 of the Agreement), requires the implementation of the Renovation Program. Owner agrees that it shall implement the Renovation Program, as soon as reasonably practicable after the date hereof, and, in doing so, shall conform to the following provisions:
  - (a) The scope of the Renovation Program shall be as described on Exhibit B hereto.
  - (b) Owner shall cause detailed plans and specifications for the Renovation Program to be prepared and submitted to Hyatt for Hyatt's review. Hyatt's review shall be based on aesthetic factors, conformity to Hyatt standards and other factors relating to the operational aspects of the Renovation Program. Hyatt shall have the right to review and comment on, and to approve, the plans and specifications as submitted by Owner, Hyatt's approval, however, to be based solely on whether or not the proposed plans and specifications are in conformity with Hyatt's standards and the first-class hotel standard. Hyatt's comments and suggestions with respect to the plans and specification as submitted by Owner shall be in writing, and shall not be unreasonably withheld or delayed.
  - (c) Upon receipt of Hyatt's comments, Owner shall cause the plans and specifications to be revised to reflect Hyatt's comments and the revised plans and specifications shall then again be submitted to Hyatt. The process described in subsection (b) shall be repeated until plans and specifications shall have been mutually approved by Owner and Hyatt.
  - (d) As soon as reasonably practicable after approval of plans and specifications, Owner shall place purchase orders for goods required in connection with the Renovation Program, and execute contracts for the implementation of the Renovation Program, including installation of FFE. Owner agrees that in implementing the Renovation Program it shall do so in a manner which minimizes, to the extent possible, disruption of ordinary Hotel operations. Hyatt agrees that it shall cooperate in all reasonable respects in the implementation of the Renovation Program.
  - (e) All cost and expenses incurred in connection with the Renovation Program shall be the sole cost and responsibility of Owner and Owner shall indemnify, defend and hold Hyatt harmless of and from any and all manner of claim, loss, damage,

liability or expense which Hyatt, or any of its employees or agents, may suffer or incur in connection with the implementation of the Renovation Program. Costs incurred in connection with the Renovation Program shall not be deducted in computing Profit, shall not be paid from operating accounts, but shall constitute part of Total Project Costs, except to the extent paid from funds on deposit in the Fund referred to in Section 5.4 of the Existing Agreement.

- (f) So long as Owner is proceeding in good faith to implement the Renovation Program, and so long as the Renovation Program shall be completed on or before twenty-four (24) full months after the date hereof (subject to delays directly resulting from one or more Force Majeure Causes), Owner shall not be deemed in default under the Management Agreement solely by reason of the fact that the Hotel is not in conformity with the first-class hotel standard. For purposes hereof, a "**Force Majeure Cause**" means any one or more events or circumstances beyond the reasonable control of the party whose performance is affected thereby that, alone or in combination, causes a delay in the completion of the Renovation Program, such events or circumstances to include, without limitation, casualties, war, invasion, insurrection, acts of terrorism, sabotage, failure of transportation, or inability to procure or general shortage of labor, equipment, facilities, materials or supplies.
- (g) Upon completion of the Renovation Program, and as of the date of such completion, the Hotel shall be deemed in compliance with the first-class hotel standard.

4. **Employees.** The proviso at the end of the first paragraph of Section 3.1(a) (relating to the position of general manager for the Hotel), together with all of the remaining portions of Section 3.1(a) that follow the proviso, are hereby deleted, and the following inserted in lieu thereof:

"By separate agreement of even date with this Amendment, and, with the consent of Owner, Hyatt has assumed the existing union agreements. Hyatt shall select, appoint and supervise all personnel for the proper operation, maintenance and security of the Hotel and in order to enable Hyatt to perform its duties and obligations under the Management Agreement. All employees of the Hotel shall be employees of Hyatt, and Hyatt may reimburse itself out of the operating accounts referred to in Section 3.3 for all employee costs which shall include, without limitation, the aggregate compensation (including, without limitation, salary, fringe benefits, incentive compensation, bonuses, employee performance and service awards, and other such amounts paid or payable to Hotel employees), and other employee related costs such as payroll taxes. Hyatt shall have the sole and exclusive right and authority to direct Hotel employees, and to hire, promote, demote, transfer in or transfer out, discipline, suspend or terminate any and all Hotel employees.

"Hyatt will negotiate, on behalf of the Hotel, with any labor union entitled to represent Hotel employees, or any collective bargaining unit comprising Hotel employees, but any collective bargaining agreement or labor contract resulting therefrom shall first be approved by Owner. In that connection, Owner understands and agrees that its approval rights shall be disclosed to the bargaining representative, and, Owner further agrees (i) Owner will not withhold, condition or delay its approval to any collective bargaining agreement if the result thereof, in the reasonable opinion of counsel for Hyatt, is to create a substantial risk of violation of legal obligations on the part of Hyatt; and (ii) in addition to any other indemnification obligations of Owner herein contained, Owner shall indemnify, defend and hold Hyatt, its officers, directors, employees and agents, completely free and harmless of and from any and all manner of liability, claim, cost or expense which may be incurred by Hyatt by reason of any failure of the part of Owner to approve a collective bargaining agreement submitted to Owner for approval and such approval shall have been unreasonably withheld by Owner.

"Anything herein contained to the contrary notwithstanding, prior to the appointment of any person to the position of general manager of the Hotel, Hyatt shall submit the name and background information on the candidate, and provide Owner a reasonable opportunity to meet with and interview the proposed candidate. No person shall be appointed as general manager of the Hotel without the prior approval of Owner, which approval shall not be unreasonably withheld, delayed or conditioned.

"Hyatt, at its option, instead of hiring specific personnel, may assign employees of Hyatt or any of its affiliates as full time or part time members of the executive staff of the Hotel on an interim basis, and Hyatt shall, as necessary, withdraw from the operating accounts the amounts required to reimburse Hyatt or its affiliates for the employee costs relating to such employees. With respect to part time members of the executive staff, a reasonable allocation shall be made of the employee costs of such employees between the portions thereof chargeable to the Hotel, and the portion chargeable to Hyatt, respectively."

Because, prior to the date hereof, all employees (other than members of the executive staff of the Hotel) have, under the terms of the Existing Agreement, been employees of Owner's predecessor in interest, all such employees shall, as a result of this Amendment, become direct employees of Hyatt.

5. **Annual Plan.** There is hereby added as a new Section 3.5 to the Management Agreement the following:

"3.10 **Annual Plan.**

(i) **Preparation and Submission.**

- (1) No later than November 1st of each calendar year during the Term, Hyatt will prepare and submit to Owner for the following calendar

year (i) a forecasted budget of the Hotel's operations, including forecasts of revenues and operating expenses and the assumptions underlying the same; (ii) a proposed marketing plan; and (iii) a proposed budget of Capital Expenditures (for this purpose, inclusive of additions to and replacements of FFE). The materials described in clauses (i) and (ii) above are herein collectively referred to as the "**Operating Budget**", the budget referred to in clause (iii) above is herein referred to as the "**Capital Budget**" and the Operating Budget and Capital Budget are collectively referred to as the "**Annual Plan**".

- (2) The Annual Plan shall be prepared in accordance with Hyatt's standard internal planning and budgeting procedures on Hyatt's standard formats. Owner agrees that it shall promptly review all Operating Budgets and Capital Budgets submitted to it, and Hyatt agrees that it shall provide Owner with such additional and supplemental information with respect thereto as shall be reasonably requested by Owner and which may be prepared or compiled without unreasonable delay, expense or interruption of normal operations.
- (3) Promptly after submission of the Annual Plan, representatives of Owner and Hyatt shall meet at the Hotel or at such other location as may be mutually agreed and at a mutually convenient time to discuss, and attempt in good faith to agree upon, the Annual Plan as provided below.

(ii) Operating Budget.

- (1) All items of expenditure contained in the Operating Budget shall be subject to approval of Owner, with the exception of the following: (i) costs associated with contracts or arrangements Hyatt has made on a chain-wide, regional or business-segment basis in accordance with Hyatt's authority under the terms of this Agreement, subject, in all cases, to the right of Owner to elect not to participate in one or more Hyatt chain-wide contracts (other than Mandatory Contracts, as described on Exhibit A hereto); (ii) compensation levels to Hotel employees or under Hyatt chain-wide or regional fringe benefit programs; (iii) room rates, menu or banquet prices, group booking rates, and other such specific pricing for the use of the Hotel and its facilities and amenities which affect the estimate of Hotel revenues; provided, however, that Owner shall not be precluded from discussing these items during budget preparation and review, and the estimated revenue goals using these items shall be subject to Owner's approval; or (iv) other expenditures required to be made under the express provisions of this Agreement including, without limitation,

expenditures for Management Fees, Allocable Chain Expense and Hyatt System Costs (except to the extent Owner has opted out of non-mandatory Hyatt System Services). Owner shall not withhold its approval for any expenditures which are reasonably necessary, in nature or amount, to enable the Hotel to continue operating in accordance with the First-Class Hotel Standard.

- (2) Subject to the foregoing, Hyatt shall take into consideration the views and suggestions of Owner regarding all aspects of the Operating Budget and both Owner and Hyatt shall attempt, in good faith, to reach a mutually satisfactory agreement, and thereupon to incorporate any such agreements into the Operating Budget. In this connection, Owner shall have the right to suggest changes in operating policies and in the proposed Operating Budget which it considers reasonably necessary to achieve the objectives of near-term and long-term maximization of Hotel profits, subject in all respects to the First-Class Hotel Standard. To the extent Hyatt disagrees with Owner's suggestions and comments, Hyatt shall provide written explanations for its disagreements. Promptly following the foregoing discussions and explanations, Hyatt shall submit a revised Operating Budget for further comment and discussion in the manner set forth above. Thereafter, the parties shall continue to discuss the Operating Budget until such time as both Hyatt and Owner shall have reached agreement on all items comprising the Operating Budget for which Owner has approval rights hereunder.
- (3) Until such time as the parties have agreed on all line items of the proposed Operating Budget for which Owner has approval rights hereunder, Hyatt shall have the right to operate the Hotel in accordance with an Operating Budget comprised of those line items which do not require Owner approval hereunder, those line items that have theretofore been agreed upon by Owner and Hyatt and, only with respect to those line items not yet approved by Owner (and for which Owner has approval rights hereunder), the standards of operation and operating policies in effect during the preceding calendar year (or, with respect to the Hotel's first Fiscal Year, as proposed by Hyatt in connection with the opening of the Hotel). Once the Operating Budget has been approved by Owner and Hyatt, Hyatt agrees that it shall use commercially reasonable efforts to operate the Hotel in a manner consistent with the approved Operating Budget both as relates to estimates of dollar amounts of expenditures, and the operating assumptions underlying the same.

- (4) Notwithstanding anything to the contrary contained herein, Owner and Hyatt both acknowledge that the forecasts of revenues and estimated expenses contained in the Operating Budget represent Hyatt's best estimate of the same for the following calendar year and not in any way a guarantee of actual results. Actual revenues and expenses can vary from forecasts and estimates for reasons beyond the reasonable control of Hyatt including, without limitation, the following: (a) the volume of business and the levels of hotel occupancy; (b) the mix of business (that is, the relationship of food and beverage revenues to other hotel related revenues and the relationship of group business to individual travel business); (c) prevailing wage rates and the effects of collective bargaining agreements; (d) inflation; (e) utility rates, insurance premiums and tax increases; (f) unanticipated and extraordinary repair and maintenance expenses; (g) the need to meet competitive market conditions; and (h) other similar causes. Owner acknowledges that so long as Hyatt adheres to its covenant to use commercially reasonable efforts to operate the Hotel in a manner consistent with the approved Operating Budget, Hyatt shall have no liability to Owner, and shall not otherwise be deemed in Default hereunder, if actual operating results vary from the Operating Budget.
- (5) Monthly, during the Term, Hyatt will provide Owner with revised cash flow forecasts for the remainder of the fiscal year and will discuss the same with Owner, providing Owner with explanations, as requested from time to time by Owner, of the reasons for any departures from the approved Operating Budget, and discussing measures for responding to such departures; provided, however, in no event shall the need for any such cash flow revisions be deemed an Event of Default by Hyatt hereunder.

(iii) Capital Budget Approval.

- (1) All items of expenditure contained in the Capital Budget shall be subject to Owner's approval (provided, however, Owner agrees that it shall approve all Capital Budgets or relevant portions thereof that are reasonably necessary in order to enable the Hotel to meet the First-Class Hotel Standard). If Owner does not approve a proposed Capital Budget, or any line items or specific Capital Expenditure projects within a proposed Capital Budget, within thirty (30) days after delivery of the same to Owner, then such Capital Budget, or such line item(s) or Capital Expenditure projects not specifically approved by Owner, as the case may be, shall be deemed disapproved. In such event, Owner and Hyatt shall meet and confer in good faith in an effort to reconcile differences and reach consensus during the thirty (30) day period thereafter.

- (2) If, by the end of the sixty (60) day period following Hyatt's submission of the Capital Budget to Owner, Owner has yet to approve a Capital Budget or a specific Capital Expenditure project, or any portion thereof, Hyatt shall notify Owner in writing of any Capital Expenditure(s) Hyatt deems necessary for the Hotel to meet the First-Class Hotel Standard (collectively, the "**Disputed Capital Expenditures**"). If Owner does not agree to include the Disputed Capital Expenditures in the approved Capital Budget, or as an approved Capital Expenditure project, within thirty (30) days after delivery of Hyatt's notice, Hyatt shall have the right to submit the issue of whether the Disputed Capital Expenditures are necessary to enable the Hotel to meet the First-Class Hotel Standard to arbitration as provided in Article XII. The arbitrator's determination shall be final and binding on both Owner and Hyatt.
- (3) Hyatt may not incur Capital Expenditures that are in excess of those required or permitted under the approved Capital Budget except for the following: (i) expenditures for the replacement of or additions to FFE (other than expenditures relating to Refurbishing Programs) from funds then on deposit or to be deposited in the Capital Fund which do not exceed Ten Thousand Dollars (\$10,000) (subject to CPI adjustment) for any single expenditure, or One Hundred Fifty Thousand Dollars (\$150,000) (subject to CPI adjustment) in the aggregate in any calendar year; and (ii) expenditures, including Capital Expenditures, which Hyatt reasonably deems necessary to minimize personal injury and property damage in cases of casualty or other emergency, or which Hyatt deems reasonably necessary in order to comply with applicable Legal Requirements."

6. **Reimbursements.** In addition to all other amounts required to be paid or reimbursed to Hyatt under the Management Agreement, Owner shall pay to Hyatt (and Hyatt may withdraw from the operating accounts) all Hyatt Systems Costs.

7. **Tax on Reimbursements.** There is hereby added a new Section 3.6 to the Management Agreement as follows:

"Section 3.6. **Tax on Reimbursements.** In the event and whenever Hyatt shall be subject to any tax, irrespective of its designation (including a fee, charge or other imposition for the issuance of a license, permit or the privilege to conduct a business or occupation), imposed, levied or assessed by any governmental agency or instrumentality (other than income and corporate franchise taxes) measured, in whole or in part, by reference to reimbursements to Hyatt directly attributable to amounts paid under the Management Agreement for compensation, employment taxes, fringe benefits, Allocable Chain Expense or Hyatt System Costs, then Owner will indemnify and hold Hyatt harmless from and against any and all liability for such tax or taxes to the extent so measured. Any payments

made by Owner in this connection shall be paid from the operating accounts and be deducted in computing Profit for the period incurred. At Owner's request, Hyatt will resist, by appropriate proceedings, any liability for any tax which is the subject of the foregoing indemnification, in which case all expenses (including, without limitation, attorneys fees) incurred by Hyatt in resisting or defending itself against such liability shall be deemed a Hotel expense payable from the operating accounts."

8. **Hyatt's Annual Management Fee.** Effective as of the first day of the calendar month next succeeding the completion of the Renovation Program, Section 4.2(b) shall be deleted and the following inserted in lieu thereof:

"(b) For any fiscal year for which there is "Profit", Hyatt shall receive, in addition to the Basic Fee, an Incentive Fee equal to twenty-five percent (25%) of the amount, if any, by which Profit for such fiscal year exceeds ten percent (10.0%) of Total Project Costs. If in any fiscal year, or part thereof, the amount of Profit shall be a negative number or shall be less than ten percent (10.0%) of Total Project Costs (or a prorated portion thereof for the 2005 fiscal year) the amount of any such deficiency shall in no event reduce the amount of Basic Fee otherwise payable during such fiscal year, or be carried back to any prior fiscal year or forward to any subsequent fiscal year."

For the fiscal year in which the Renovation Program is completed, if completion occurs on a date other than January 1 of such year, the amount of Incentive Fee for the period from January 1 of such year to the effective date of the above amendment to Section 4.2(b) shall be calculated on the basis of the provisions of the Existing Agreement, and for the period on and after the said effective date shall be calculated on the basis of the above provisions set forth in this Amendment, except that, the amount equal to ten percent (10.0%) of Total Project Costs shall be pro rated, on a per diem basis, for the period after the said effective date and for the remainder of said fiscal year.

Until such time as the Renovation Program is completed, Section 4.2(b) of the Existing Agreement shall continue in full force and effect.

9. **Time and Manner of Payment.** Effective as of the date on which the amendment to Section 4.2(b) shall become effective, subsection (b) of Section 4.3 shall be deleted and the following inserted in lieu thereof:

"(b) The tentative monthly installments on account of the Incentive Fee shall be equal to twenty-five percent (25%) of the amount, if any, by which Profit for the Cumulative Period exceeds ten percent (10.0%) of Total Project Costs (prorated on a per diem basis for the Cumulative Period in question) less the aggregate amount of the tentative monthly installments having theretofore become payable for such fiscal year on account of the Incentive Fee."

For the fiscal year in which the Renovation Program is completed, if completion occurs on a date other than January 1 of such year, tentative monthly payments with respect to the Incentive Fee for the period from January 1 of such year to the said effective date, shall be calculated on the basis currently set forth in the Existing Agreement, and for the period after the said effective date shall be calculated on the basis of the provisions above set forth with a per diem proration of the amount equal to ten percent (10.0%) of the Total Project Costs for the period (and for each Cumulative Period) following the said effective date.

For greater clarity, the paragraph following subsection (b) of Section 4.3, beginning with the words "If, for any fiscal year, ..." shall not be deleted and shall remain in full force and effect.

Until such time as the Renovation Program is completed, Section 4.3(b) of the Existing Agreement shall continue in full force and effect.

10. **"Profit" Defined.** The provisions of this Section 10 shall constitute an amendment to Section 5.2 of the Existing Agreement, as the same has heretofore been amended, in the following respects:

(a) Section 3 of the Third Amendment to the Existing Agreement is hereby deleted and the following added in lieu thereof, effective as of the date hereof:

"3. There shall be deducted in computing Profit, in addition to all other deductions herein set forth, an amount equal to (i) all rental charges required to be paid under the City Lease (without duplication, however, for any amounts designated as rent under the City Lease, but otherwise deducted in computing Profit), but not rent paid under the Operating Lease; and (ii) all capital expenditures and, without duplication, all expenditures for the acquisition of FFE, in excess of amounts available for the payment thereof in the Fund, excluding, however, any of the foregoing accounted for as part of Total Project Costs."

(b) There shall be deducted, in computing Profit, in addition to all other deductions herein set forth (but without duplication) an amount equal to the Basic Fee, but not the Incentive Fee.

11. **Waiver of Subrogation.** Section 8 of the Existing Agreement is hereby amended by inserting the following as a new Section 8.4:

"8.4 **Waiver of Subrogation.** Any policies of insurance maintained by Owner or Hyatt with respect to the Hotel shall provide that the insurer's right of subrogation shall be waived in favor of the party not providing the insurance."

12. **Damage or Destruction.**

(a) The last two sentences of Section 9.1 are hereby deleted.

- (b) The number of "Twenty-Five Thousand Dollars (\$25,000)" appearing in Section 9.3 is hereby amended so as to read "Two Hundred Fifty Thousand Dollars (\$250,000)".
13. **Assignment by Owner.** The last sentence of Section 15.2 is hereby deleted, and the following inserted in lieu thereof:
- "Notwithstanding such assumption by such assignee, Owner shall remain fully liable hereunder for all liabilities and obligations (and only such liabilities and obligations) of the Hotel arising, or relating to events occurring, prior to any sale or conveyance of the Hotel or assignment of its interest in this Agreement, or both, it being understood and agreed, however, Owner shall not be relieved of any liability in connection with any hypothecation of the Hotel, or any assignment of its interest in this Agreement in connection with any such hypothecation, until a subsequent sale of the Hotel by either the lender and assumption of this Agreement by the lender or a subsequent purchaser."
14. **Approvals.** The last sentence of Section 17 is hereby amended, and as so amended shall read as follows:
- "If such other party shall not respond positively in writing to such notice within twenty (20) days after receipt thereof, such other party shall be deemed to have disapproved the matter referred to in such notice."
15. **Improvements.** Owner and Hyatt acknowledge that the improvements required by Section 4 of the Third Amendment to Management Agreement have not as yet been completed. Hyatt hereby agrees that Owner shall have twenty-four (24) months following the date hereof in which to complete the Improvements, subject, however, to delays resulting from one or more Force Majeure Causes. Failure to complete the Improvements within the aforesaid twenty-four (24) month period shall constitute an event of default by Owner under the Management Agreement.
16. **Liquor License.** For greater clarity, it is understood and agreed between Hyatt and Owner that the liquor license or licenses for the Hotel shall be held in the name of Hyatt, or its designee, during the term of the Management Agreement. Owner shall cooperate, in all respects, with Hyatt, in connection with the application or renewal of all liquor licenses, and Hyatt shall, at the request of Owner, either surrender or transfer the liquor license(s) for the Hotel upon expiration or earlier termination of the Management Agreement.
17. **Estoppel Certificates.**
- (a) On request from time to time, Hyatt shall execute and deliver to Owner or any Lender or Ground Lessor, within thirty (30) days following Hyatt's receipt of written request therefor, a certificate: (i) certifying that the Management Agreement has not been modified and is in full force and effect (or, if there have been modifications, that the same is in full force and effect as modified and specifying the modifications); (ii) stating whether, to the actual knowledge of the

general manager and controller of the Hotel, any default by Owner exists, and if so, specifying each default of which the general manager or controller may have knowledge and that said persons know of no act, event or omission that, with the giving of notice or the passage of time, or both, could become a default by Owner; and (iii) providing any additional information reasonably requested by Owner or a Lender or lessor under the City Lease; provided, however, that in no event shall Hyatt be required to agree to any waivers with respect to the Management Agreement or other agreements in effect between the parties. On similar notice, Hyatt shall be entitled to a similar certificate from Owner.

- (b) Owner and Hyatt hereby acknowledge and agree that, except for the incomplete "Projects" as described in Section 4 of the Third Amendment to Management Agreement which comprises part of the Existing Agreement, as of the date hereof, neither party has any actual knowledge of the occurrence of any event or circumstance which constitutes, or with notice or the passage of time, or both, would constitute, a default or event of default under the Management Agreement.

**18. Insurance.** Section 8 of the Existing Agreement is hereby amended in the following respects:

- (a) Sections 8.1(a)(3) and 8.1(a)(4) are hereby deleted.
- (b) Section 8.1(a)(5) is hereby amended, and as so amended shall read as follows:

“(5) With respect to the Hotel building and its contents, replacement costs coverage against loss or damage against “all risk” perils including boiler and machinery explosion, earthquake and flood in such amount as Owner determines is economically reasonable from time to time.

- (c) The existing Section 8.1(b) is hereby re-designated as Section 8.1(c) and the following inserted as a new Section 8.1(b):

“(b) Hyatt shall maintain, at all times during the Term, the following insurance respecting the Hotel with responsible companies licensed to do business in California:

(1) Worker’s compensation insurance, in the name of Hyatt covering all of Hyatt’s employees at the Hotel, to include employer’s liability, in the amount of Five Hundred Thousand Dollars (\$500,000), but in no event less than the statutory amount as required under applicable provisions of law but subject (to the extent applicable) to the self-insurance provisions referred to in Exhibit A hereto.

(2) Crime insurance, in amounts not less than Five Million Dollars (\$5,000,000), in the name of Hyatt including (i) employee dishonesty coverage, covering Hyatt’s employees in job classifications normally bonded or insured in other hotels leased or managed by Hyatt or as otherwise required by law, (ii) loss inside the premises coverage, (iii) loss outside the premises

coverage, (iv) money orders and counterfeit paper currency coverage, and (v) depositor's forgery coverage, covering computer fraud."

- (d) Insurance coverage referred to in Section 8.1(a)(1) and 8.1(a)(2) shall in no event be less than the amount and scope of coverage generally maintained by Hyatt, from time to time at other hotels leased or managed by Hyatt. Subject to compliance with the preceding sentence, Owner has informed Hyatt that it intends to maintain commercial general liability insurance, including umbrella coverage, with a combined annual aggregate limit of not less than One Hundred Million Dollars (\$100,000,000) per occurrence and location including at least the following (i) contractual liability; (ii) products and completed operations; (iii) innkeeper's liability insurance; and (iv) garage keeper's legal liability. All of the foregoing coverages shall be primary to any other insurance carried by Hyatt, and shall apply against claims for bodily injury or death, personal injury and property damage occurring on, in or about the Hotel and Hotel garage, and on, in or about the adjoining streets or passage-ways thereof or other areas under this Agreement.
  - (e) Any insurance maintained by Owner pursuant to Section 8.1(a)(v) shall include coverage in an amount equal to one-year's Annual Management Fees, the amount thereof, upon and subject to receipt thereof, to be paid to Hyatt as compensation for Annual Management Fees lost as a result of any casualty or other event as to which said insurance provides coverage.
  - (f) Premiums for all insurance maintained by either Owner or Hyatt as above set forth with respect to the Hotel shall be deemed Hotel expenses and deducted in computing Profit.
  - (g) To the extent reasonably obtainable, all policies of insurance required to be obtained under Section 8 shall have attached thereto an endorsement that such policy shall not be cancelled or materially changed without at least thirty (30) days prior notice to Owner, Hyatt, the lenders or any additional insureds.
  - (h) All policies of insurance shall name Owner, Landlord, Hyatt, any Hotel lenders, Kennedy Associates Real Estate Counsel, Inc., and the City of San Diego as additional insureds as their respective interests may appear.
  - (i) The party procuring such insurance shall deliver to the other parties and all named insureds certificates of insurance with respect to all policies so provided, including existing additional and renewal policies and, in the case of insurance about to expire, shall deliver certificates of insurance with respect to the renewal policies on or prior to the respective dates of expiration.
19. **Title Warranties.** Hyatt acknowledges that Owner is not the owner of the fee simple title to the land or the buildings, nor is Owner the lessee under the City Lease. Accordingly, nothing in Section 7.5 shall be deemed a representation or warranty by Owner as to the condition of title to the Hotel or of any title exceptions or encumbrances with respect thereto. Notwithstanding the foregoing, Owner represents, warrants and

covenants that, during the Term, Owner shall have an interest in all of the assets and property comprising the Hotel, whether arising under the Operating Lease or otherwise, sufficient in all respects to enable Owner lawfully, and as a matter of right, to designate and appoint Hyatt as managing agent for the operation and management of the Hotel as contemplated by, and in accordance with the terms and provisions of, the Management Agreement.

20. **Attorneys Fees.** If any actions or proceedings, including arbitration proceedings, are instituted by either party to enforce any of the provisions of the Management Agreement, the party prevailing in any such proceedings shall, in addition to any other amounts or relief to which it may be entitled, also be entitled to reimbursement of its reasonable legal fees and expenses incurred in connection with any such proceedings.
21. **Employment Discrimination.** There is hereby added as a new paragraph to Section 6.2 of the Existing Agreement, the following:

“During the Term of the Management Agreement, Hyatt shall implement measures, and establish and maintain policies, intended to avoid discrimination against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40) or sex. Hyatt shall use commercially reasonable efforts to assure that the evaluation and treatment of all Hotel employees and applicants for employment at the Hotel are free of such discrimination. Hyatt agrees that it will also implement measures, and establish and maintain policies, intended to comply with the provisions of the California Fair Employment and Housing Act (Section 12900 et. seq. of the California Government Code) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 560).”

22. **Notices.** Section 16 of the Existing Agreement is hereby deleted and the following is inserted in lieu thereof:

“Section 16. **Notices.** All notices or other communications hereunder shall be in writing and shall be deemed duly delivered (i) upon personal delivery thereof to, and actual receipt by, the other party; (ii) upon electronic facsimile transmission to the other party, at its fax number as set forth below, provided such delivery is followed by an original of the notice delivered to the other party by overnight delivery or United States postal service delivery and provided the facsimile copy sent by the sender provides an automatic notation confirming the delivery thereof; (iii) on the next business day following delivery by the sender to a recognized and reliable air freight delivery service; or (iv) three (3) business days following deposit in the United States mails. Selection of the method of delivery shall be at the election and risk of the party sending the notice. All notices delivered hereunder shall be pre-paid by the sending party and shall be addressed to the parties as follows:

If to Owner: c/o Kennedy Associates Real Estate Counsel, Inc.  
1215 Fourth Avenue, Suite 2400  
Seattle, Washington 98161

Attention: Jena Thornton

Fax No.: 206.624.8515

With a copy to: McNaul Ebel Nawrot & Helgren PLLC  
600 University Avenue, Suite 2700  
Seattle, Washington 98101

Attention: Marc Winters

Fax No.: 206.624.5128

If to Hyatt: Hyatt Center  
71 South Wacker Drive  
12<sup>th</sup> Floor  
Chicago, Illinois 60606

Attention: General Counsel

Fax No.: 312.780.5284

Either party hereto shall have the right to change its address for notice or its fax number, or the identity of Persons (not more than two (2) in number) entitled to receive copies of any such notices, by delivery in the manner hereinabove provided of an appropriate notice to the other party setting forth the new address or the new fax number, or the identity of the additional or replacement Persons entitled to receive copies, or any one or more thereof."

23. **Counterparts.** This Amendment may be executed in one or more counterparts each of which shall be deemed an original and each of which, when executed and delivered by all parties, shall constitute one and the same instrument notwithstanding that all parties are not signatory to the same counterpart.
24. **Indemnification.** There is hereby added as a new Section 21 to the Management Agreement the following:

"21. **Indemnification.**

(a) **Indemnification of Hyatt.** To the extent Hyatt shall not be fully compensated by insurance, Owner hereby agrees that it will indemnify, defend and hold Hyatt (and its officers, directors, shareholders, agents, employees and Affiliates) free and harmless of and from any and all damages, liability, cost, claim or expense, including, without limitation, reasonable attorneys fees and expenses, arising out of or in any way related to the Hotel or to the performance

by Hyatt of its duties hereunder, other than any such damages, liabilities, costs, claims or expenses which arise out of or are attributable to Hyatt's grossly negligent or willful acts or breach of the Management Agreement (other than the provisions of Section 6.2 as to which the standard shall be Hyatt's grossly negligent or willful acts); provided, however, Owner shall have no liability hereunder to the extent Hyatt is reimbursed for its loss from the proceeds of insurance maintained in accordance with the provisions of the Management Agreement, and, with respect to such coverage, Hyatt agrees that it will, in good faith, pursue its available insurance recoveries prior to making demand on Owner for indemnity. Amounts paid by Owner in fulfillment of its indemnification obligations under this Section 21(a) shall constitute Hotel expenses and shall be deducted in computing Profit for the Fiscal Year in which incurred. Without in any way limiting the generality of the foregoing, upon expiration or earlier termination of this Agreement, Owner will indemnify, defend and hold Hyatt (and its officers, directors, shareholders, employees and Affiliates) free and harmless of, from and against, liabilities, loss, cost, damage, claim or expense arising out of or relating to (i) union contracts entered into or assumed by Hyatt in accordance with the Management Agreement during the Term with respect to events occurring after the date of any such expiration or earlier termination; (ii) booking contracts entered into by Hyatt pursuant to its authority under the Management Agreement which relate to Hotel use after the termination or expiration of the Management Agreement; (iii) events arising or matters occurring after the expiration or termination of the Management Agreement; or (iv) U.S. Worker Adjustment and Retraining Notification Act, or state or local laws of similar import ("WARN") if Hyatt has not had notice of any early termination prior thereto for a period of at least ten (10) days plus the applicable period of notice under WARN; or (v) to any of the provisions of the Employee Retirement Income Security Act of 1974, the Multi-Employer Pension Plan Amendments Act of 1980 ("MEPPA"), as amended, with respect to any withdrawal liability (as described in Section 4201 of MEPPA) incurred in connection with the discontinuance of contributions to any Multi-Employer Pension Plan to which Hyatt may make contributions on behalf of persons employed at the Hotel but only to the extent such withdrawal liability is attributable to benefits accrued by employees of Hyatt in respect of services performed at the Hotel.

(b) Indemnification of Owner. To the extent Owner shall not be fully compensated by insurance, Hyatt hereby agrees that it will indemnify, defend and hold Owner (its partners, and their respective partners, shareholders, officers, directors, agents, employees and Affiliates) free and harmless of and from any and all damages, liabilities, costs, claims or expenses, including, without limitation, attorneys fees and expenses arising out of or in any way relating to (i) Hyatt's operations, business or conduct other than in connection with the performance of its duties hereunder; (ii) Hyatt's grossly negligent or willful acts; or (iii) the breach of this Agreement by Hyatt (other than Section 6.2 as to which the standard shall be Hyatt's grossly negligent or willful acts); provided, however, Hyatt shall have no liability hereunder to the extent Owner is reimbursed for its loss from the proceeds of insurance, and, with respect to such coverage, Owner

agrees that it will, in good faith, pursue its available insurance recoveries prior to making demand on Hyatt for indemnity. Amounts paid by Hyatt in fulfillment of its indemnification obligations under this Section 21(b), shall not be deemed an expense of the operation of the Hotel and shall not be deducted in computing Profit, it being understood and agreed that such amounts shall be borne and paid for solely by Hyatt."

25. **City Lease.** Section 7.7 of the Management Agreement is hereby deleted and the following inserted in lieu thereof:

"7.7 **Matters Pertaining to City Lease.** Owner hereby represents and warrants that the City Lease has been executed and delivered by and on behalf of the parties thereto, and that the copy of the City Lease delivered to Hyatt is a true, accurate and complete copy thereof. Owner also represents and warrants that while Owner is not the Lessee under the City Lease, it has covenanted and agreed with the Lessee, which is an Affiliate of Owner, to comply with all of the covenants of the City Lease. Hyatt hereby acknowledges that it has received a copy of the City Lease and has reviewed the same. Hyatt further covenants and agrees, with respect to the City Lease, as follows:

- (a) Hyatt will familiarize itself with the provisions of the City Lease, use reasonable efforts (to the extent within the control of Hyatt in its capacity as manager of the Hotel, and consistent with the authority of Hyatt under the Management Agreement) to comply with those provisions of the City Lease which directly relate to the management and operation of the Hotel, and will not knowingly or intentionally take any action which would cause Owner or the Lessee to be in default of its obligations under the City Lease, all subject, however, to the following provisions of this Section 7.7, to the limitations on Hyatt's liabilities and obligations as herein set forth, and to the provisions herein contained relating to indemnification by or of Hyatt. In case of any conflict between the provisions of the Management Agreement and the provisions of the City Lease, the Management Agreement shall prevail.
- (b) With respect to Section 1.6 of the City Lease, Hyatt agrees that the Hotel shall remain open seven (7) days per week, and twenty-four (24) hours per day, recognizing, however, that all facilities or amenities of the Hotel may not be open at all times during the day or during all seasons of the year. The foregoing shall be subject to Force Majeure Causes, and to maintenance or refurbishment programs. In all events, Hyatt's policies with respect to operational hours of the Hotel, and its facilities and amenities, shall be consistent with past practices. In addition, with respect to food service operations, Hyatt shall endeavor to cause the Hotel to qualify for the "A" Card as required by Section 1.6 of the City Lease.

- (c) With respect to Section 3.1 of the City Lease, Hyatt agrees that it shall not make any changes in the use of the Hotel from past practices and will, in all events, comply with the provisions of the second sentence of Section 3.1 (recognizing that actions of guests, patrons and tenants are beyond the reasonable control of Hyatt).
- (d) With respect to Section 3.3 of the City Lease, it is acknowledged that Hyatt's management and operation of the Hotel in conformity with the First-Class Hotel Standard shall, as between Owner and Hyatt, constitute competent management for purposes of Section 3.3 of the Lease.
- (e) On any policies of insurance maintained by Hyatt with respect to the Hotel, including, without limitation, any chain-wide policies of insurance in which Owner elects to participate, the City of San Diego shall be included as an additional insured as required by Section 7.2(b)(1) of the City Lease.
- (f) Subject to applicable privacy policies and regulations, Hyatt will, in those cases where it has actual knowledge, prepare incident reports as contemplated by Section 7.2(b)(3) of the City Lease and submit the same to Owner. Owner acknowledges, however, that in the ordinary and usual course of business, Hyatt's usual policy is to prepare such reports only periodically, and only for matters which, in the reasonable opinion of the general manager of the Hotel, represent material matters.
- (g) Hyatt will endeavor to provide Owner with timely notice of any material damage to the Hotel including damage caused by fire or other casualty.
- (h) The parties agree that compliance by Hyatt with the provisions of Section 7.6 of the Management Agreement shall constitute compliance, as between Owner and Hyatt, with the obligations under Section 8.8 of the City Lease.
- (i) Hyatt agrees that it will comply with the restrictions and covenants regarding signs set forth in Section 8.9 of the City Lease with the understanding that any signs, flags, pennants, posters and other similar items currently in place on or about the Hotel shall be deemed authorized and may continue in effect until such time as the City of San Diego may otherwise require. Hyatt further agrees that it shall remove all such items whose removal is demanded by the City of San Diego as provided in Section 8.9.
- (j) Provisions regarding environmental issues are part of Hyatt's obligations to comply with legal requirements under Section 6.2. If Hyatt, during the course of its management and operation of the Hotel, becomes aware of the presence of the release of any hazardous or toxic substances in or

about the Hotel of a significant nature it will report the same to Owner with such details as may be then known to Hyatt.

- (k) The parties acknowledge that compliance by Hyatt with the provisions of Section 6.2 of the Management Agreement shall constitute compliance, as between Owner and Hyatt, with the provisions of Sections 9.1, 9.3 and 9.8(a) of the City Lease.
- (l) With respect to Sections 9.4 and 9.5 of the City Lease, to the extent said section requires compliance with laws and ordinances, the parties agree that compliance by Hyatt with the provisions of Section 6.2 of the Management Agreement shall constitute compliance, as between Owner and Hyatt, with said provisions. In addition, Hyatt agrees to use commercially reasonable efforts in good faith to comply with all other requirements of Section 9.4 and 9.5 of the City Lease to the extent compliance is within the control of Hyatt.
- (m) With respect to Section 9.6 of the City Lease, Hyatt agrees that it will not knowingly violate the provisions of said Section 9.6.
- (n) With respect to Section 9.7 of the City Lease, Hyatt agrees that it will publish the statements, and conduct the programs, and otherwise use commercially reasonable efforts, intended to comply with the provisions of said Section 9.7 of the City Lease.
- (o) With respect to Section 9.9 of the City Lease, Hyatt agrees that it will continue, in accordance with past practices, its monitoring and compliance with water quality standards and practices to the extent related to Hotel operations, but, to the extent capital expenditures are required, the expenditure thereof shall be subject to the provisions of this Agreement regarding Capital Budgets."

**26. Disabled Veterans Business Enterprises.** There is hereby added, as a new Section 7.8 to the Management Agreement, the following:

"7.8 Disabled Veterans Business Enterprises (DVBE). Owner is an Affiliate of the California Public Employees Retirement System, an instrumentality of the State of California. Owner has provided to Hyatt a "DVBE Resource Packet" issued by the State of California setting forth certain guidelines to be referenced by parties contracting on behalf of California state instrumentalities. Hyatt recognizes the importance given by the State of California to patronizing, to the extent feasible, DVBEs. Accordingly, Hyatt hereby agrees that, in connection with any contracts, purchase orders or other acquisition of goods or services for the Hotel which, in accordance with the provisions of Section 7.9, either require competitive bidding or which Hyatt elects to submit to a competitive bidding process, it shall consider, in awarding such contract, whether or not any of the proposed bidders are certified as DVBEs in the

State of California, and will, so long as quality, service and reliability can be satisfied in Hyatt's reasonable judgment, use good faith efforts to implement the intention of the State of California as expressed in the DVBE policy, and not deliberately or intentionally disregard the requirements of the policy. Notwithstanding the foregoing, failure by Hyatt to adhere to the DVBE policy, whether in the judgment of Owner or any other agency of the State of California, will not constitute a default or event of default by Hyatt hereunder, but Hyatt acknowledges that its failure to do so will affect possible extension of the Management Agreement, or future contracts between Hyatt and any agencies or instrumentalities of the State of California."

27. **Competitive Bidding.** There is hereby added as a new Section 7.9 to the Management Agreement the following:

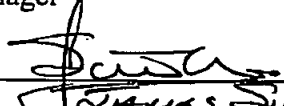
"7.9 **Responsible Contractor Program.** Owner has further provided to Hyatt a copy of the California Public Employees Retirement System Responsible Contractor Program. Consistent with such policy, Hyatt hereby agrees, that, except for "Excluded Contracts" (as hereinafter defined) Hyatt will endeavor to seek competitive bidding on any contracts in which the value of such contract (that is, the amount to be paid by or on behalf of the Hotel with respect thereto), in the reasonable estimate of Hyatt, can be expected to exceed Fifty Thousand Dollars (\$50,000) in any Fiscal Year. For purposes hereof, "**Excluded Contracts**" shall mean any of (i) contracts entered into by Hyatt, on a chain-wide, regional or business segment basis, applicable to various other hotels in the Hyatt chain of hotels, and which Hyatt is either required to, or elects, to implement at the Hotel in accordance with standard Hyatt policies and practices in the management and operation of its hotels; (ii) collective bargaining agreements; (iii) contracts or agreements for employment of individuals as employees of the Hotel, whether on an at will basis or otherwise; (iv) contracts for goods or services in which, to the best knowledge of Hyatt, there is only one supplier who can meet required specifications, delivery schedules and performance reliability standards; and (v) contracts required in response to emergency situations. Whenever Hyatt is required to, or otherwise does, seek competitive bids it will adopt policies and procedures which are commercially reasonable under the circumstances in relation to the nature of the goods or services to be procured and Hyatt's obligation to operate in a businesslike and efficient manner. Subject to the foregoing, Hyatt will use good faith efforts to comply with the competitive bidding procedures of the Responsible Contractor Program policy, and will not deliberately or intentionally disregard the requirements of the policy."

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed on their behalf as of the day and year first above written.

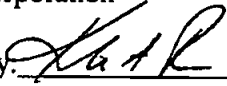
**KENCAL OPERATING LLC**, a California  
limited liability company

By: FST HRI LLC, member and manager

By: MTM Management, L.L.C., member  
and manager

By:   
Name: JAMES SINKINS  
Title: MANAGER

*Ked*  
**HYATT CORPORATION**, a Delaware  
corporation

By:   
SVP-Finance & Treasurer

### THIRD AMENDMENT TO MANAGEMENT AGREEMENT

THIS THIRD AMENDMENT TO MANAGEMENT AGREEMENT (this "Amendment") is dated as of the \_\_\_\_ day of \_\_\_\_\_, 2002, but effective as of January 1, 2003 (the "Effective Date"), by and between HYATT CORPORATION, a Delaware corporation ("Hyatt") and ISLANDIA ASSOCIATES, LTD., a California limited partnership ("Islandia").

#### WITNESSETH:

WHEREAS, California Hyatt Corporation, the predecessor in interest to Hyatt, and Islandia, entered into that certain Management Agreement dated as of August 10, 1976, as amended by the Amendment to Management Agreement executed and delivered as of June 29, 1978, and by the Second Amendment to Management Agreement executed November 17, 1989; by letters dated November 23, 1980, and August 8, 1983; and further with respect to certain mortgagee interests by Subordination, Non-Disturbance and Assignment of Management Agreement dated as of May 28, 1996 (collectively, the "Management Agreement"). Pursuant to the terms of the Management Agreement, Hyatt manages and operates, for the account of Islandia, the hotel known as the Hyatt Regency Islandia Hotel located at Mission Bay, San Diego, California ("Hotel"); and

WHEREAS, neither Hyatt nor Islandia are currently in default under the terms of the Management Agreement; and

WHEREAS, to the best of the knowledge of both Hyatt and Islandia, no event has occurred which, with the passage of time, the giving of notice, or both, would cause Hyatt or Islandia to be in default under the Management Agreement; and

WHEREAS, Hyatt and Islandia now wish to amend the Management Agreement to extend the term (the "Term") of the Management Agreement and make certain other modifications to the Management Agreement in connection therewith. Capitalized terms used in this Amendment, but not otherwise defined, have the meanings given to such terms in the Management Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth hereinbelow and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties hereto, Hyatt and Islandia, intending to be legally bound, agree as follows:

1. Recitals. The foregoing recitals are intended to be a material part of this Amendment and are incorporated herein by this reference.

2. Term. The Term of the Management Agreement is hereby extended for ten (10) years ending on December 31, 2020, at 11:59 p.m. P.S.T.

3. Management Fee Calculation. Profit, as defined in Section 5.2 of the Management Agreement shall, from and after the Effective Date, be reduced by a deduction (the "Deduction") calculated as follows:

Fifty percent (50%) of the aggregate of the following: (i) FFE and capital expenditures in excess of amounts available in the Fund; and (ii) rent payments made pursuant to the City Lease.

The Deduction amount shall not exceed the following caps in any respective fiscal year notwithstanding that the actual amounts paid in respect of the items identified as a component of the Deduction amount may exceed the cap:

| <u>Fiscal Years</u> | <u>Cap Amount</u> |
|---------------------|-------------------|
| 2003-2010           | \$1,000,000       |
| 2011-2015           | \$1,500,000       |
| 2016-2020           | \$2,000,000       |

In no event shall the Incentive Fee, as defined in Section 4.2(b) of the Management Agreement, including the Deduction, be a negative number (i.e. the Incentive Fee may not be less than zero for any given fiscal year). Furthermore, the amount of the Deduction, if any, that exceeds the cap in any given fiscal year shall not be carried forward into any subsequent fiscal year.

4. Improvements. At a minimum, Islandia shall make capital expenditures in connection with the following projects (the "Projects") by the end of fiscal year 2003 (the "Project Completion Date"):

- (a) Guest room balconies – Replacement of concrete, railings, and other components for the majority of tower. Approximate cost: \$235,000.00
- (b) Elevators – Replacement of all software and "core" items for tower. Approximate cost: \$355,000.00

A more detailed description of the Projects is shown in Exhibit A. Hyatt shall have the discretion and authority to complete the Projects under its supervision, including, but not limited to, the selection of the contractors. If Islandia does not fully fund the Projects by the Project Completion Date, then, at Hyatt's sole option, this Amendment shall be null and void.

5. Hyatt System Services and Hyatt System Costs. The Hyatt System Services and Hyatt System Costs, as of the date of this Amendment, are as described on Exhibit B.

6. Notices. Notwithstanding anything to the contrary contained in Section 16 of the Management Agreement, all Notices shall be sent to the following addresses:

For Islandia:

Mr. Joseph J. Amoroso  
Amoroso Development Corporation  
4500 East Thousand Oaks  
Suite 103  
West Lake Village, CA 91362

and

Mr. Jerald Greenstein  
General Partner  
Islandia Associates, Ltd.  
5743 Corsa  
Suite 200  
Westlake Village, CA 91362

For Hyatt:

President  
Hyatt Corporation  
200 West Madison Street  
Suite 3900  
Chicago, IL 60606  
Fax No. 312.750.1417

With a copy to:

General Counsel  
Hyatt Corporation  
200 West Madison Street  
Suite 3900  
Chicago, IL 60606  
Fax No. 312.750.8581

7. Ratification. Except as otherwise expressly modified by the terms of this Amendment, the Management Agreement remains unchanged and shall continue in full force and effect. All terms, covenants, and conditions of the Management Agreement not expressly modified herein are hereby confirmed and ratified and remain in full force and effect, and, as further amended hereby, constitute valid and binding obligations of Islandia and Hyatt enforceable according to the terms thereof.

8. Authority. Hyatt and Islandia hereby covenant and warrant that they have full right and authority to enter into this Amendment.

9. Defined Terms. Unless otherwise provided herein, all terms used in this Amendment that are defined in the Management Agreement shall have the meanings provided in the Management Agreement.

10. Counterparts. This Amendment may be executed in counterparts. Each such counterpart shall be an original and together they shall constitute a single Amendment.

IN WITNESS WHEREOF, Hyatt and Islandia have executed this Amendment as of the date first above written.

HYATT CORPORATION, Delaware  
corporation

By: [Signature]  
Name: FRANK BORG  
Its: V.P.

ISLANDIA ASSOCIATES, LTD., a  
California limited partnership

By: AMGREEN, INC., a  
California corporation  
Its: General Partner

By: [Signature]  
Name: Islandia Associates  
Its: Pres.

ACKNOWLEDGED AND APPROVED BY:

LOCAL AMERICA BANK OF TULSA,  
A FEDERAL SAVINGS BANK

By: [Signature] Local OK/Idaho Bank NA  
Name: Neva Hume  
Its: SVP

## EXHIBIT A

### **Tower Balcony Structural Reinforcement**

The concrete in the Tower balconies is deteriorating due to age (30 years old) and exposure to the ocean air. It is imperative to replace the eroding concrete and seal the balconies before the steel structure is exposed and begins to rust. The cost is \$900 per balcony to remove the portions of the concrete that have deteriorated, replace the concrete and finish with a sealant. The total cost for 261 balconies is \$234,900. The cost will be reduced if any balconies do not need concrete replacement. The cost in only re-surfacing a balcony is \$400. Supply Co. Inc., the company recommended by Robert Milmo (the structural engineer for Islandia), provided this preliminary information.

### **Elevator Control Panel Modernization**

The new electronic controls are equivalent to an additional elevator and will address guest complaints of slow service provided by the 30 year old elevators. They are capable of better response to the demand with upgraded technology to provide expedited service and load detection to prevent unnecessary stops when the car is full. The electronic controls are much faster and more reliable than the current electro-mechanical controls. The elevator equipment will be installed in accordance with ASME/ANSI A17.1 Safety Code for Elevators and Escalators, An American National Standard, including the latest Supplement, and the Americans with Disabilities Act. The preliminary cost for modernizing our four elevators in the Tower building is \$355,000. This bid is from Otis Elevator, our elevator service provider.

## EXHIBIT B

### Hyatt System Services and Hyatt System Costs

In addition to management services and Chain Services, Hyatt and its affiliates currently provide certain additional centralized services to Hyatt Hotels including the following:

#### Mandatory Services

All Hyatt Hotels are required to participate in certain programs and/or services made available by Hyatt and/or its affiliates. With respect to the calculation of costs for each category of mandatory Hyatt System Services, and except as otherwise noted, costs include an allocable share of corporate office overhead and occupancy costs, but without a profit or mark-up component to Hyatt. The allocation of such costs is based upon service specific formulas developed by Hyatt. These services include the following:

1. Gold Passport. Hyatt currently maintains a frequent guest incentive program known as Gold Passport, the cost of which is paid by assessing each Hyatt Hotel four percent (4%) of all qualifying charges attributable to a Gold Passport member's stay at that hotel excluding applicable taxes. The amount of this assessment, including the cost of amenities provided to Gold Passport members, typically approximates one percent (1%) of total annual room revenue, depending on program usage in a given hotel.
2. Human Resources Services. Hyatt provides certain human resource and employee relations services to Hyatt Hotels including, but not limited to, specialized and divisional training programs, preparation and revision of manuals, employee surveys and employee newsletters and monitoring compliance with affirmative action policies and other employment policies and practices. The cost of providing Human Resources Services is allocated to each Hyatt Hotel on the same basis as such costs are allocated to all other Hyatt Hotels, e.g. the number of full-time equivalent employees at a given hotel in relation to the number of full-time equivalent employees at all other Hyatt Hotels, the number of employees in an affected class (such as all management employees) in relation to the number of all Hyatt employees of such class, the number of actual employees of a hotel receiving training or other Human Resources Services in relation to the number of all other Hyatt employees participating in such programs, or any combination of one or more of the foregoing. The typical annual cost ranges from approximately \$50 to \$100 per each full-time equivalent employee.
3. Coordinated Marketing Services. Hyatt conducts joint marketing programs on behalf of a hotel together with one or more other Hyatt Hotels. A hotel's pro rata share of Coordinated Marketing Services is allocated to the hotel on the same basis as allocated to all other Hyatt Hotels participating in the marketing program(s) in question. Aggregate spending in this category is entirely dependent on a hotel's business mix, business segment, revenues, needs and the number of programs in which it participates.

Participation in specific marketing programs is left to the discretion of the hotel's General Manager and Divisional Vice President.

4. Technology Services. Computer Sciences Corporation Outsourcing, Inc. ("CSCO") (an unaffiliated party) renders technology services to Hyatt Hotels through Hyatt Corporation pursuant to a technology outsourcing agreement. In particular, CSCO provides software support, maintenance, training, installation and related services for automated management systems including, but not limited to, property management, point-of-sale, sales and marketing, catering and convention services, local and wide area networks, electronic mail, central databases and reporting, reservations, group business services and transient room monitoring. The cost of providing computer services depends primarily on the actual systems in place at a hotel and the usage thereof and is allocated to a hotel on the same basis as the cost of computer services are allocated to all other Hyatt Hotels, e.g. the number of personal computers in the hotel in relation to the number of personal computers in all Hyatt Hotels, or the number of point-of-sale servers in the hotel in relation to the number of point-of-sale servers in all Hyatt Hotels, or, with respect to group service automation, the number of rooms occupied by groups at the hotel in relation to the total number of rooms occupied by groups at all other Hyatt Hotels, or, with respect to the costs of transient business automation systems, the number of rooms occupied by transient guests at the hotel in relation to the total number of rooms occupied by transient guests in all other Hyatt Hotels, or, with respect to the costs of electronic mail, the number of electronic mail users at the Hotel in relation to the number of electronic mail users in all other Hyatt Hotels, or on actual usage based on a combination of the foregoing. The outsourcing agreement was recently extended through December 31, 2006.
5. Other Reservations Center Services. In addition to the central reservations center currently located in Omaha, Nebraska, which is allocated to each Hyatt Hotel as part of Allocable Chain Expense, other global distribution systems (principally airline reservations systems such as American Airlines' Sabre System and United Airlines' Apollo System) accept reservations for Hyatt Hotels and confirm the reservations with Hyatt through Hyatt's central reservations center. These supplemental reservations systems charge Hyatt a reservations fee, currently averaging approximately \$4.00 per reservation, which Hyatt passes on to the hotel receiving the reservation at cost without mark-up or profit to Hyatt. Similarly, fees charged by Internet travel service providers (ranging from a fixed fee per transaction to a percentage of the daily room rate charged to the customer) such as Expedia and Travelocity are passed on to the hotel receiving the reservation at cost without mark-up or profit to Hyatt. In addition, Pegasus Systems, Inc., a publicly traded company (in which Hyatt currently owns less than 1% of the outstanding common shares) provides connections to the airline reservations systems, internet related reservations services and consolidated travel agent commission payment processing services for which hotels using such services pay on a per transaction basis at rates set by the service provider.
6. Wide Area Network (WAN). The WAN is a private communication network among Hyatt Hotels, the central reservations center, Hyatt's corporate office, divisional offices

and other important points of contact within the Hyatt chain. Among other things, the WAN permits the central reservations center to transmit reservations to the applicable Hyatt Hotel, provides each Hyatt Hotel access to Hyatt's applications and databases, and allows Hyatt to gather, process and use information from each Hyatt Hotel and the central reservations center for, among other things, sales purposes and various financial and other analyses. The WAN also is the delivery mechanism utilized for Hyatt's electronic mail system. Each Hyatt Hotel has, or is required to purchase, specific hardware necessary to connect to the WAN at an estimated one-time cost which currently approximates \$12,000 to \$15,000, exclusive of initial circuit costs which typically range from \$5,000 to \$10,000 (exact costs are determined upon completion of a system proposal). The current standard for the WAN circuit is 256K. Existing hotels with 56K or 128K circuits may upgrade to the 256K standard for an estimated one-time hardware cost of \$6,000. In operating the WAN, Hyatt incurs expenses including telephone support from customer service employees of CSCO for hardware and communications, telephone line charges, circuit costs and certain other third party costs. From time to time, as new equipment is added to the WAN, the cost of leasing the equipment, or an amortization of the equipment cost (depending on whether the equipment is leased or purchased), is charged to each Hyatt Hotel as part of the operating costs of the system. Each Hyatt Hotel pays its share of these network operating charges, without profit or mark-up, on a per hotel basis based on the number of hotels connected to the WAN (except for hotels on a public network and the Hawaiian properties because of their unique configurations) and the circuit size (56K, 128K or 256K) for that hotel.

7. Employee Benefits. Hyatt provides certain employee benefits to hotels managed by Hyatt, as follows:

- a. Health and Dental Plan (Non-Union Personnel and Non-HMO Personnel). Hyatt is self-insured for these programs. Claims and administrative costs are allocated among the hotels on the basis of the number of participating employees in each plan. Amounts are paid to Hyatt, reconciled and aggregated and then deposited in an Internal Revenue Code section 501(c)(9) trust fund. Hyatt's corporate office along with certain individual Hyatt Hotels utilize First Health Group Corporation, a publicly traded company to provide health benefits to employees. Pritzker Family Business Interests hold a minority interest in First Health.
- b. Retirement Plans (Non-Union Employees). All hotels managed by Hyatt pay a percentage of eligible compensation pursuant to the applicable retirement plan documents and/or a fixed amount per employee (class) which is reconciled and aggregated at the Hyatt corporate level and deposited in a retirement trust fund. Employees self-direct the investment of their individual account balances for these defined contribution plans.
- c. Other Benefit Plans. Costs associated with other benefit plans are generally allocated and/or administered in a manner similar to retirement plans.

Costs for each Hyatt Hotel for the benefit plans listed above vary based on the type and level of employee participation.

8. Mandatory Contracts. Hyatt from time to time negotiates contracts with vendors or providers of services which, under their terms, provide for mandatory participation by all Hyatt Hotels or by certain Hyatt Hotels (e.g. hotels in a certain business segment). Except as otherwise expressly provided in the hotel's operating agreement, Hyatt does not receive any fees, rebates or commissions under, or with respect to, Mandatory Contracts, although certain of the Mandatory Contracts may provide for promotional or other allowances which are then allocated among participating Hyatt Hotels on a fair and equitable basis as determined by Hyatt.
9. Other Corporate Services. Hyatt also provides a number of other corporate services and programs for the benefit of Hyatt Hotels for which reimbursement is made on a cost recovery basis. These services and programs include in-house merchandising services, group sales promotional programs and events sponsored by two or more Hyatt Hotels, property evaluations, quality assurance manuals, college recruiting programs, other training programs and other various services. Costs are allocated among hotels that receive these services or participate in these programs pursuant to program specific allocation formulas developed by Hyatt.

#### Non-Mandatory Services

Hyatt and its affiliates make certain additional programs and/or services available to Hyatt Hotels allowing each Hotel to participate at its discretion. These programs and/or services include the following:

1. FFE Purchasing Services. Rosemont Project Management, LLC offers purchasing services to Hyatt Hotels for the purchase of furniture, fixtures and equipment which, together with renovation related services, are typically subject to a separate contract and fee structure (which includes a profit component). Each Hyatt Hotel may determine, in accordance with the terms of its operating agreement, whether and the extent to which to use the foregoing purchasing services.
2. Purchasing Services. Hyatt makes various goods and services available to Hyatt Hotels through a centralized purchasing program currently administered by Avendra, LLC ("Purchasing Company"), a procurement services company in which an affiliate of Hyatt has a minority ownership interest. While Hyatt receives no fees, commissions or other remuneration in connection with such purchasing services, the Purchasing Company may receive fees, rebates or commissions on certain goods or services so provided (which include a profit component). Each Hyatt Hotel determines whether, and the extent to which, to use the services of the Purchasing Company (other than as stated under Mandatory Contracts above). Hyatt corporate personnel provide on-going oversight of Hyatt's customer relationship with the Purchasing Company. The cost of providing this

oversight is allocated among those hotels utilizing the purchasing services of the Purchasing Company on a fair and equitable basis without premium, profit or mark up to Hyatt.

3. Remote Call Forwarding. Hyatt currently offers Hyatt Hotels the option of forwarding reservations calls received at a hotel to Hyatt's centralized reservations center, currently located in Omaha, Nebraska, when on-site personnel are unavailable to process potential reservations. The cost of Remote Call Forwarding is charged on a per call basis, which currently approximates \$1.41 per call, to all Hyatt Hotels receiving Remote Call Forwarding Services. Each Hyatt Hotel may determine whether to elect to use such Remote Call Forwarding Services.
4. General Liability and Auto Insurance. Hyatt offers comprehensive general liability insurance, including liquor and dram shop liability insurance, automobile coverage for all hotel vehicles, umbrella liability insurance, and crime and fidelity insurance to Hyatt Hotels, the cost of which is allocated among all participating Hyatt Hotels based upon their respective total hotel revenues. Participation in Hyatt's insurance program is voluntary and generally subject to the acceptance of the hotel into the program by underwriters.
5. Property Insurance. Hyatt also offers a property and business interruption insurance program to each Hyatt Hotel, the cost of which depends on the valuations of each insured hotel. Participation in Hyatt's insurance program is voluntary and generally subject to the acceptance of the hotel into the program by underwriters.
6. Travel and Accident Insurance. For those Hyatt Hotels participating in Hyatt's insurance program, Hyatt offers a travel and accident insurance program for its employees. Currently, the premiums incurred and paid by Hyatt to a third party insurer for this program are reimbursed to Hyatt by each Hyatt Hotel on a pro rata basis based on the number of participants employed at each Hyatt Hotel covered by these programs.
7. Worker's Compensation Insurance. Hyatt offers worker's compensation insurance under its insured or self-insured programs. Under the insured program (for those jurisdictions that do not allow self-insurance programs or where it is not financially beneficial to establish self-insured programs), the hotel pays the state's standard modified premium. Under the self-insured program, the hotel currently pays the first \$25,000 (deductible) for each claim, including any adjusting expenses, and an amount equal to approximately 25% to 35% of the state's manual premium. Hyatt is responsible for any amounts in excess thereof.
8. MT Phone Company. This affiliate of Hyatt negotiates volume telecommunications agreements and obtains favorable rates through the aggregation of local, long distance and frame relay data network volume for Hyatt Hotels and other entities. It also provides, through various third parties, audit services, special analyses and reports, oversight of PBX, voice mail and call accounting systems, and evaluations and recommendations of telecommunication equipment. The costs incurred by MT Phone Company in providing

these services (including an allocation of corporate overhead and occupancy costs but without a profit component) are reimbursed by the entities utilizing these services based on long distance minute volume. Hyatt is currently examining the potential efficiencies of dissolving MT Phone Company and outsourcing its services to Computer Sciences Corporation Outsourcing, Inc.

9. Pritzker Family Business Interests. Given the varied nature and scope of investments by or on behalf of the Pritzker Family, there may be situations where a company in which the Pritzker Family holds an interest (either directly or indirectly), is doing business with Hyatt or individual Hyatt Hotels. Where that interest is significant and is known to Hyatt, Hyatt will make every effort to inform hotel owners. In that regard, TransUnion, one of the two approved vendors utilized by Hyatt Hotels to perform employee background checks, is one of the Marmon companies owned by Pritzker Family Business Interests. While TransUnion is neither a Hyatt company nor a Hyatt affiliate, owners of hotels that selected TransUnion were notified of this relationship.

**KENNEDY ASSOCIATES**  
REAL ESTATE COUNSEL, INC.

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June 1, 2005

Matthew Coe  
Associate General Counsel  
Hyatt Corporation  
200 West Madison Street  
Suite 3900  
Chicago, IL 60606

Re: Fourth Amendment to Management Agreement Term Sheet

As you are aware, KAREC California Development Program LLC ("Buyer") has entered into a Purchase and Sale Agreement with Islandia Associates, Ltd., a California limited partnership ("Seller") dated March 22, 2005 (the "Purchase Agreement"). Prior to Closing, Buyer will assign the Purchase Agreement to KenCal Ownership LLC ("Owner"). Under the Purchase Agreement, Buyer will purchase Seller's leasehold interest in a newly amended and restated Lease Agreement with the City of San Diego to be completed prior to Closing on the transaction (the "City Lease") and all improvements located on the property covered by the City Lease (the "Hotel"). Owner intends to own the Hotel as a rental property and does not intend to manage or operate the Hotel. Therefore, at the closing of this transaction, Owner will enter into a Hotel Operating Lease with KenCal Operating LLC ("Operator") which will operate the Hotel and engage the hotel manager. Please refer to Attachment A for a diagram of the tax structure.

We reviewed the Management Agreement by and between California Hyatt Corporation, a Delaware corporation ("Hyatt") and Seller dated as of August 10, 1976, as amended (the "Management Agreement") that will be assigned to Operator at the closing of the Purchase Agreement. Contemporaneously with the assignment of the Management Agreement to Operator, we request that the following provisions be incorporated into a Fourth Amendment to Management Agreement ("Fourth Amendment"):

1. Annual Budget. At least thirty (30) days prior to the commencement of each fiscal year, Hyatt shall propose an annual budget and operating plan to Operator for Operator's review, comment and approval. The annual budget shall include a marketing plan and a capital expenditure budget.
2. Incentive Fee. Incentive Management Fee will be 25% of Cash Flow Available for Debt Service that exceeds an 11.0% return on Total Project Costs ("Incentive Fee Threshold"). Cash Flow Available for Debt Service is defined as: Gross Operating Profit less (i) real estate taxes, (ii) insurance, (iii) 4.0% reserve for replacement, (iv) City of San Diego ground lease payments, and (v) Basic Fee (base management fee).
3. Employees. Currently executive staff members are employed by Hyatt and the remainder of employees are employed by Seller. Effective as of the Fourth Amendment, all employees of the Hotel shall be employees of Hyatt. In addition, Operator shall have the right to interview and approve the General Manager of the Hotel. Portions of Section 3.1 will need to be revised to reflect these changes.

4. Insurance.

- A. At all times during the term of this Agreement, Operator shall maintain or caused to be maintained, at Operator's expense, the following insurance coverage's:
  - (i) With respect to the hotel building and its contents, replacement costs coverage against loss or damage against "all risk", perils including boiler menand machinery, earthquake and flood in such amounts as Operator determines are economically reasonable from time to time and against Business Interruption and Extra Expense from loss or damage resulting from the hazards defined above which prevent normal operations from continuing.
  - (ii) At least \$1,000,000 automobile liability insurance on vehicles it owns including hired and non-owned use.
- B. At all times during the term of this Agreement Hyatt shall place and maintain at Operator's expense the following insurance coverage:
  - (iii) Employee dishonesty coverage not less than \$5,000,000.
  - (iv) With respect to all hotel personnel, appropriate worker's compensation insurance required by the State of California.
  - (v) Commercial general liability insurance and umbrella with a combined annual aggregate limit of \$100,000,000 per occurrence and location including at least the following
    - a) Contractual Liability
    - b) Products and Completed Operations
    - c) Innkeepers Liability Insurance
    - d) Liquor Liability Insurance
    - e) Garagekeepers Legal Liability - Such insurance shall be primary and shall apply against claims for bodily injury or death, personal injury, and property damage occurring on, in or about the hotel and hotel garage and on, in, or about the adjoining streets or passageways thereof or other areas under this agreement.
- C. Other Insurance Requirements to be included in the Fourth Amendment are:
  - (i) KenCal Operating LLC, Ken Cal Ownership LLC, California Hyatt Corporation, and City of San Diego each as named insureds as their interests appear under the policies outlined above;
  - (ii) A requirement that the insurer provide at least thirty (30) days notice to all named insureds before terminating or amending any policy of insurance; and
  - (iii) The party procuring such insurance shall deliver to the other parties and all named insureds certificates of insurance with respect to all policies so procured,

including existing, additional and renewal policies and, in the case of insurance about to expire, shall deliver certificates of insurance with respect to the renewal policies not less than thirty (30) days before the respective dates of expiration. A copy of all policies procured hereunder shall be delivered to Operator.

Portions of Section 8.1 will need to be revised to reflect these changes.

5. Title Warranties. Section 7.5 includes a warranty that Hyatt's interest shall not be subject or subordinate to an encumbrance (unless a non-disturbance agreement is in place) or any other matters affecting title. Because Operator will not be the owner of the Hotel, Operator cannot give warranties as to the title of the property, and Section 7.5 should be amended accordingly. However, Operator (a) is willing to subordinate the Hotel Operating Lease to the Management Agreement and (b) will work with Hyatt and the lender to reach agreement on a form of non-disturbance agreement that is acceptable to all parties.
6. Casualty Restoration. In the event of a casualty that affects the Hotel, Operator shall repair the Hotel in accordance with Section 9.1; however, Hyatt shall not have the right to complete such restoration without Operator's prior written approval. Section 9.1 shall be modified to reflect this change. In addition, the restoration approval threshold in Section 9.3 should be increased to \$250,000.
7. Assignment by Owner. If Operator assigns its interest in the Management Agreement to an assignee that expressly assumes its obligations thereunder, then Operator shall not be liable under the Management Agreement for matters occurring after the assignment. The last sentence of Section 15.2 should be deleted to reflect this change.
8. Approvals. In the event that a party is requested to give its approval to a matter under the Management Agreement and that party has not responded within twenty (20) days, then such party shall be deemed have disapproved the matter. The last sentence of Section 17 should be modified to reflect this change.
9. Improvements. Section 4 of Third Amendment to Management Agreement required Seller to make capital expenditures in connection with guest room balconies and elevators. It is our understanding that these improvements have not been completed. To prevent Operator from being in default immediately upon the assignment of the Management Agreement, Operator shall have 18 months following closing under the Purchase Agreement to complete these improvement projects as part of the renovation of the Hotel.
10. City Lease. Hyatt shall approve the amended and restated Lease by and between the City of San Diego and Owner as required under Section 7.7 of the Management Agreement. In the event that the City Lease is terminated, then the Management Agreement shall also be terminated. In addition, Hyatt shall acknowledge and approve the existence of the Hotel Operating Lease.
11. Liquor License. The Management Agreement does not cover the liquor license for the Hotel. The liquor license shall be held by Hyatt or its designee.
12. Additional required language. Please see CalPERS required language in Attachment B.

13. Attorneys' fees. The Management Agreement does not currently contain an attorneys' fee clause. In the event that an action or proceeding is brought to enforce the Management Agreement, the prevailing party shall be entitled to recover its attorneys' fees.
12. Estoppel. As part of the Fourth Amendment, Hyatt will certify to Operator that there are no uncured defaults outstanding under the Management Agreement and that Hyatt knows of no act, event or omission that could become a default under the Management Agreement.
13. Term. In exchange for agreeing to the items listed above, Operator will extend the term of the Management Agreement for ten (10) years ending on December 31, 2030.

Please do not hesitate to contact me with any questions on the terms in this letter. We look forward to working with you to successfully complete this transaction.

Sincerely,

A handwritten signature in black ink, appearing to read "Jena Thornton", with a long horizontal flourish extending to the right.

Jena Thornton  
Vice President – Hotels

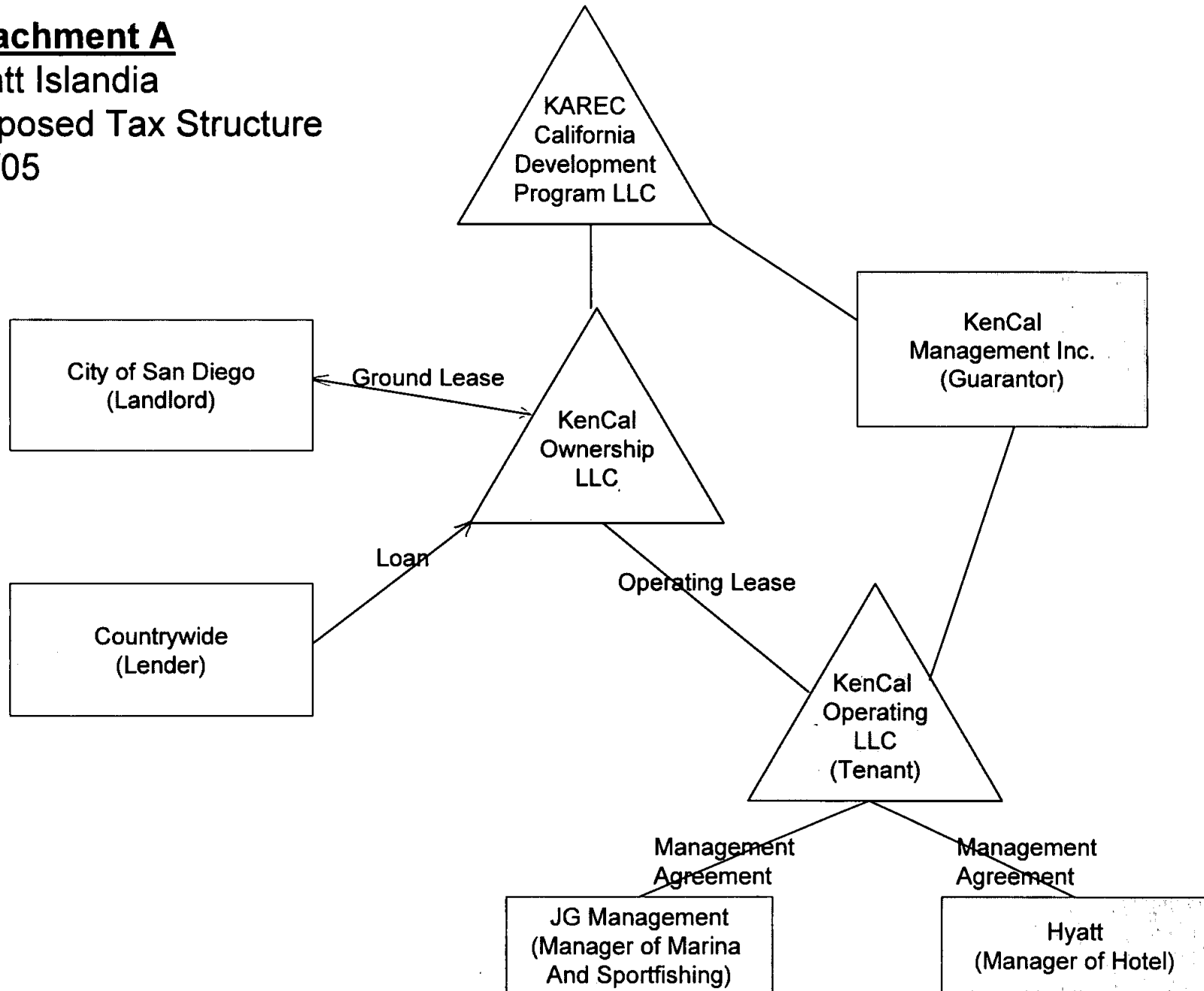
Cc: Jack vanHartesvelt  
Michelle Gail

## **Attachment A**

Hyatt Islandia

Proposed Tax Structure

6/1/05



## Attachment B

### CalPERS Property Manager Requirements

- ◆ Include nondiscrimination compliance provisions in all written contracts to perform work or provide services:  
During the term of this Agreement, neither the Manager nor any of its Affiliates, employees or agents shall unlawfully discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40) or sex. The Manager and its Affiliates, employees and agents shall assure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination. In connection with Company activities in the State of California, the Manager and its Affiliates, employees and agents shall comply with the provisions of the California Fair Employment and Housing Act (Section 12900 et seq. of the California Government Code) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 560). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code Section 12990, set forth j.11 Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated herein by this reference and are made a part hereof as if set forth herein in full.
- ◆ Service Disabled Veteran Business Enterprise (SDV/BE)  
  
Satisfaction of the CalPERS' SDV/BE Policy is a necessary condition before the System, acting through its contractors, hires a Responsible Contractor. Advisors and Contractors should provide a certification statement of SDV/BE compliance, or documentation of good faith efforts.
- ◆ Communicate in bid documents the **Responsible Contractor Program Policy** to contractors seeking to secure construction or building service contracts.
  - ◆ Communicate the Policy to any interested party.
  - ◆ Ensure there is a competitive bidding process inclusive of potentially eligible Responsible Contractors.
  - ◆ Require bidders to provide to property manager a Responsible Contractor self certification on a form approved by CalPERS.
  - ◆ Prepare and send to Kennedy a contract listing for applicable service contracts for each property under management. The building trades and service trades and other potential bidders will have access to this list.
  - ◆ Provide Kennedy with a simplified bid summary for each contract.
  - ◆ Provide property level annual report information to Kennedy
  - ◆ Maintain documentation for successful bidders.
  - ◆ Seek from trade unions/service unions input in the development of Responsible Contractor lists.
  - ◆ Maintain list of any interested Responsible Contractors. (Names, addresses and telephone numbers).

SECOND AMENDMENT TO MANAGEMENT AGREEMENT

This Second Amendment to Management Agreement is executed as of this 17th of November, 1989, by and between ISLANDIA ASSOCIATES, LTD., a California limited partnership, of which AMGREEN, INC., a California corporation is the general partner (hereinafter called "Owner"), and CALIFORNIA HYATT CORPORATION, a Delaware corporation (hereinafter called "Hyatt").

WHEREAS, the parties heretofore have executed and delivered that certain Management Agreement dated as of August 10, 1976, as amended by Amendment to Management Agreement executed and delivered as of June 29, 1978, by letters dated November 23, 1980 and August 8, 1983, and further with respect to certain mortgagee interests by Non-Disturbance Agreement dated October 12, 1977 and by Non-Disturbance and Attornment Agreement dated as of June 12, 1987 (hereinafter collectively called "Management Agreement"), pursuant to which Hyatt manages and operates for the account of Owner the hotel known as The Hyatt Islandia Hotel located at Mission Bay, San Diego, California ("Hotel");

WHEREAS, the Management Agreement will currently expire on December 31, 1994 in accordance with its terms;

AND WHEREAS, Owner and Hyatt wish to further amend the

Management Agreement to provide for an extension thereof, and for other purposes consistent with their mutual interests;

NOW THEREFORE, the parties hereto agree to amend the Management Agreement as follows:

1. Except as may be otherwise specifically noted herein, all defined terms expressed in this agreement shall have the same meaning as is ascribed to them in the Management Agreement.

2. Section 2 of the Management Agreement is hereby amended to read in its entirety:

"Section 2. Term of Agreement.

The term of this agreement (herein called the "Term") shall commence on August 10, 1976 (the "Commencement Date"), and shall end at midnight, December 31, 2010."

3. Section 5.4 of the Management Agreement is hereby amended to read in its entirety:

"5.4 Fund for Replacement of and Additions to Furnishings and Equipment.

(a) During each fiscal year Hyatt shall deposit for each calendar month included in such fiscal year an amount equal to four percent (4%) of the Gross Receipts for such calendar month into a fund to be entitled "Fund for Replacement of and Additions to Furnishings and Equipment," which Fund shall be maintained on deposit by Hyatt in trust for Owner in an

interest-bearing bank account. The monies in such Fund shall be the property of Owner. Interest earned during any period from the amounts in such Fund shall be excluded from the Gross Receipts for such period and in computing Profit for such period and shall remain part of such Fund. To the extent that Hyatt shall be required to pay any income taxes on such interest as a fiduciary, the same shall be payable out of such Fund. In addition to such payments into such Fund, all proceeds from the sale of Furnishings and Equipment no longer needed for the operation of the Hotel shall also be paid into such Fund. Hyatt shall be entitled to withdraw from such Fund any amounts required to make contributions to the cost of replacements of and additions to, the Furnishings and Equipment reasonably deemed by Hyatt to be necessary or desirable, and the items of Furnishings and Equipment so replaced or added shall be and become, forthwith upon acquisition and installation and without further act or action, the property of Owner and part of the Hotel. All such replacements and additions may be purchased by Hyatt at competitive prices from Rosemont Purchasing, a Hyatt affiliate. Any amounts remaining in such Fund at the termination or expiration of the Term shall be returned by Hyatt to Owner.

(b) Hyatt shall not, without the approval of Owner (which approval shall not be unreasonably withheld), expend any monies for replacements of, or additions to, the Furnishings and

Equipment in excess of the amount then existing in the Fund and, notwithstanding anything else to the contrary in this Agreement contained, Hyatt's obligations with respect to additions to, or replacements of, Furnishings and Equipment shall be excused to the extent that the amount in such Fund is inadequate to meet such obligations.

(c) When amounts in the Fund are (or are reasonably anticipated to be) insufficient to satisfy the obligation of Owner to provide funds necessary for the Hotel to be maintained in accordance with the first-class hotel standard (as hereinafter defined), any such additional amounts as Owner and Hyatt shall agree upon shall be provided by Owner. In any such case, one-half of such additional amounts will be deemed to be an operating expense of the Hotel for the purposes of calculating Profit (and only in respect of the calculation of the Annual Management Fee and for no other purposes), and only with respect to such additional amounts as are actually expended in the fiscal year for which the calculation of Profit is being made.

(d) Anything in this Agreement to the contrary notwithstanding, Owner shall be obligated to make sufficient funds available to Hyatt so that the Hotel can be maintained at all times during the Term in accordance with the first-class hotel standard. The "first-class hotel standard" for purposes of this section refers to the standard of construction,

furnishing and equipping applicable to such other hotels comparable in size to the Hotel and operated by Hyatt, which represents the highest quality of hotels of such size in the Hyatt chain of hotels."

4. Section 7.1(b) of the Management Agreement is hereby deleted in its entirety and shall be, as of the date hereof, of no further force and effect.

5. Section 12.2 (b) of the Management Agreement is hereby deleted in its entirety and shall be, as of the date hereof, of no further force and effect.

6. Except as herein modified and amended, Owner and Hyatt agree that the Management Agreement is in full force and effect in accordance with its terms.

IN WITNESS WHEREOF, Owner and Hyatt have executed this Agreement as of the date first above written.

ISLANDIA ASSOCIATES, LTD.

By [Signature]  
Its General Partner

By [Signature]  
Its General Partner

CALIFORNIA HYATT CORPORATION

By [Signature]  
Its VP

PDC:mjb.amendment

## AMENDMENT TO MANAGEMENT AGREEMENT

THIS AMENDMENT TO MANAGEMENT AGREEMENT is executed as of the \_\_\_\_\_ day of \_\_\_\_\_, 1978, by and between ISLANDIA ASSOCIATES, LTD., a California limited partnership, of which AMGREEN, INC., a California corporation is the general partner (hereinafter called "Owner"), and CALIFORNIA HYATT CORPORATION, a Delaware corporation (hereinafter called "Hyatt").

## W I T N E S S E T H:

WHEREAS, the parties heretofore executed and delivered that certain Management Agreement (the "Management Agreement") dated August 10, 1976, whereunder Hyatt agreed to manage, for the account of Owner, the hotel known as the "Islandia Hyatt House" (the "Hotel") located at Mission Bay, San Diego, California; and

WHEREAS, the parties hereto wish to amend the Management Agreement with respect to the construction by Owner of improvements to the existing coffee shop facility in the Hotel;

A G R E E M E N T

NOW, THEREFORE, the parties hereto agree to amend the Management Agreement as follows:

Owner shall, at its sole risk, cost and expense, with reasonable diligence and in accordance with plans and specifications approved by Hyatt, (i) cause improvements to the existing coffee shop facility, including the kitchen and employees' dining area (the "Coffee Shop Improvement") to be constructed, and (ii) cause to be purchased and installed in or about the

Coffee Shop Improvement all personal property necessary or desirable for the operation of such Coffee Shop Improvement, such Coffee Shop Improvement and such personal property, together with any remaining portions of the existing coffee shop facility, being herein collectively called the "Coffee Shop Facility". As soon as reasonably practicable after completion of the Coffee Shop Facility, Owner shall furnish to Hyatt, in reasonable detail, the total cost (herein referred to as the "Project Cost") to Owner of completing the Coffee Shop Facility. The Coffee Shop Facility shall be deemed completed when construction of the Coffee Shop Improvement and the installation of all necessary personal property shall have been completed in accordance with all applicable laws and regulations and in accordance with the plans and specifications approved by Hyatt so that the Coffee Shop Facility will be available for use and operation by Hyatt. The representatives of Hyatt shall be accorded access to the records of Owner for the purpose of verifying the Project Cost.

An amount equal to twenty percent (20%) of the Project Cost is herein referred to as the "Annual Amortization" and an amount equal to one-twelfth (1/12) of the Annual Amortization is herein referred to as the "Monthly Project Cost Amortization".

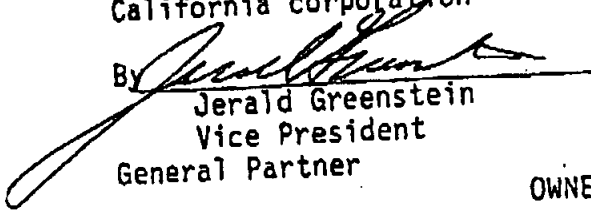
Commencing with the calendar month next succeeding the completion of the Coffee Shop Facility and for a period of 60 calendar months, there shall be deducted in computing Profit for each calendar month an amount equal to the Monthly Project Cost Amortization not to exceed, however, the sum of \$5,000.

Except as hereby amended, the management Agreement shall continue in full force and effect.

IN WITNESS WHEREOF, Owner and Hyatt have executed this Amendment to Management Agreement as of the date hereinabove set forth.

ISLANDIA ASSOCIATES, LTD.,  
a California limited partnership

By: AMGREEN, INC., a  
California corporation

By   
Jerald Greenstein  
Vice President  
General Partner

OWNER

CALIFORNIA HYATT CORPORATION,  
a Delaware corporation

By   
Lawrence A. Zinder  
Vice President

HYATT

DUPLICATE ORIGINAL

MANAGEMENT AGREEMENT

between

ISLANDIA ASSOCIATES, LTD.  
a California limited partnership

and

CALIFORNIA HYATT CORPORATION  
a Delaware corporation

Dated: As of August 10, 1976

9-29-77 (179A)

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## MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT is executed as of August 10, 1976, by and between ISLANDIA ASSOCIATES, LTD., a California limited partnership, of which AMGREEN, INC., a California corporation, is the general partner (hereinafter called "Owner"), and CALIFORNIA HYATT CORPORATION, a Delaware corporation (hereinafter called "Hyatt").

### RECITALS

The City of San Diego (the "City") owns or controls certain improved land and a portion of Mission Bay (herein collectively called the "Land") at Mission Bay, in the City of San Diego, County of San Diego, State of California, more particularly described in Exhibit A-1 attached hereto and hereby made a part hereof.

Owner has control of the Land through that certain Lease with the City (the "City Lease") described in Section 7.7 hereof whereby the Land has been leased to the lessee thereunder for a term of fifty (50) years from March 21, 1961.

The Land has been developed as a hotel and marina complex composed of (i) hotel and restaurant improvements (the

"Existing Hotel Improvements"), and (ii) marina improvements (the "Existing Marina Improvements"), including fuel docks, slips for berthing boats, and two buildings known, respectively, as the "Marlin Club" and the "Sports Fishing Building." The land and water underlying the Existing Hotel Improvements are herein collectively referred to as the "Site," and the waters underlying the Existing Marina Improvements are herein collectively referred to as the "Marina Site".

The Existing Hotel Improvements include a highrise tower, together with two two-story buildings, comprising, in the aggregate, approximately 348 guest rooms, and a free standing restaurant building rising above Mission Bay. Such Existing Hotel Improvements are furnished and equipped with certain personal property owned by Owner (herein called the "Existing Personalty") consisting of furniture, furnishings, equipment and other personal property suitable for the operation of a hotel, including a bar and restaurant. The Site, the Existing Hotel Improvements and the Existing Personalty (all herein collectively referred to as the "Existing Hotel") have been used for the operation of a hotel known as "Islandia Hyatt House."

Owner and Hyatt desire to enter into an agreement whereunder Hyatt will manage the Hotel (as hereinafter defined) for the account of Owner, upon the terms and conditions hereinafter set forth. The Marina Site, together with the improvements thereon, will be operated by Owner and is, therefore, excluded from the scope of this Management Agreement.

#### AGREEMENT

NOW, THEREFORE, the parties hereto agree as follows:

Section 1. Construction of Convention Facilities;  
Definitions.

1.1 Construction of Convention Facility.

(a) Owner shall, at its sole risk, cost and expense, with reasonable diligence and in accordance with plans and specifications approved by Hyatt, (i) cause a convention center (the "Convention Center") comprising approximately 10,000 square feet to be constructed upon land located between the restaurant building and the building containing the hotel lobby, and (ii) cause to be purchased and installed in or about the Convention Center all personal property necessary or desirable for the operation of such Convention Center, such Convention Center and such personal property being herein collectively called the "Convention

Center Facility." As soon as reasonably practicable after completion of the Convention Center Facility, Owner shall furnish to Hyatt, in reasonable detail, the total cost (herein referred to as the "Project Cost") to Owner of completing the Convention Center Facility. The Convention Center Facility shall be deemed completed when construction of the Convention Center and the installation of all necessary personal property shall have been completed in accordance with all applicable laws and regulations and in accordance with the plans and specifications approved by Hyatt so that the Convention Center Facility will be available for use and operation by Hyatt. The representatives of Hyatt shall be accorded access to the records of Owner for the purpose of verifying the Project Cost.

(b) An amount equal to fifteen percent (15%) of the Project Cost is herein referred to as the "Annual Amortization" and an amount equal to one-twelfth (1/12) of the Annual Amortization is herein referred to as the "Monthly Project Cost Amortization."

Commencing with the calendar month next succeeding the completion of the Convention Center Facility and for a period of 120 calendar months, there shall be deducted in computing Profit for each calendar month an amount equal to the Monthly Project Cost Amortization not to exceed, however, the sum of \$6,250.

1.2 "FFE" Defined.

"Operating Equipment," as used herein shall mean all uniforms, tools, utensils, china, glassware, linens, silverware and the like from time to time during the Term (as hereinafter defined) on hand for use in connection with the operation of the Hotel.

"Furnishings and Equipment," as used herein, shall mean all other items of tangible personal property from time to time during the Term on hand for use in connection with the operation of the Hotel. "FFE," as used herein, as of any given time during the Term, shall mean the Operating Equipment and the Furnishings and Equipment then on hand for use in connection with the operation of the Hotel (including items to be purchased and installed pursuant to Section 1.1).

1.3 Improvements, Marina Improvements, Hotel Development and Marina Development.

As used herein, the "Improvements" shall, as of any given time during the Term, mean all improvements then existing on or above the Site, including the Existing Hotel Improvements and the improvements made pursuant to the provisions of Section 1.1. As of any given time during the Term, the "Marina Improvements" shall mean all improvements then existing on, about or within the Marina Site. As used

herein, the "Hotel Development" shall, as of any given time during the Term, mean the Site and the Improvements. As used herein, the "Marina Development" shall, as of any given time during the Term, mean the Marina Site and the Marina Improvements.

1.4        "Hotel" Defined.

As used herein, the "Hotel" shall, as of any given time during the Term, mean the Site, the Improvements, and the FFE then on hand (exclusive of the Marina Development, or any part thereof).

1.5        First-class Hotel Standard.

The term "first-class hotel" refers, as of any given time, to such other hotels located in the vicinity of the Hotel as are then most nearly comparable in quality to the Hotel. A "first-class hotel standard" refers to the standard pursuant to which first-class hotels are operated and, as respects construction, furnishing and equipment matters, pursuant to which first-class hotels are constructed, furnished and equipped.

1.6        Qualified Mortgage.

A "Qualified Mortgage" shall be a mortgage or deed of trust upon Owner's right, title and interest in and to (i) the City Lease and (ii) the Hotel Development or the

Hotel Development plus the Marina Development, which mortgage or deed of trust shall hereafter be executed by Owner in favor of an insurance company or other lending institution as beneficiary securing a permanent loan made to Owner for the purpose of refinancing the existing deed of trust upon such right, title and interest, whether or not such permanent loan shall also be secured by the FFE. The mortgagee or beneficiary named in a Qualified Mortgage or any affiliate thereof is herein referred to as a "Qualified Mortgagee." An "affiliate" of such mortgagee or beneficiary shall mean a corporation included in an "affiliated group," as that term is defined in Section 15.04(a) of the Internal Revenue Code as presently in effect, and of which such mortgagee or beneficiary is the common parent corporation.

Section 2.        Term of Agreement.

The term of this Agreement (herein called the "Term") shall commence on August 10, 1976 (the "Commencement Date"), and shall end at midnight, December 31, 1994.

Section 3.        Use and Operation of the Hotel.

3.1                Use and Standard of Operation.

(a) Except to the extent excused, as hereinafter provided, Hyatt agrees that it will, as the agent of Owner, operate the Hotel during the Term in conformity with a first-class hotel standard, and shall use the Hotel solely

for the operation of a hotel business conforming to a first-class hotel standard, and for other activities which are customary and usual in connection with such an operation. Hyatt shall use reasonable efforts to conduct, on behalf of Owner, such hotel business and such other activities in such manner as to produce, to the extent reasonable, a maximum amount of Profit (as that term is defined in Section 5.2 hereof) for the benefit of both parties hereto. Except as otherwise specifically limited under this Agreement, Hyatt, as sole and exclusive agent of Owner, shall (subject to compliance with the provisions of Section 6.2 hereof) have, among other things, the power to enter into such reasonable contracts in the name and at the expense of Owner as may be reasonably necessary or advisable in connection with the operation of the Hotel (subject, however, to Owner's right to approve contracts with a corporation or a person or persons controlling, controlled by, or under common control or affiliated with Hyatt), the power to determine the terms of admittance, charges for rooms and commercial space, charges for entertainment, food and beverages, labor policies (including wage rates, the hiring and discharging of employees, and the installation of employee retirement or other benefit plans), and all phases of promotion and publicity relating to the Hotel,

Provided that whenever the position of general manager for the Hotel is to be filled Hyatt shall, in advance, consult with Owner on the selection of the general manager (but no approval of Owner shall be required).

Except for executive staff members (as hereinafter provided), all employees of the Hotel shall be the employees of Owner. In this connection: (i) Hyatt shall not be liable to such employees for their wages or compensation (which shall be paid out of the operating accounts referred to in Section 3.3), (ii) Hyatt will negotiate, on Owner's behalf, with any labor union entitled to represent such employees, but any collective bargaining agreement or labor contract resulting therefrom shall first be approved by Owner and Owner shall be the only authorized person to execute the same, and (iii) Hyatt, at its option, instead of hiring specific personnel, may assign employees of Hyatt or any of its affiliates as full time or part time members of the executive staff of the Hotel, and in such event, Hyatt shall, as necessary, withdraw from the operating accounts referred to in Section 3.3 the amounts required to reimburse Hyatt or such affiliates for the wages, salaries and other compensation, employment taxes and fringe benefits payable from time to time by Hyatt or such affiliates in respect of such assigned employees. In the event and whenever

Hyatt shall assign employees as part time members of the executive staff of the Hotel, a reasonable allocation shall be made of the wages, salaries and other compensation, employment taxes and fringe benefits payable in respect of such employees between the portions thereof chargeable to the Hotel and to Hyatt, respectively. The term "fringe benefits" shall, without limitation, include any pension or profit sharing plan contributions, workmen's compensation insurance, group life and accident and health insurance premiums and similar benefits available to such employees by virtue of their employment by Hyatt.

Any provision of this Agreement to the contrary notwithstanding, in the event that a Qualified Mortgagee or an affiliate thereof shall succeed to Owner's rights hereunder (i) as a result of the exercise of a power of sale or a judicial foreclosure under the Qualified Mortgage held by such Qualified Mortgagee or (ii) as the result of the delivery by Owner of a deed in lieu of foreclosure, then all employees of the Hotel shall thereafter be the employees of Hyatt and so long as such employees shall be the employees of Hyatt the following provisions shall apply:

(1) In the event and whenever Hyatt shall be subject to any tax, irrespective of its designation (including a fee, charge or other imposition for

the issuance of a license, permit or the privilege to conduct a business or occupation), imposed, levied or assessed by the United States, the State of California, the County of San Diego, or the City of San Diego or by any subdivision or agency of the foregoing, which tax is measured by reimbursements for wages and salaries and any fringe benefits paid to or in respect of employees of the Hotel, then, and in any such event, Owner will indemnify and hold Hyatt harmless from and against any and all liability for such tax or taxes.

(2) At Owner's request, Hyatt will resist, by appropriate proceedings, any liability for any tax which is the subject of the foregoing indemnification, in which case all costs and expenses (including, without limitation, attorneys' fees) incurred by Hyatt in resisting or defending itself against such liability shall be borne and paid for by Owner.

(b) Notwithstanding anything in this Section 3.1 or elsewhere in this Agreement contained, Hyatt shall be excused from its obligation to operate the Hotel in conformity with a first-class hotel standard, (i) to the extent and whenever Hyatt shall be prevented from compliance with such standard by events beyond Hyatt's reasonable control, (ii) to the extent and whenever there shall be insufficient funds

in the operating accounts, and (iii) to the extent and whenever there is herein provided a limitation upon Hyatt's ability to expend funds in respect of the Hotel (for example, the limitations contained in Section 5.4 hereof respecting monies available for the replacement of, and additions to, Furnishings and Equipment), provided that the failure to expend funds by reason of the operation of such limitation shall reasonably prevent Hyatt from meeting such standard. It is expressly agreed and understood that each and every provision contained in this Agreement pursuant to which Hyatt is excused from its obligation to operate the Hotel in conformity with a first-class hotel standard shall operate without prejudice to any other remedy (including, without limiting the generality of the foregoing, the right to terminate this Agreement) which Hyatt shall have under the terms of this Agreement.

3.2        Leases and Concessions.

(a) Hyatt shall not, without the approval of Owner, arrange leases or concessions for any hotel operations, any restaurant or food service operations or for any other commercial operation in or about the Hotel. Any such lease or concession so approved shall be entered into in Owner's name and shall be executed by Owner.

(b) Hyatt shall, during the Term, use

reasonable efforts to perform, as agent for Owner, all of the obligations of Owner as landlord or concessionaire under any and all leases and concessions hereafter made or granted with respect to the Hotel.

(c) Hyatt shall collect all rents and other sums falling due during the Term under any present or future lease or concession, and shall deposit the same in the operating accounts.

3.3        Bank Accounts.

There shall be deposited in a bank or banks designated by Owner and in accounts established in Owner's name ("operating accounts") all monies advanced to the Hotel as working capital by Owner, as provided in Section 7.1 hereof, and all monies received by Hyatt from the operations of the Hotel, and Hyatt shall pay out of the operating accounts, to the extent of the funds from time to time therein, all costs and expenses incurred in connection with the operation of the Hotel, all other items entering into the calculation of Profit hereunder, and all other amounts required to perform its obligations hereunder. Checks or other documents of withdrawal drawn upon the operating accounts shall be signed by representatives of Hyatt or Hotel employees designated by Hyatt, as agent for Owner, which persons drawing on such accounts shall be bonded or otherwise insured.

3.4 Negotiation of Partnership or Joint Venture.

Nothing in this Agreement contained shall constitute, or be construed to be or to create, a partnership, joint venture or lease between Owner and Hyatt with respect to the Hotel, and the rights of Owner to receive an amount based on the financial returns from the operation of the Hotel shall not, except as elsewhere herein specifically provided, be deemed to give Owner any interest, control or discretion in the operation of the Hotel which is vested in Hyatt, as agent for Owner, pursuant to this Management Agreement.

Section 4. Management Fees and Remittances to Owner.

4.1 Definitions.

(a) A "fiscal year" hereunder shall mean a period of twelve (12) consecutive months included in the Term and ending on December 31st, except that the first fiscal year hereunder shall commence on the Commencement Date and end on December 31, 1976.

(b) "Gross Receipts" derived from the Hotel during any fiscal year or calendar month shall (subject to the exclusion hereinafter provided) mean all revenues and income of any kind properly accrued during such fiscal year or calendar month and derived, directly or indirectly, from the Hotel during such fiscal year or calendar month, including

without limitation, all revenues derived from the sale or rental of rooms, food and beverages during such fiscal year or calendar month (without taking into account any costs incurred in respect of such sales or rentals), all rents or sums payable under leases or concessions affecting the Hotel by tenants and concessionaires in respect of such fiscal year or calendar month (but not the gross receipts of such tenants or concessionaires) and the net proceeds (after deduction of the expenses of adjustment and collection) of use and occupancy or other similar insurance in respect of the Hotel actually received during such fiscal year or calendar month. There shall be excluded from "Gross Receipts" (as such term is used herein) (i) the amount of all sales and other tax receipts required to be accounted for and paid by Owner to any government or governmental agency, and (ii) the amount of any gratuities paid or incurred by guests, patrons or customers of the Hotel and paid or payable to the employees thereof.

(c) The "Cumulative Period" in respect of any month included in a fiscal year shall mean the period commencing on the first day of such fiscal year and ending on the last day of such calendar month.

The Gross Receipts for any Cumulative Period shall mean the sum of the Gross Receipts (as defined

in the foregoing paragraph (b) of this Section 4.1) for each calendar month included in such Cumulative Period. The Profit for any Cumulative Period shall mean the sum of the amounts of Profit (as defined in Section 5.2 hereof) for each calendar month included in such Cumulative Period, such sum to be determined after taking into account any deficit in Profit for any such calendar month.

4.2     Hyatt's Annual Management Fee.

For each fiscal year Hyatt shall receive, in respect of its management services hereunder, an amount (the "Annual Management Fee") equal to the sum of the Basic Fee and Incentive Fee, as provided in the ensuing clauses (a) and (b):

(a) For each fiscal year, Hyatt shall receive a Basic Fee equal to four percent (4%) of the Gross Receipts for such fiscal year; and

(b) For any fiscal year for which there is a Profit Hyatt shall receive, in addition to the Basic Fee, an Incentive Fee equal to the amount (if any) by which twenty percent (20%) of the Profit for such fiscal year exceeds the Basic Fee payable for such fiscal year.

4.3     Time and Manner of Payment.

With respect to any fiscal year and each calendar month included therein, the Basic Fee and the

Incentive Fee shall each be payable in tentative monthly installments of the respective amounts hereinafter provided, which tentative monthly installments on account of such Basic Fee and Incentive Fee for any such calendar month shall be paid by Hyatt withdrawing the same at any time after Hyatt shall furnish to Owner the unaudited financial statement for such calendar month, pursuant to Section 7.4 hereof.

With respect to each calendar month included in any fiscal year:

(a) The tentative month installment on account of the Basic Fee shall equal four percent (4%) of the Gross Receipts for the Cumulative Period in respect of such calendar month, less the aggregate amount of the tentative monthly installments having theretofore become payable for such fiscal year on account of such Basic Fee; and

(b) The tentative monthly installment on account of the Incentive Fee shall equal (i) the excess, if any, of twenty percent (20%) of the Profit for the Cumulative Period in respect of such calendar month over four percent (4%) of the Gross Receipts for such Cumulative Period, less (ii) the aggregate amount of the tentative monthly installments having theretofore

become payable for such fiscal year on account of such Incentive Fee.

If, for any fiscal year, the aggregate amount of the tentative monthly installments paid to Hyatt on account of the Basic Fee and Incentive Fee shall be more or less than the Annual Management Fee payable for such fiscal year based upon the final determination of Gross Receipts and Profit for such fiscal year as reflected in the Certified Financial Statement for such fiscal year referred to in Section 7.4 hereof, then, by way of year-end adjustment, within fifteen (15) days after the delivery of such Certified Financial Statement to Owner, Hyatt shall pay into the operating accounts the amount of any such overpayment or withdraw from the operating accounts the amount of any such underpayment.

#### 4.4 Remittances to Owner.

Contemporaneously with furnishing the monthly statement for each calendar month pursuant to Section 7.4 hereof, Hyatt shall remit to Owner out of the operating accounts an amount (the "Owner's Remittance Amount") by which the total funds then in the operating accounts exceed the amount then reasonably required to be maintained in the operating accounts in order to carry on the operation of the Hotel pursuant to a first-class standard and so that Hyatt

may perform its obligations hereunder. Except as otherwise provided in Section 7.7, each remittance shall be paid to Owner, at Owner's address then in effect hereunder for receipt of notices hereunder by Owner, or at such other place as Owner may, from time to time, designate in a notice to Hyatt.

4.5      Supplemental Payment.

In addition to the Owner's Remittance Amount to be paid by Hyatt under Section 4.4, Hyatt shall pay, in respect of each calendar month during the Term, as a supplemental payment to Owner, the amount deductible under Section 5.4 hereof in respect of such calendar month, and payable under Section 5.4 into the Fund for Replacements of and Additions to Furnishings and Equipment referred to therein, such amount to be paid by Hyatt into such Fund for the account of Owner.

Section 5.      Determination of Profit.

5.1      Books and Records.

Hyatt shall keep full and adequate books of account and other records reflecting the results of the operation of the Hotel. Such books and records shall be kept in all material respects in accordance with the then latest edition of the Uniform System of Accounts for Hotels (the "Uniform System"), as adopted by the American Hotel Association, except as otherwise specified in this Agreement.

5.2           "Profit" Defined.

There is attached hereto as Exhibit B, and hereby made a part hereof, a copy of page 12 of the Uniform System, Sixth Revised Edition (the "Current Uniform System"), showing the items of income and expense which are taken into account in determining "Gross Operating Profit."

The "Profit" derived from the Hotel for any period shall mean the Gross Operating Profit of the Hotel for such period, determined in accordance with the Current Uniform System, without regard to any supplements or amendments thereto hereafter adopted, but without taking into account any deduction for management fees payable under Section 4 hereof, and less deductions for the following amounts (but only to the extent that such amounts are not otherwise deducted under the Current Uniform System in computing Gross Operating Profit):

(a) An amount equal to the aggregate deductions made for such period under Section 5.3 hereof;

(b) An amount equal to the aggregate deductions made under Section 5.4 for such period;

(c) The amount deductible for such period pursuant to Section 7.1(b) hereof;

(d) The Hotel's prorata share of Allocable Chain Expense for such period, in accordance with Section 7.2;

(e) Premiums on insurance maintained in accordance with Section 8.1 and properly allocable to such period provided that the amount deductible for premiums on policies maintained pursuant to Section 8.1 hereof shall be subject to the limitation provided in paragraph (b) of such Section 8.1;

(f) All real and personal property taxes referred to in Section 7.6 and properly allocable to such period;

(g) All costs and expenses incurred during such period in respect of items described in Section 6;

(h) Equipment rentals accrued during such period to the extent deductible under Section 5.5 hereof; and

(i) All other reasonable costs and expenses incurred during such period in the operation of the Hotel and all other amounts deductible in respect of such period under the terms of this Agreement.

5.3        Deduction for Replacements of Operating Equipment.

Hyatt shall deduct, in determining the Profit for any period, all amounts incurred during such period for replacements of or additions to Operating Equipment.

5.4      Fund for Replacement of and Additions to  
Furnishings and Equipment.

(a) During each fiscal year Hyatt shall deduct for each calendar month included in such fiscal year an amount determined by multiplying the "applicable amount" for such calendar month by the number of key guest rooms in the Hotel and shall pay such amount deducted into a fund to be entitled "Fund for Replacement of and Additions to Furnishings and Equipment," which Fund shall be maintained on deposit by Hyatt, in trust for Owner, in an interest bearing account or as otherwise invested subject to approval by Owner. The monies in such Fund shall be the property of Owner. All income generated from the amounts in such Fund shall be excluded from Gross Receipts and in computing Profit, and shall remain part of such Fund. To the extent that Hyatt shall be required to pay any income taxes on such income as a fiduciary, the same shall be payable out of such Fund after approval by Owner of any required fiduciary return. The "applicable amount" shall be \$30.20 for each calendar month included in the first fiscal year. At the end of the first fiscal year and at the end of each fiscal year thereafter, the "applicable amount" shall be adjusted so as to bear the same ratio to \$30.20 as the Cost of Living Index last published prior to such adjustment date bears to

the Cost of Living Index in effect on December 31, 1975. Each such adjusted "applicable amount" shall be effective with respect to each calendar month included in the ensuing fiscal year. Reference herein to "Cost of Living Index" shall mean the U.S. Labor Department Consumer Price Index - All Items, U.S. Average (1967=100). In addition to such payments into such Fund, all proceeds from the sale of Furnishings and Equipment no longer needed for the operation of the Hotel shall also be paid into such Fund. Hyatt shall be entitled to withdraw from such Fund any amounts required to make all replacements of, and additions to, the Furnishings and Equipment reasonably deemed by Hyatt to be necessary or desirable, and the items of Furnishings and Equipment so replaced or added shall be and become, forthwith upon acquisition and installation, and without further act or action, the property of Owner. All such replacements and additions shall be purchased by Hyatt at competitive prices. Any amounts remaining in such Fund at the termination or expiration of the Term shall be returned by Hyatt to Owner.

(b) Hyatt shall not, without the approval of Owner, expend any monies as agent for Owner for replacements of, or additions to, the Furnishings and Equipment in excess of the amount then existing in the Fund, and, notwithstanding anything else to the contrary in this Agreement contained,

Hyatt's obligations with respect to additions to, or replacements of, Furnishings and Equipment shall be excused to the extent that the amount in such Fund is inadequate to meet such obligations.

Anything to the contrary in the foregoing provisions of this Section 5.4 contained notwithstanding, the following provisions shall apply with respect to the fiscal years ending December 31, 1976 and 1977, respectively:

(1) Each of the fiscal years ending December 31, 1976 and 1977, respectively, is herein called an "Eligible Year," the former being herein referred to as the "First Eligible Year" and the latter as the "Second Eligible Year." With respect to the First Eligible Year, the "Applicable Year of Restoration" shall be the fiscal year ending December 31, 1980, and with respect to the Second Eligible Year the "Applicable Year of Restoration" shall be the fiscal year ending December 31, 1979.

(2) In the event that, for any Eligible Year, the aggregate amount paid by Hyatt into the Fund for Replacement of and Additions to Furnishings and Equipment (the "Fund") referred to in the foregoing paragraph (a) of this Section 5.4 shall exceed the aggregate amount withdrawn by Hyatt from the Fund in

compliance with such paragraph (a), then, at any time after the expiration of such Eligible Year, Owner shall have the right to withdraw from the Fund a sum equal to the lesser of (i) the amount of such excess or (ii) two-thirds (2/3) in the case of the First Eligible Year, and one-third (1/3) in the case of the Second Eligible Year, of the aggregate amount paid into the Fund during such Eligible Year. The amount so withdrawn with respect to any Eligible Year shall be deemed to be additional Profit for such Eligible Year and shall be restored to the Fund during the Applicable Year of Restoration by increasing the monthly payments into the Fund during such Applicable Year of Restoration (over the amount that would otherwise be payable pursuant to such paragraph (a)) by one-twelfth (1/12) of the amount so withdrawn.

5.5        Equipment Rentals.

Hyatt shall, as agent for Owner, pay out of the operating accounts, to the extent of the funds from time to time therein, all amounts falling due during the Term under leases now existing or hereafter made ("Equipment Leases") covering items of FFE, including leases with companies affiliated with Owner. However, for the purpose of determining Profit hereunder, rentals under Equipment

independent certified public accounts as shall be selected by Owner and be approved by Hyatt. The cost of such audit in respect of such Certified Financial Statement for a fiscal year shall be charged as an expense of the operation of the Hotel for the succeeding fiscal year. If the opinion of such independent certified public accounting firm with respect to the matters set forth in such Certified Financial Statement for a fiscal year shall be an unqualified opinion, then such Certified Financial Statement shall be conclusive upon the parties hereto with respect to such matters and shall be deemed to be a final determination of the Gross Receipts and of the Profit for such fiscal year.

(b) Hyatt shall furnish to Owner, at least thirty (30) days prior to the commencement of each fiscal year other than the first fiscal year referred to in Section 4.1(a) hereof a projection of estimated income and expenses for such fiscal year broken down by calendar month. Such projection shall be advisory in nature, and Hyatt shall have no liability to Owner in the event that the actual operating results for any fiscal year shall differ from any good faith projection furnished to Owner for such fiscal year.

7.5 Owner's Warranties as to Title.

Owner warrants that the interest of Hyatt under this Agreement shall, at all times during the Term,

Leases shall not be deducted except for rentals relating to television sets and that portion of the rentals payable under any Equipment Leases which are properly allocable to a repair and maintenance obligation on the part of the lessor thereunder or to personal property taxes.

5.6      Activities and Expenses Shared by Hotel  
Development and Marina Development.

The parties recognize that certain facilities, activities or functions will be common to, or shared by, the Hotel Development and the Marina Development or the respective operation thereof, and that an arrangement may be feasible whereby employees engaged in the operation of the Marina Development will perform services benefiting the Hotel Development and employees engaged in the operation of the Hotel Development will be performing services benefiting the Marina Development (such employees of either category being herein referred to as "shared employees"). It is further recognized that, in addition to the compensation of shared employees, other expenses will be incurred in connection with the operation of the Hotel Development and the Marina Development, respectively, which cannot be wholly allocated to the former or the latter and that a proper allocation of such expenses, including the compensation of shared employees (hereinafter called "Allocable Expenses"), will be required.

The parties agree to cooperate, each with the other, in making such arrangements for the sharing of facilities, activities and functions (including the services of shared employees) as shall reasonably accommodate the interests of Hyatt and Owner in connection with the operation of the Hotel Development and the Marina Development, respectively, and, as regards the Allocable Expenses for any period, to make a reasonable allocation thereof between the Hotel Development and the Marina Development.

Section 6. Repairs and Changes; Legal Requirements.

6.1 Repairs and Maintenance.

Hyatt, as agent for Owner, shall take good care of the Hotel (except for such portions thereof as are leased to tenants who undertake a duty of repair and maintenance) and maintain the same in good order and condition as may be necessary to maintain a first-class hotel standard, and make all necessary repairs thereto.

6.2 Compliance with Legal Requirements.

Throughout the Term, Hyatt as agent for Owner, except as elsewhere herein limited or excused, shall comply with all applicable requirements ("Legal Requirements") under all laws, ordinances, orders, rules and regulations of governmental authorities having jurisdiction over the Hotel. Hyatt may, as agent for Owner, but only after approval by

Owner (which may be arbitrarily withheld) contest, by appropriate legal proceedings conducted in good faith, in the name of Hyatt or Owner, or both, the validity or application of any Legal Requirements. If Owner shall approve any such contest, Owner shall execute and deliver any appropriate documents which may be necessary or proper to permit Hyatt, as agent for Owner, to prosecute such contest. Owner may, by notice to Hyatt, direct Hyatt to contest, or Owner may contest directly, any Legal Requirements which Hyatt may otherwise desire not to contest.

6.3 Alterations and Additions.

Except in order to comply with Legal Requirements and except as hereinafter provided, Hyatt shall make no alterations, additions or improvements in or to the Improvements without the approval of Owner (which approval may be arbitrarily withheld). Notwithstanding the preceding sentence, Hyatt shall (without obtaining the approval of Owner) have the right, from time to time during the Term, to make voluntary alterations, additions or improvements in or to the Improvements (which shall become part thereof for the purposes of this Agreement) in order to improve the operation of the Hotel; provided that the aggregate amount which may be incurred in respect thereof during any fiscal year shall not exceed two percent (2%) of the amount incurred under Section 6.1 hereof during the preceding fiscal year.

Section 7.      General Covenants of Hyatt and Owner.

7.1      Working Capital.

(a) Except as otherwise in this Agreement specifically provided, Owner shall, at all times during the Term, cause sufficient working capital funds to be on hand in the operating accounts to assure the timely payment of all current liabilities of the Hotel (including Hyatt's management fees payable hereunder) and all other items entering into the calculation of Profit, the uninterrupted and efficient operation of the Hotel at all times during the Term, and the performance by Hyatt of its other obligations hereunder. On the commencement of the Term, Owner shall have paid for the cost of all "Working Capital Assets") as hereinafter defined), other than cash, then reasonably required to be on hand or to be prepaid. The term "Working Capital Assets" shall mean all liquor and other licenses required to meet the applicable Legal Requirements and the current assets of the Hotel, including, without limitation, all cash on hand and in banks, accounts receivable (less a reasonable reserve for doubtful accounts), food and beverage inventory and operating supplies, and prepaid insurance and other prepaid items.

(b) As of the end of each calendar month during the Term Hyatt shall deduct, for the purpose of

computing Profit, an amount in the nature of interest equal to one-twelfth (1/12th) of the Effective Rate (as hereinafter defined) as of the end of such calendar month times the Working Capital (as hereinafter defined) as of the end of such calendar month. The "Effective Rate" as of the end of any calendar month shall mean one-half of one percentage point above the then best rate of the bank in which the main operating account for the Hotel is maintained for 90-day loans to responsible and substantial borrowers. "Working Capital" as of the end of any calendar month shall mean the excess of the cost of the Working Capital Assets (as hereinabove defined) on hand as of the end of such month over the current liabilities of the Hotel at the end of such month, such current liabilities to include the Basic Fee and Incentive Fee (if any) payable to Hyatt pursuant to Sections 4.2 and 4.3 hereof, and the Owner's Remittance Amount referred to in Section 4.4 hereof.

7.2        Chain Services.

Hyatt shall provide, or shall cause its affiliates to provide, in connection with the operation and for the benefit of the Hotel, those group benefits, services and facilities (hereinafter referred to collectively as "Chain Services") generally made available by Hyatt from time to time during the Term to hotels (which term, as used

herein, does not include Hyatt Lodges or any hotel not operated under a name which includes the word "Hyatt") operated by Hyatt or its affiliates. Chain Services presently consist of (i) convention, business and sales promotion services (including the maintenance and staffing of Hyatt's home office sales force and of regional sales offices in various parts of the United States and the world), (ii) advertising, publicity and public relations services, (iii) food and beverage, personnel and other operational departmental supervision and control services, (iv) centralized reservations services in Omaha, Nebraska, and (v) the making available of qualified personnel through the Hyatt employee training program. Neither Hyatt nor any of its affiliates shall charge or receive any profit in respect of any such Chain Services. Hyatt shall, however, be entitled to charge the operation of the Hotel and to be reimbursed for the Hotel's prorata share of "Allocable Chain Expense." "Chain Expense" for any period shall include all costs incurred during such period by Hyatt or by any of its affiliates in respect of Chain Services, other than the costs of food and beverage, personnel and other operational departmental supervision and control services. "Allocable Chain Expense" for any period shall mean all Chain Expense incurred during such period, reduced by any amounts which Hyatt or any of

its affiliates shall be entitled to be paid in respect of Chain Services furnished during such period to hotels which are situated outside of the United States (whether or not opened to the public) or which are situated in the United States but are not opened to the public (for the reason that they are under construction or are otherwise being prepared for opening). The Hotel's prorata share of Allocable Chain Expense for any period shall bear the same ratio to the Allocable Chain Expense for such period as the number of key guest rooms in the Improvements bears to the average number of key guest rooms in all hotels in the United States opened to the public and operated during such period by Hyatt or its affiliates. Each time that Hyatt shall charge the operation of the Hotel for its prorata share of Allocable Chain Expense for any period, it shall furnish to Owner a statement in reasonably sufficient detail to provide Owner with data supporting such charge. Owner may, in connection with any such statement for any period, cause an audit to be made of the books and records of Hyatt and its affiliates relating to the data furnished in such statement, including, without limitation, the Chain Expense and Allocable Chain Expense incurred during such period and the average number of key guest rooms during such period in hotels opened to the public and situated in the United States and operated by

Hyatt or its affiliates. Such audit shall be made by a national independent certified public accounting firm selected by Owner which is experienced in hotel accounting matters, and a copy of such audit shall be furnished to Hyatt. If the audit of any such statement shall disclose that such statement is inaccurate, appropriate adjustment shall be made as between Owner and Hyatt to correct such inaccuracy, and if such audit shall disclose that the charge made to the Hotel for the period covered by such statement exceeds, by two percent (2%) or more, the amount of the charge which should have been made, then Hyatt shall pay for the reasonable cost of such audit; otherwise, Owner shall pay for the cost of such audit.

7.3      Right of Inspection and Review.

Hyatt shall accord to Owner and the duly authorized officers, accountants, employees, agents and attorneys of Owner the right to enter upon any part of the Hotel at all reasonable times during the Term for the purpose of examining or inspecting the Hotel or examining or making extracts from the books and records of the Hotel operation, or for any other purpose which Owner, in its discretion, shall deem necessary or advisable, but the same shall be done with as little disturbance to the operation of the Hotel as possible.

7.4

Financial Reports.

(a) Hyatt shall deliver to Owner, within thirty (30) days after the end of each calendar month, an unaudited financial statement prepared from the books of account maintained by Hyatt and containing (i) a statement of the current assets and current liabilities of the Hotel as of the end of such calendar month, (ii) a profit and loss statement showing the results of operation of the Hotel for such calendar month and for the period from the beginning of the fiscal year in which such calendar month is included to the end of such calendar month, and (iii) a statement of the Gross Receipts for such calendar month. Within ninety (90) days after the end of each fiscal year, Hyatt shall deliver to Owner a financial statement for such fiscal year (herein referred to as the "Certified Financial Statement"), containing (i) a statement of the current assets and current liabilities of the Hotel as of the end of such fiscal year, (ii) a profit and loss statement showing the results of operation of the Hotel (including store rentals) for such fiscal year, (iii) the Gross Receipts and Profit for such fiscal year and (iv) the Annual Management Fee (broken down between the Basic Fee and the Incentive Fee) for such fiscal year, with an opinion on such Certified Financial Statement after an audit by Laventhol & Horwath or such other national firm of

not be subject or subordinate (a) to any leases, mortgages, deeds of trust, security agreements or other encumbrances affecting the Hotel (herein collectively called "Encumbrances") except Encumbrances currently existing and those Encumbrances hereafter made, granted or entered into which contain, or are subject to, a non-disturbance agreement, so-called, to the effect that this Agreement shall not be subject to forfeiture or termination except in accordance with the provisions thereof, notwithstanding a default under such Encumbrance or any obligation secured thereby, or (b) to any other matters affecting title to the Hotel, except for non-delinquent real and personal property taxes and such other matters as shall not materially and adversely affect the operation of the Hotel by Hyatt. Owner further warrants that, so long as Hyatt shall not be in default hereunder, Hyatt (subject to Owner's right to terminate this Agreement in accordance with the provisions of Section 12.2 hereof) shall be entitled to operate the Hotel for the Term, and Owner shall, at no expense to Hyatt, undertake and prosecute against third parties all appropriate actions, judicial or otherwise, required to assure such right of operation to Hyatt.

7.6            Property Taxes.

During each fiscal year included in the Term,

Hyatt, as agent of Owner, shall, to the extent of funds in the operating accounts, pay, prior to delinquency, all real and personal property taxes (improvement assessments shall be deemed to be property taxes hereunder and shall be paid, and shall be deductible in computing Profit, ratably over the maximum period allowed by law for payment thereof) assessed against or properly allocable to the Hotel to the extent that the same are payable during such fiscal year and properly allocable to the Term. Such property taxes for any period which includes the Commencement Date or the date on which the Term shall expire or otherwise terminate shall be equitably prorated. Hyatt may, subject to the same restrictions as are applicable to the contest of Legal Requirements under Section 6.2 hereof, contest the amount or validity, in whole or in part of any such property tax, in which event Hyatt may postpone or defer payment of such tax to the extent allowable by law.

It is recognized that for real property tax purposes, the Hotel Development will not be separately assessed from the Marina Development. Accordingly, the parties agree to make a reasonable allocation of the real property taxes assessed against the entire hotel and marina complex (the "Complex"). Initially, and until the parties agree that a different allocation is fairer and more

reasonable, the real property taxes allocable to the Hotel shall be determined as follows:

(a) There shall be determined the percentage ratio (rounded off to the nearest 1%) which the aggregate area comprised in the Hotel Site bears to the aggregate floor area comprised in the Complex (and for the purpose of this determination the water surfaces included in the Hotel Site and in the Complex, respectively, shall be treated as part of the respective area to be taken into account). Such percentage ratio of the real property taxes and assessments assessed against all of the land in the Complex shall be deemed to have been assessed against the Hotel.

(b) In the event that the County Assessor's work sheets are available for inspection by the parties and show thereon an apportionment between the Improvements and the Marina Improvements, then such apportionment shall be used in determining the taxes and assessments levied or assessed against the Improvements. If such work sheets are not available, then the taxes and assessments levied or assessed against the Improvements shall be determined by multiplying the total taxes and assessments levied or assessed against all of the improvements in the Complex by a fraction, the numerator of which shall be the direct construction cost of the

Improvements and the denominator of which shall be the total direct construction cost of the Complex.

Owner agrees to preserve such proper records as it has relating to the cost of construction of the Complex, including a reasonable breakdown of the cost of construction between the Improvements and the Marina Improvements in order to facilitate the determination provided in the foregoing clause (b).

In the event of any dispute between the parties concerning the allocation of taxes and assessments, the matter in dispute shall be submitted to arbitration in accordance with the provisions of Section 14 hereof.

7.7        Compliance with Leases.

Owner represents and warrants to Hyatt as follows: (a) The City Lease is evidenced by the following documents (the "Lease Documents"), to wit: (i) Seventh Amendment to Lease Agreement dated March 14, 1968, between the City, as Lessor, and Quivera Basin Enterprises, Inc., a corporation, as Lessee, and San Diego Federal Savings and Loan Association, a United States corporation, as Assignee, (ii) Eighth Amendment to Lease Agreement between the same parties dated September 25, 1969 (the interest of Quivera Basin Enterprises, Inc., in the City Lease having been assigned to Owner by Assignment of Corporate Interest executed August 14, 1969, by the stockholders of Quivera

Basin Enterprises, Inc., as Assignors, in favor of PSA Hotels, Inc. ("PSA"), as Assignee, and consented to by the City on August 25, 1969, and by Notice of Assignment addressed by PSA to the City under date of December 31, 1969), (iii) Ninth Amendment to Lease Agreement dated December 17, 1970, and Tenth Amendment to Lease Agreement dated July 24, 1972, both executed between the City, as Lessor, and PSA, as Lessee and (iv) Eleventh Amendment to Lease dated August 4, 1976, executed between the City, as Lessor, and Owner, as Lessee; (b) the aforementioned Seventh Amendment to Lease Agreement restates the original Lease Agreement between the City, as Lessor, and C. P. Sikes and Garrick O'Bryan, jointly as Lessee, and all amendments thereto executed prior to March 14, 1968; (c) Owner has furnished Hyatt true copies of the Lease Documents; (d) the City Lease has not been amended or modified, except as set forth in the Lease Documents, is in full force and effect in accordance with the terms thereof, and neither party thereto is in default thereunder; and (e) the Site and the Existing Hotel Improvements are not subject to any sublease or rights of occupancy by third persons.

Hyatt acknowledges that it has reviewed the copies of the Lease Documents furnished it by Owner. Hyatt agrees, as agent of Owner, and at Owner's expense, during the Term, to perform the obligations and observe the covenants of Owner under the City Lease, to the extent that

Hyatt shall, by reason of the rights granted to it under this Agreement, be reasonably in a position to do so, except for the payment of rent required under the City Lease, such payment to be made by Hyatt for the account of Owner out of Owner's Remittance Amounts payable to Owner under Section 4.4 (but only to the extent thereof). All expenses incurred by Hyatt in performing its obligations under this Section 7.7 shall be paid out of the operating accounts to the extent of funds available therein.

Owner agrees that it will not amend, modify or cancel the City Lease or enter into a new lease with respect to the Site and the Improvements without the prior written approval of Hyatt.

Section 8.        Insurance.

8.1        Insurance to be Maintained by Owner During Term.

(a) Owner shall maintain, at all times during the Term, the following insurance respecting the Hotel with responsible companies licensed to do business in California, in amounts approved by Hyatt, which amounts shall in no event be less than the amounts required under any mortgage or security agreement affecting the Hotel:

(1) Public liability insurance, elevator liability insurance and insurance against theft of or damage to the property of guests in the Hotel;

(2) Innkeeper's legal liability insurance, including liability, if any, under any so-called "dram shop law;"

(3) Workers' Compensation, employer's liability or similar insurance covering the employees of the Hotel as may be required by law;

(4) Fidelity insurance covering such employees, including loss of money and securities, inside and outside the Hotel, and depositor's forgery, with policy limits determined by Owner and communicated to Hyatt;

(5) Insurance against loss or damage to the Hotel from fire, boiler explosion and such other risks and casualties with respect to which insurance is customarily carried for hotels of similar character; and

(6) Such other insurance as either Hyatt or Owner shall reasonably deem necessary for protection against claims, liabilities and losses arising from the operation or ownership of the Hotel or as may be required under any mortgage or security agreement affecting the Hotel or under the applicable leases.

All policies required to be maintained under this Section 8.1 shall name Owner as the principal insured and shall name Hyatt and (if required by Owner) any mortgagee or secured party under any mortgage or security agreement affecting the Hotel as additional insureds thereunder.

(b) Whenever Owner is about, or proposes, to purchase any insurance policy or policies required under this Section 8.1, Owner shall invite a bid from Hyatt (the "Hyatt bid") covering such policy or policies and prepared by Hyatt's insurance broker or adviser. The Hyatt bid may be based upon providing all or part of the insurance in question under a blanket policy insuring, in addition to the Hotel, other hotels operated by Hyatt or its affiliates, in which event the insurance premiums to be included in the Hyatt bid shall be those properly allocable to the Hotel. If Owner shall purchase such policy or policies of insurance (the "Owner-procured policies") through its own resources in preference to accepting the Hyatt bid, then, for the purposes of determining Profit hereunder, the premiums in respect of the Owner-procured policies shall be deemed not to exceed the amount of the premiums which would have been payable for such policies under the Hyatt bid in respect of each fiscal year included in the term or terms of the Owner-procured policies.

8.2           Evidence of Insurance Coverage.

Owner shall, from time to time, furnish to Hyatt duplicate copies of all policies of insurance carried by Owner pursuant to this Section 8 so as to enable Hyatt to review the sufficiency of the insurance coverage in the light of the requirements of this Section 8.

8.3           Notice of Cancellation or Change.

All insurance policies required to be carried by either party hereto shall, to the extent obtainable, have attached thereto an endorsement that the same shall not be cancelled or changed without at least ten (10) days' prior written notice to all named insureds.

Section 9.       Damage to and Destruction of Hotel.

9.1           Owner's Duty of Restoration.

If the Hotel, or any portion thereof, shall be damaged or destroyed at any time or times during the Term by fire or any other casualty, Owner, at no expense or risk to Hyatt, shall repair, rebuild or replace the same (such repairing, rebuilding or replacing being herein called "restoration") so that after such restoration the Hotel shall be substantially the same as prior to such damage or destruction, and all proceeds of insurance shall be made available to Owner for this purpose; provided that Hyatt shall have the right to ensure that such proceeds of insurance

shall be applied to such restoration. If Owner fails to undertake such restoration within sixty (60) days after such fire or other casualty, or shall fail to complete the same diligently, Hyatt may, but shall not be obligated to, undertake or complete such restoration for the account of Owner and shall be entitled to be repaid therefor (including all necessary incidental costs and expenses incurred in connection therewith), as provided in Section 11 hereof. In such case, the proceeds of insurance shall be made available to Hyatt for this purpose, provided that Owner shall have the right to ensure that such proceeds of insurance shall be applied to such restoration.

9.2 Owner's Election not to Restore.

Anything in Section 9.1 to the contrary contained notwithstanding, if, in connection with any casualty, the cost of restoring the Improvements and the FFE shall equal or exceed (i) 25% of the replacement cost thereof immediately prior to such casualty if such casualty shall be covered by insurance, or (ii) 10% of such replacement cost if such casualty shall not be covered by insurance, then, and in either event, Owner shall have an election exercisable by notice to Hyatt, given within 45 days from the occurrence of such casualty, not to restore the Hotel and to terminate this Agreement, effective upon the last day of the month next succeeding the month in which such notice shall be given.

9.3        Approval of Plans and Specifications.

Any restoration estimated to cost Twenty Five Thousand Dollars (\$25,000) or more shall be made by Owner in accordance with plans and specifications approved by Hyatt in advance. Hyatt shall also have the right to approve, in advance, the architect who shall prepare such plans and specifications. For the purpose of this Section 9.3, the term "restoration" shall include any restoration required or elected to be made by Owner under any provision of this Section 9 or any subsection thereof, and any alteration or modification required to be made under the provisions of Section 10.2 hereof.

Section 10.        Condemnation.

10.1        Total Taking.

If the whole of the Hotel shall be taken or condemned in any eminent domain, condemnation, compulsory acquisition or like proceeding by any competent authority for any public or quasi-public use or purpose, or if such a portion thereof shall be taken or condemned so as to make it imprudent or unreasonable to use the remaining portion as a hotel of the type and class immediately preceding such taking or condemnation, then the Term shall terminate as of the date of such taking or condemnation, and Hyatt shall not be entitled to any part of any award for such taking or condemnation.

10.2      Partial Taking.

If only a part of the Hotel shall be taken or condemned and the taking or condemnation of such part does not make it unreasonable or imprudent to operate the remainder as a hotel of the type and class immediately preceding such taking or condemnation, then this Agreement shall not terminate, but there shall be made available to Owner upon the terms provided in Section 9.1 respecting insurance proceeds so much of any award made to Owner (the term "award" referring to the amount remaining after deduction of any expenses of collecting the gross amount of the award) as shall be reasonably necessary for making alterations to or modifications of the Hotel, or any part thereof, so as to make it a satisfactory architectural unit and a hotel of the type and class immediately preceding such taking or condemnation. The balance of the award, after the deduction of the sum necessary for such alterations or modifications (herein called the "net award") shall be the sole property of, and shall be distributed to, Owner.

Section 11.      Right to Perform Covenants and Reimbursement.

If either party shall fail, within the time and after due notice, as specified in Section 12 hereof, to make any payment or to perform any act to be made or performed by such party pursuant to this Agreement, then,

unless a bona fide dispute shall exist between Owner and Hyatt as to whether such payment or performance is required, the other party may, without further notice to or demand upon such defaulting party from any obligations under this Agreement, make such payment or perform such act. All sums so paid by such other party and all necessary incidental costs and expenses incurred by such other party in connection with the performance of any such act, together with interest thereon at the rate of ten percent (10%) per annum (but not to exceed the maximum interest allowed by law) from the date of making such expenditure by such other party shall be payable to such other party upon demand. Any amounts payable hereunder to Hyatt may, at the option of Hyatt, be withdrawn out of the operating accounts, provided that no bona fide dispute then exists as to such amount payable to Hyatt.

Section 12.      Defaults; Termination Rights.

12.1      Defaults.

The following shall constitute events of default hereunder:

- (a) The failure of Hyatt to pay to Owner any sum which may become due to Owner hereunder, together with interest thereon, if any, provided in Section 11 hereof, within fifteen (15) days after

receipt by Hyatt of a notice from Owner, specifying such failure;

(b) The filing by either party hereto of a voluntary petition in bankruptcy or insolvency or a petition for reorganization under any bankruptcy law or a petition for the appointment of a receiver for all or any substantial portion of the property of such party;

(c) The consent by either party hereto to an involuntary petition in bankruptcy or the failure to vacate, within sixty (60) days from the date of entry thereof, any order approving such involuntary petition;

(d) The entry of an order, judgment or decree by any court of competent jurisdiction, on the application of a creditor, adjudicating either party as a bankrupt or insolvent or approving a petition seeking reorganization or appointing a receiver, trustee or liquidator of all or a substantial part of such party's assets, and such order, judgment or decree shall continue unstayed and in effect for any period of one hundred twenty (120) consecutive days;

(e) The making by either party of an assignment for the benefit of creditors;

(f) The failure by either party (the "defaulting party") to perform, keep or fulfill any of the covenants, undertakings, obligations or conditions set forth in this Agreement, other than those referred to in the foregoing paragraphs (a) through (e), inclusive, of this Section, and such failure shall continue for a period of thirty (30) days after receipt by the defaulting party of notice thereof from the other party (the "non-defaulting party") specifying such failure, or, in the case of a failure which cannot, with due diligence and in good faith, be cured within thirty (30) days, and the defaulting party fails to proceed promptly and with due diligence and in good faith to cure the same, and thereafter to prosecute the curing of such failure with due diligence and in good faith (it being intended that, in connection with a failure not susceptible of being cured with due diligence and in good faith within thirty (30) days, the time of the defaulting party within which to cure the same shall be extended for such period as may be necessary for the curing thereof with due diligence and in good faith).

In any of such events of default, the non-defaulting party may give to the defaulting party notice of intention to terminate the Term after the expiration of a

period of fifteen (15) days from the date of such notice, and, upon the expiration of such period, the Term shall expire. Anything to the contrary herein contained notwithstanding, neither party shall be deemed to be in default under this Agreement, and no such notice of intention to terminate, if given by either party, shall be effective if a bona fide dispute shall have arisen with respect to any of the foregoing events of default or with respect to the alleged event of default on which such notice is based and such dispute has been submitted to arbitration. A dispute shall be deemed to have been submitted to arbitration if either party hereto shall have served upon the other the written notice referred to in the first sentence of Section 14 hereof. The rights granted hereunder shall not be in substitution for, but shall be in addition to, any and all other rights and remedies for breach of contract available to the non-defaulting party under the applicable law.

12.2        Termination by Owner in Case of Sale.

(a) For the purpose of this Section 12.2, the "Hotel" shall mean all of Owner's right, title and interest in and to the Hotel. An "independent party" shall mean a third party having no interest in Owner or its general partner or any affiliate corporation thereof, and in which Owner or its general partner or any affiliate corporation thereof has likewise no interest.

(b) In the event that Owner shall at any time during the term desire to sell the Hotel and receive from an independent party a bona fide offer (the "Purchase Offer") to purchase the Hotel, Owner shall furnish Hyatt a copy of such Purchase Offer with reasonable evidence that the party making the Purchase Offer is an independent party. Upon receipt of the Purchase Offer and for a period of thirty (30) days thereafter Hyatt shall have a right of first refusal to purchase the Hotel for the price and upon all of the terms and conditions set forth in the Purchase Offer, such right of first refusal to be exercisable by Hyatt giving to Owner within such 30-day period notice of Hyatt's intention to purchase the Hotel pursuant to the terms of this Section 12.2. If Hyatt shall exercise its right of first refusal in the prescribed manner, then there shall be a firm contract between Owner and Hyatt for the sale and purchase of the Hotel at the price and upon the terms and conditions set forth in the Purchase Offer. If Hyatt shall fail to exercise its right of first refusal within the aforementioned 30-day period and if, thereafter, Owner shall sell the Hotel to such independent party for the price and upon the terms and conditions contained in the Purchase Offer (but not otherwise), then Owner shall have the right, by a notice to Hyatt, to terminate this Agreement

effective on the date (the "Closing Date") when the sale of the Hotel to such independent party shall be consummated, provided that Owner shall have paid to Hyatt on or before the Closing Date an amount equal to 2.5 times the Annual Management Fee (including the Basic Fee and Incentive Fee provided in Sections 4.2 and 4.3) which shall have been payable to Hyatt for the fiscal year next preceding the fiscal year in which such sale is consummated.

12.3        Termination by Hyatt for Excusable Inability to Maintain a First-class Hotel Standard.

As used herein, the term "financial requirements" shall mean requirements which can be met by the expenditure of money for, or the investment of funds in, the Hotel.

If, at any time during the Term, Hyatt shall, under any provisions of this Agreement, be excused from its obligation to operate the Hotel in conformity with a first-class hotel standard, as such standard is defined in Section 1.5 hereof, then, notwithstanding that Owner is not then in default hereunder, Hyatt may give to Owner a notice (the "action notice") stating such fact and setting forth the financial requirements which, in Hyatt's reasonable opinion, must be met by Owner to enable Hyatt to meet a first-class

hotel standard and the time schedule according to which such requirements must be met. If, within ninety (90) days from the receipt of any action notice (the date of such receipt being herein referred to as the "Receipt Date"), the parties hereto shall execute and deliver a written agreement (the "action agreement") to the effect that Owner will meet the financial requirements deemed necessary by Hyatt in accordance with an appropriate time schedule (as such financial requirements and time schedule are set forth in the action notice or in such action agreement), then Hyatt's action notice shall be of no further force and effect, but the Owner's obligations contained in the action agreement shall be deemed incorporated in this Agreement with the same force and effect as if originally set forth therein. All monies expended pursuant thereto shall be deducted in determining Profit hereunder in the fiscal year incurred, and a breach of any such obligations by Owner shall constitute an event of default under the provisions of Section 12.1 hereof. If, following the receipt by Owner of an action notice, the parties shall fail to execute and deliver an action agreement within the aforementioned period of ninety (90) days from the Receipt Date, then, at any time prior to the expiration of one hundred and twenty (120) days from the Receipt Date, Hyatt shall have the right, by notice to Owner, to terminate

this Agreement, effective upon the expiration of one (1) year from the Receipt Date.

Section 13.     Trade Name.

During the Term the Hotel shall at all times be known and designated as "Islandia Hyatt House" or under such other name (which shall include the word "Hyatt") as Hyatt shall designate in a notice to Owner and Owner shall thereafter approve. Hyatt represents and warrants to Owner that Hyatt has the legal right to use the name "Hyatt" (herein called the "protected name"), either alone or in conjunction with another word or words. Owner acknowledges that the protected name, when used either alone or in conjunction with any other word or words, is the exclusive property of Hyatt. Accordingly, Owner agrees that no right or remedy of Owner for any default of Hyatt hereunder, nor any provision of this Agreement, shall confer upon Owner, or any transferee, assignee or successor of Owner, or any person, firm or corporation claiming by or through Owner, the right to use the protected name, either alone or in conjunction with any other word or words, in connection with the use or operation of the Hotel or otherwise. In the event of any breach of this covenant by Owner, Hyatt shall be entitled to damages, to relief by injunction and to all other available legal rights or remedies, and this provision shall be deemed to survive the expiration or sooner termination of the Term.

Section 14.      Arbitration.

Except as otherwise herein provided, if any controversy should arise between the parties in the performance, interpretation or application of this Agreement, either party may serve upon the other a written notice stating that such party desires to have such controversy reviewed by a board of three (3) arbitrators and naming the person whom such party has designated to act as an arbitrator. Within fifteen (15) days after receipt of such notice, the other party shall designate a person to act as arbitrator and shall notify the party requesting arbitration of such designation and the name of the person so designated. The two (2) arbitrators designated as aforesaid shall promptly select a third arbitrator and if they are not able to agree on such third arbitrator, then either arbitrator, on five (5) days' notice in writing to the other, or both arbitrators shall apply to the American Arbitration Association for the designation and appointment of such third arbitrator. If the party upon whom such written request for arbitration is served shall fail to designate its arbitrator within fifteen (15) days after receipt of such notice, then the arbitrator designated by the party requesting arbitration shall act as the sole arbitrator and shall be deemed to be the single, mutually approved arbitrator to resolve such controversy.

The decision and award of a majority of the arbitrators or of such sole arbitrator, shall be binding upon both Owner and Hyatt and shall be enforceable in any court of competent jurisdiction. Such decision and award may allocate the costs of such arbitration to one of the parties or disproportionately between the parties. The provisions of this Section 14 shall be subject to the requirements of the applicable law.

Section 15. Successors and Assigns.

15.1 Assignment by Hyatt.

Hyatt shall have the right to assign its rights and obligations under this Agreement, without the consent of Owner, to any affiliate or to any assignee who also acquires all, or substantially all, of the assets of Hyatt and assumes its obligations, including those hereunder. In such latter event, Hyatt's liability hereunder shall terminate upon such assignment, but in the event of such an assignment to an affiliate Hyatt shall continue to be liable under this Agreement to the same extent as though such assignment had not been made. Except as hereinabove provided, Hyatt shall not assign its rights and obligations under this Agreement without the approval of Owner. In the event that Hyatt shall so assign its rights and obligations under this Agreement to any affiliate (the "assignee

affiliate"), as hereinbefore provided, then the sale by Hyatt or by an affiliate of a controlling interest in such assignee affiliate shall constitute an assignment requiring Owner's approval, as provided in the immediately preceding sentence, except for a sale which is part of a sale of all or substantially all of the assets of Hyatt to an assignee who assumes its obligations, including those hereunder (in which case any contingent liability of Hyatt hereunder shall terminate upon such sale). "Controlling interest" in an affiliate refers to shares of capital stock representing more than fifty percent (50%) of the voting power of such affiliate.

It is understood and agreed that any approval given by Owner to any assignment shall not be deemed a waiver of the covenant herein contained against assignment in any subsequent case. Any assignee who succeeds to the interest of Hyatt hereunder (or to the interest of an assignee of Hyatt hereunder) shall be deemed to be Hyatt hereunder for all purposes. The term "affiliate," as used herein, shall mean a corporation included in an "affiliated group," as that term is defined in Section 1504(a) of the Internal Revenue Code as presently in effect, and of which Hyatt is the common parent corporation.

15.2      Assignment by Owner.

Owner shall have the right to sell, hypothecate and convey the Hotel or to assign its interest in this Agreement, or both, without the consent of Hyatt; provided, however, that any such assignee shall expressly assume in writing the obligations of Owner hereunder. Notwithstanding such assumption by such assignee, Owner shall remain fully liable hereunder.

15.3      Binding on Successors.

The terms, provisions, covenants, undertakings, agreements, obligations and conditions of this Agreement shall be binding upon and shall inure to the benefit of the successors in interest and the assigns of the parties hereto with the same effect as if mentioned in each instance where the party hereto is named or referred to, except that no assignment by Hyatt and no transfer or mortgage by or through Owner, as the case may be, in violation of the provisions of this Agreement, shall vest any rights in the transferee or mortgagee.

Section 16.      Notices.

All notices to be given hereunder shall be given in writing and shall be deemed given when delivered by messenger or by the U.S. mails (and, if mailed, shall be deemed received two business days after the postmarked date

thereof), with postage prepaid, registered or certified, and, if intended for Owner, delivered or addressed c/o Joseph J. Amoroso, 16633 Ventura Boulevard, Suite 1325, Encino, California 91316, with a copy to Jerald Greenstein, CPA, Accountancy Corporation, 16400 Ventura Boulevard, Suite and if intended for Hyatt, delivered or addressed to 1338 Bayshore Highway, Burlingame, California 94010, Attention: Marvin T. Tepperman, Esq., with a copy to Jay A. Pritzker, President, at the same address. Either party hereto may change the address for notices hereunder by such party giving notice of such change to the other party hereto in the manner hereinabove provided. If Hyatt is given the name and address of any mortgagees, it will give copies of all notices given to Owner to such mortgagees, in the manner set forth in this Section 16.

Section 17.     Approvals.

Whenever any party hereto is requested hereunder to give its approval to a matter, such approval shall not be unreasonably withheld. If a party shall desire the approval of the other party hereto to any matter, such party may give notice to such other party that it requests such approval, specifying in such notice the matter as to which such approval is requested and reasonable detail respecting such matter. If such other party shall not respond negatively

in writing to such notice within twenty (20) days after receipt thereof, such other party shall be deemed to have approved the matter referred to in such notice.

Section 18.      Further Instruments.

Upon notice from either party to the other, Hyatt and Owner shall execute (in recordable form) and deliver to the party requesting the same an appropriate instrument which, when recorded, will, to the extent allowed by applicable law, impart constructive notice to third parties of the rights of Hyatt under this Agreement. Each party hereto shall further execute and deliver all such other appropriate supplemental agreements and other instruments and take such other action as may be necessary to make this Agreement fully and legally effective, binding and enforceable as between the parties hereto and as against third parties, or as the other party may reasonably request.

Section 19.      Applicable Law.

This Agreement shall be governed in all respects by the laws of the State of California.

Section 20.      Partial Invalidity.

In the event that any one or more of the phrases, sentences, clauses, paragraphs or sections contained in this Agreement shall be declared invalid by arbitration or by the final and unappealed order, decree or judgment of

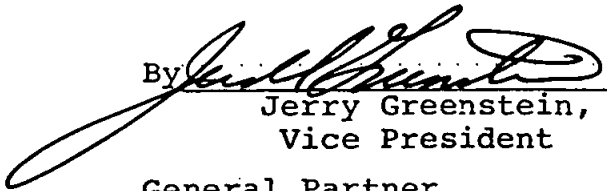
any court, this Agreement shall be construed as if such phrases, sentences, clauses, paragraphs or sections had not been inserted herein.

IN WITNESS WHEREOF, Owner and Hyatt have executed this Agreement as of the day and year first above set forth.

ISLANDIA ASSOCIATES, LTD.,  
a California limited partnership

By: AMGREEN, INC.,  
a California corporation

By

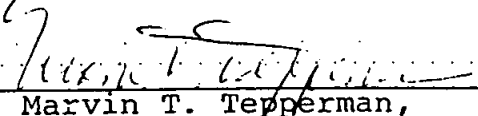
  
Jerry Greenstein,  
Vice President

General Partner

OWNER

CALIFORNIA HYATT CORPORATION,  
a Delaware corporation

By

  
Marvin T. Tepperman,  
Vice President

HYATT

PARCEL 1

That parcel of land and adjoining water area in the City of San Diego, State of California, being a portion of the tidelands and submerged or filled lands of False Bay, also known as Mission Bay, and including any portion of the Pueblo lands of San Diego, according to Map thereof by James Pascoe, a copy of which is on file in the Office of the County Recorder of San Diego County and known as Miscellaneous Map No. 36, described as follows:

Beginning at the Southeast corner of Lot 24 of Block 10 in the Resubdivision of Blocks 7, 8, 10 and a portion of Block 9 and Lot "A" in Inspiration Heights, according to Map thereof No. 1700, filed in the Office of the County Recorder of San Diego County; thence along the Southerly line of said Lot, South  $89^{\circ}55'56''$  West (Record: North  $89^{\circ}59'00''$  West) 25.00 to a point of tangent curve in the boundary of said Lot; thence South  $00^{\circ}04'04''$  East, 2.00 feet to a line which is parallel with and 2.00 feet Southerly at right angles from the Southerly line of said Block 10; thence along said parallel line North  $89^{\circ}55'56''$  East, 249.70 feet; thence North  $05^{\circ}30'02''$  West, 104.06 feet to the United States Coast and Geodetic Survey, Triangulation Station "Old Town"---the Lambert Grid Coordinates California Zone 6 for said Station "Old Town" are X equals 1,712,415.69 and Y equals 213,820.33---said Station "Old Town" being the point of origin for the San Diego City Engineer's Mission Bay Park Coordinate System; thence North 5,160.53 feet and West 16,030.79 feet to Mission Bay Park Coordinates North 5,160.53 feet and West 16,030.79 feet, being also the TRUE POINT OF BEGINNING; thence South  $15^{\circ}55'11''$  West, 675.05 feet to Mission Bay Park Coordinates North 4,511.37 feet and West 16,215.95 feet; thence North  $89^{\circ}23'36''$  West to Mission Bay Park Coordinates North 4,517.60 feet and West 16,898.48 feet; thence North  $08^{\circ}09'38''$  West, 143.45 feet to Mission Bay Park Coordinates North 4,659.60 feet and West 16,918.84 feet; thence North  $57^{\circ}31'13''$  West, 109.37 feet; thence North  $03^{\circ}09'38''$  West, 338.66 feet to the beginning of a tangent 364.56 foot radius curve, concave Easterly; thence Northerly along said curve 226.18 feet through a central angle of  $38^{\circ}09'38''$ ; thence tangent to said curve North  $30^{\circ}00'00''$  East, 139.21 feet to the beginning of a tangent 171.29 foot radius curve, concave Southerly; thence Easterly along said curve 249.34 feet through a central angle of  $83^{\circ}24'14''$ ; thence tangent to said curve South  $66^{\circ}35'46''$  East, 763.14 feet to the TRUE POINT OF BEGINNING.

The above described Parcel 1 contains approximately 346,152 square feet of land area and approximately 408,605 square feet of water area.

PARCEL 2

All that portion of Pueblo Lot 214, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe, a copy of which is on file in the Office of the Recorder of San Diego County and is known as Miscellaneous Map No. 36, described as follows:

Beginning at the Northeasterly corner of abovesaid Parcel 1, said corner being Mission Bay Park Coordinates North 5,160.53 feet and West 16,030.79 feet; thence along the Northerly boundary of said Parcel 1 North  $66^{\circ}35'46''$  West, 746.30 feet; thence North  $23^{\circ}24'14''$  East, 60.00 feet; thence South  $66^{\circ}35'46''$  East, 321.40 feet to the TRUE POINT OF BEGINNING; thence North  $23^{\circ}24'14''$  East, 84.65 feet to a point in a non-tangent

2,006.00 foot radius curve concave Northeasterly, a radial line to said point bears South 35°06'41" West; thence Northwesterly along said curve through an angle of 09°51'14", an arc distance of 345.00 feet; thence tangent to said curve North 50°02'05" West, 157.33 feet; thence South 39°57'55" West, 60.13 feet to the beginning of a tangent 113.00 foot radius curve, concave Easterly; thence along said curve through an angle of 106°33'41", an arc distance of 204.58 feet; thence tangent to said curve South 66°35'46" East, 400.00 feet to the TRUE POINT OF BEGINNING.

The above described Parcel 2 contains approximately 66,136.00 square feet.

RECORDER'S MEMO:  
QUALITY OF RECORD DUE TO  
CONDITION OF ORIGINAL DOCUMENTS

DSB:ar  
6-19-72

PAGE 2 OF 2

EXHIBIT A-1

## STATEMENT OF INCOME

(Short Form)

|                                         |               |    | Current<br>Period |
|-----------------------------------------|---------------|----|-------------------|
| DEPARTMENTAL PROFIT (Loss)              |               |    |                   |
| Rooms                                   | Schedule B- 1 | \$ |                   |
| Food                                    | " B- 2        |    |                   |
| Beverages                               | " B- 2        |    |                   |
| Telephone                               | " B- 3        |    |                   |
| Barber Shop                             | " B- 4        |    |                   |
| Beauty Parlor                           | " B- 5        |    |                   |
| Checkrooms and Washrooms                | " B- 6        |    |                   |
| Cigar and Newsstand                     | " B- 7        |    |                   |
| Fountain and Gift Shop                  | " B- 8        |    |                   |
| Garage--Parking Lot                     | " B- 9        |    |                   |
| Guest Laundry                           | " B-10        |    |                   |
| Swimming Pool--Cabanass--Baths          | " B-11        |    |                   |
| Valet                                   | " B-12        |    |                   |
| Profit from Operated Departments        |               | \$ |                   |
| OTHER INCOME                            | " B-13        |    |                   |
| GROSS OPERATING INCOME                  |               | \$ |                   |
| DEDUCTIONS FROM INCOME                  |               |    |                   |
| Administrative and General Expense      | " B-14        | \$ |                   |
| Advertising and Sales Promotion         | " B-15        |    |                   |
| Heat, Light and Power                   | " B-16        |    |                   |
| Repairs and Maintenance                 | " B-17        |    |                   |
| Total Deductions from Income            |               | \$ |                   |
| HOUSE PROFIT                            |               | \$ |                   |
| STORE RENTALS                           | " B-18        |    |                   |
| GROSS OPERATING PROFIT                  |               | \$ |                   |
| RENT, MUNICIPAL TAXES AND INSURANCE     | " B-19        |    |                   |
| PROFIT BEFORE INTEREST AND DEPRECIATION |               | \$ |                   |
| INTEREST                                | " B-19        |    |                   |
| PROFIT BEFORE DEPRECIATION              |               | \$ |                   |
| DEPRECIATION AND EXPENSE AMORTIZATION   | " B-19        |    |                   |
| NET OPERATING PROFIT (LOSS)             |               | \$ |                   |
| OTHER ADDITIONS AND DEDUCTIONS          | " B-20        |    |                   |
| NET INCOME (Loss)--TO RETAINED EARNINGS |               | \$ |                   |

DESCRIPTION OF LEASED PREMISES

PARCEL 1

That parcel of land and adjoining water area in the City of San Diego, State of California, being a portion of the tidelands and submerged or filled lands of False Bay, also known as Mission Bay, and including any portion of the Pueblo Lands of San Diego, according to Map thereof by James Pascoe, a copy of which is on file in the Office of the County Recorder of San Diego County and known as Miscellaneous Map No. 36, described as follows:

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The above described Parcel 1 contains approximately 346,152 square feet of land area and approximately 403,805 square feet of water area.

PARCEL 2

All that portion of Pueblo Lot 214, in the City of San Diego, County of San Diego, State of California, according to Map thereof made by James Pascoe, a copy of which is on file in the Office of the Recorder of San Diego County and is known as Miscellaneous Map No. 36, described as follows:

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2,006.00 foot radius curve concave Northeasterly, a radial line to said point bears South  $30^{\circ}06'41''$  West; thence Northwesterly along said curve through an angle of  $09^{\circ}51'14''$ , an arc distance of 345.00 feet; thence tangent to said curve North  $50^{\circ}02'05''$  West, 157.33 feet; thence South  $39^{\circ}57'55''$  West, 60.13 feet to the beginning of a tangent 110.00 foot radius curve, concave Easterly; thence along said curve through an angle of  $106^{\circ}33'41''$ , an arc distance of 204.58 feet; thence tangent to said curve South  $66^{\circ}35'46''$  East, 400.00 feet to the TRUE POINT OF BEGINNING.

The above described Parcel 2 contains approximately 65,775.00 square feet.