

DUPLICATE



CITY OF SAN DIEGO

**PERCENTAGE LEASE AND
LICENSE AGREEMENT**

BY AND BETWEEN

**THE CITY OF SAN DIEGO,
A CALIFORNIA MUNICIPAL CORPORATION**

AND

**BRAEMAR PARTNERSHIP,
CATAMARAN PIER AGREEMENT**

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CITY OF SAN DIEGO PERCENTAGE LEASE AND LICENSE AGREEMENT

THIS CITY OF SAN DIEGO PERCENTAGE LEASE AND LICENSE AGREEMENT ("Agreement") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY") and BRAEMAR PARTNERSHIP, a California limited partnership ("BRAEMAR"), to be effective as of DECEMBER 14, 2016 (the "Effective Date"), when signed by the parties and approved by the San Diego City Attorney.

FOR VALUABLE CONSIDERATION, the sufficiency of which is acknowledged, the parties agree as follows:

RECITALS

- A. CITY is the owner of that certain real property ("Lease Premises") consisting of approximately 1.49 acres of land and water located in the City of San Diego, County of San Diego, State of California, adjacent to Catamaran Resort Hotel and Spa and commonly known as the "Catamaran Pier," located in Mission Bay Park, and more particularly described in **Exhibit A: Legal Description of Property**, and **Exhibit B: Aerial Map of the Property**, attached hereto. According to the Record of Survey (ROS) filed on February 28, 2001, in the Book of Records of Survey Maps, with the San Diego County Recorder, at page 16891, the Lease Premises, as surveyed in June 2000 and according to the mean high water line location in June 2000, consists of 0.64 acres of land and 0.85 acres of water.
- B. CITY is the owner of that certain real property ("License Area A") consisting of approximately 0.133 acres of land located in the City of San Diego, County of San Diego, State of California, adjacent to Catamaran Resort Hotel and Spa, located in Mission Bay Park, and more particularly described in **Exhibit A: Legal Description of Property**, and **Exhibit B: Aerial Map of the Property**, attached hereto.
- C. CITY is the owner of that certain real property ("License Area B") consisting of approximately 0.266 acres of land located in the City of San Diego, County of San Diego, State of California, adjacent to Catamaran Resort Hotel and Spa, located in Mission Bay Park, and more particularly described in **Exhibit A: Legal Description of Property**, and **Exhibit B: Aerial Map of the Property**, attached hereto.
- D. CITY is the owner of that certain real property (collectively referred to as "New License Areas") consisting of approximately 0.595 acres of land ("License Area C") and 0.405 acres of land ("License Area D") located in the City of San Diego, County of San Diego, State of California, adjacent to Catamaran Resort Hotel and Spa, located in Mission Bay Park, and more precisely described in **Exhibit C: New License Areas**, attached hereto.
- E. The Lease Premises, License Area A, License Area B, and the New License Areas shall be referred to hereafter collectively as the "Property."
- F. CITY and William D. Evans, the Catamaran Resort Hotel and Spa operator, entered into a

Lease Agreement filed as Document No. 217443 in the Office of the City Clerk on January 5, 1977, (the "Original Lease") for the construction, operation and maintenance of the Lease Premises.

- G. The Original Lease was renewed in 1982, filed as Document No R-256824 in the Office of the City Clerk on July 19, 1982; in 1992 with Braemar Partnership, filed as Document No. RR- 281244-1 in the Office of the City Clerk on December 8, 1992; and in 2004, with BRAEMAR PARTNERSHIP, a California limited partnership, and 9th & A LIMITED PARTNERSHIP, a California limited partnership, filed as Document No. RR-299832 in the Office of the City Clerk on November 15, 2004, (" Braemar Lease").
- H. CITY and BRAEMAR PARTNERSHIP, a California limited partnership, entered into a License Agreement dated November 15, 2004, filed in the Office of the San Diego City Clerk as Document No. RR- 299833 on November 15, 2004, ("Braemar License"), for operation of beach chair, umbrella, boat rentals, and food and beverage service for Catamaran Resort Hotel and Spa guests and the general public, on License Area A.
- I. The Braemar Lease and Braemar License expired on November 30, 2014, and are currently on month-to-month holdover.
- J. CITY and BRAEMAR PARTNERSHIP, a California limited partnership, entered into a Non- Exclusive Use and Occupancy Permit dated August 15, 2013, ("Braemar Permit"), for operation of beach chair, umbrella, complimentary movie screening, and food and beverage service for Catamaran Resort Hotel and Spa guests and the general public, on License Area B.
- K. The Braemar Permit expired on August 16, 2016.
- L. CITY and BRAEMAR have agreed to consolidate the Lease, License and Permit into a single agreement and extend the permit area, which will include the cancellation of the Braemar Permit and the approval of this Agreement for the lease of the Lease Premises and licenses for the License Area A, License Area B, and New License Area for a term of ten (10) years, with one option to renew for an additional five (5) years.
- M. As further set forth in this Agreement, BRAEMAR shall pay to CITY as rent Ten Percent (10%) of the gross revenue attributable to the Property for BRAEMAR's use and possession of the Property and shall invest at least two percent (2%) of the annual gross income attributable to the Property to the ongoing capital investments that would maintain and increase the value of the Property, the improvements thereon, and Mission Bay Park in general to the benefit of tourists, residents, and the CITY by improved utilization of the Property.

SECTION 1: COUNCIL AUTHORIZATION; PROPERTY; USES

- 1.1 City Council Action Required. BRAEMAR acknowledges and agrees that this Agreement is expressly conditioned on the San Diego City Council's (the "City Council's") prior authorization ("Council Authorization"), which may or may not be granted in the City Council's sole discretion. CITY shall not be liable or obligated for any burden or loss, financial or otherwise, incurred by BRAEMAR as a result of the City Council's failure to grant the Council Authorization.

BRAEMAR's WAIVER. BRAEMAR EXPRESSLY WAIVES ANY CLAIM AGAINST CITY AND ITS ELECTED OFFICIALS, OFFICERS, EMPLOYEES, REPRESENTATIVES AND AGENTS FOR ANY BURDEN, EXPENSE OR LOSS WHICH BRAEMAR INCURS AS A RESULT OF THE CITY COUNCIL'S FAILURE TO GRANT THE COUNCIL AUTHORIZATION.

- 1.2 Lease Premises. CITY leases to BRAEMAR and BRAEMAR leases from CITY (the "Lease") all of that CITY-owned real property (the "Lease Premises") located adjacent to 3999 Mission Boulevard, San Diego, California 92109, commonly known as the "Catamaran Pier," consisting of approximately 0.64 acres of land and 0.85 acres of water in Mission Bay Park and more particularly described in **Exhibit A: Legal Description of Property**, and **Exhibit B: Aerial Map of the Property**, attached hereto.
- 1.3 Supersedes Prior Agreements. Upon the Effective Date and, subject to the approval and authorization by the City Council, CITY and BRAEMAR hereby terminate the Braemar Lease, Braemar License and Braemar Permit as of the Effective Date of this Agreement. It is mutually agreed that this Agreement shall supersede any and all prior agreements between the parties, and their predecessors in interest, related to all or any portion of the Lease Premises, License Area A and License Area B, including that certain Braemar Lease, that certain Braemar License, and that certain Braemar Permit. The Braemar Lease, Braemar License and Braemar Permit shall be of no further force or effect except as to any rentals and fees that may have accrued thereunder, and any rights and remedies accrued or granted thereunder and which by their nature or by agreement survive such termination.
- 1.4 Allowed Uses on the Lease Premises. BRAEMAR may only use the Lease Premises for the following purposes (the "Allowed Uses"): (a) the operation and maintenance of a docking facility for the temporary berthing of boats by the general public and patrons of the Catamaran Resort Hotel and Spa; (b) for storage and rental of small boats, watercraft, and bicycles to the general public and patrons of the Catamaran Resort Hotel and Spa; (c) operation of a beach chair, umbrella and boat rental concession serving the general public and patrons of the Catamaran Resort Hotel and Spa; (d) sale of food and non-alcoholic beverages from the existing stand on the Lease Premises to the general public and patrons of the Catamaran Resort Hotel and Spa; and (e) for the storage and mooring of the sight-seeing and excursion boats operated by BH Partnership, d.b.a. Bahia Resort Hotel on the sides of the pier on the Lease Premises, all in compliance with all laws, rules and regulations of competent governmental authority. BRAEMAR is not allowed to use or maintain the Lease Premises for any other purpose whatsoever without CITY's prior written consent in each instance.

1.5 Non-exclusive License. CITY grants to BRAEMAR the non-exclusive license ("License"), for the term of this Agreement, to utilize the City-owned property adjacent to the Lease Premises comprised of License Area A, License Area B and the New License Areas (hereafter referred to collectively as the "License Area") for the benefit of the general public and for patrons of the Catamaran Resort Hotel and Spa. The License Area is more specifically described in **Exhibit A: Legal Description of Property**, and **Exhibit B: Aerial Map of the Property**, attached hereto.

1.5.1 Accessory Uses. The License Area shall be utilized for uses that are compatible and accessory to the Allowed Uses (the "Accessory Uses"), provided such Accessory Uses are not, in CITY's sole discretion, inconsistent or incompatible with the public's use of such City-owned property. Accessory Uses of License Area should include the following:

1.5.1.1 Setting-out and maintaining beach chairs, umbrellas and beach volleyball nets for complimentary use on a first-come, first-served basis by Catamaran Resort Hotel guests and members of the general public, complimentary movie screening, and food and non-alcoholic beverage service for the general public and patrons of the Catamaran Resort Hotel and Spa and for other related and incidental purposes as may be first approved in writing by CITY;

1.5.1.2 Displaying two CITY- approved signs at the north-east and north-west boundary of the License Area stating precisely the following: "BEACH OPEN TO THE PUBLIC. BEACH CHAIRS AND UMBRELLAS ARE COMPLIMENTARY AND AVAILABLE FOR PUBLIC USE". The signs shall be at least 12" x 24" in dimension, and contain sufficiently large and clear font to communicate to passers-by and the public that the License Area and the contents therein are open for public use and enjoyment. No other signs, banners, pennants, flags, posters, decorations, marquees, awnings or similar devices or advertising are allowed without CITY's prior written consent;

1.5.1.3 Accessory Uses are allowed between 6:00 A.M. and 10:00 P.M. every day. All chairs, umbrellas, and other personal property of BRAEMAR shall be removed from the License Area no later than 10:00 P.M. daily;

1.5.1.4 BRAEMAR shall have no right to limit, exclude, or evict any person or member of the general public from using or occupying the License Area or any portion thereof.

1.5.2 License Not a Lease. Notwithstanding any provision of this Agreement to the contrary, the License Area is not part of the Lease Premises and the license to use the License Area is not a lease. The License is a license to use CITY-owned property, and may be revoked at will by CITY, in its sole discretion, upon sixty

(60) days prior written notice to BRAEMAR. CITY shall not be obligated for any loss, financial or otherwise, which may be incurred by BRAEMAR as a result of such revocation or the termination of the License. BRAEMAR expressly waives any claim for expense or loss which BRAEMAR might incur as a result of CITY's revocation or termination of the License. If the License is revoked, the Lease of this Agreement shall continue in full force and effect.

- 1.5.3 No Holdover. If BRAEMAR continues to occupy the License Area after the expiration or earlier termination of the License, such occupancy shall neither constitute a renewal or extension of the License, nor give BRAEMAR any rights in or to the License Area. If BRAEMAR continues to occupy the License Area after the expiration or earlier termination of the License, CITY may demand and receive from BRAEMAR rent for the License Area calculated on a per diem basis using up to two (2) times the then rental rate of the License Area. CITY's acceptance of such rent shall neither constitute a renewal or extension of the License, nor give BRAEMAR any rights in or to the License Area.
- 1.5.4 Terms Apply to License Area. All terms and conditions of this Agreement with regard to the Lease that do not conflict with the terms and conditions of this Section 1.5 regarding the License Area shall apply to BRAEMAR's use and occupancy of the License Area.
- 1.6 Dedicated Public Park. BRAEMAR acknowledges that the Property is part of a dedicated public park.
- 1.7 Mission Bay Park Master Plan. This Agreement is subject to the City of San Diego Mission Bay Park Master Plan Update, adopted August 2, 1994, amended July 9, 2002, and as it may be amended from time to time.
- 1.8 Local Coastal Program. If a local coastal program ("Local Coastal Program") is adopted for the Mission Bay/Mission Beach community, and if the Local Coastal Program provides for the collection of a traffic impact mitigation fee from commercial lessees in the Mission Bay/Mission Beach community to fund all or a portion of the cost of a beach shuttle or other substantially similar public-access improvements, BRAEMAR shall contribute its fair and equitable share, as calculated pursuant to the Local Coastal Program, to such a traffic impact mitigation program, provided the amount payable by BRAEMAR shall be reasonable and shall not exceed the amount BRAEMAR 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/Mission Beach Community. **This provision shall not be altered or amended without the prior written approval of the California Coastal Commission.**
- 1.9 Business Objective. BRAEMAR shall diligently and continually conduct its business on the Property to reasonably maximize "Gross Revenue," as defined by this Agreement. -
- 1.10 Superior Interests. This Agreement is subject to all liens, encumbrances, covenants,

conditions, restrictions, reservations, contracts, permits and licenses, easements, and rights-of-way pertaining to the Property, whether or not of record. BRAEMAR shall obtain all licenses, permits and agreements from such third parties as may be or become necessary or reasonably advisable to allow its use of the Property, relative to any such superior interest. If BRAEMAR's use of the Property is or becomes inconsistent or incompatible with a preexisting, superior interest, BRAEMAR shall take such actions and pay all costs and expenses necessary to remove such inconsistency or incompatibility to the satisfaction of the holder of the superior interest.

- 1.11 Governmental Approvals. By entering into this Agreement, neither CITY nor the City Council is obligating itself to BRAEMAR or to any governmental agent, board, commission, or agency with regard to any other discretionary action relating to BRAEMAR's occupancy, use, development, maintenance or restoration of the Property. Discretionary action includes without limitation re-zonings, variances, environmental clearances and all other required governmental approvals. CITY makes no representation or warranty regarding review or approval of BRAEMAR's development or redevelopment plans for the Property, and failure of the CITY or City Council to approve any plans or grant any required permits for development or redevelopment shall not give rise to any claim, liability, obligation, or cause of action related to this Agreement.
- 1.12 CITY's Consent, Approval. CITY's consent or approval under this Agreement shall mean the written consent or approval of the Mayor of San Diego, or his or her designee ("Mayor"), unless otherwise expressly provided. CITY's discretionary acts hereunder shall be made in the Mayor's discretion, unless otherwise expressly provided.
- 1.13 Quiet Possession. BRAEMAR, performing the covenants and agreements in this Agreement, shall at all times during the term of this Agreement peaceably and quietly have, hold, and enjoy the Property. If BRAEMAR is temporarily dispossessed through action or claim of a title superior to CITY's, this Agreement shall not be voidable nor shall CITY be liable to BRAEMAR for any loss or resulting damages.
- 1.14 Reservation of Rights.
 - 1.14.1 Mineral Rights. CITY reserves all rights, title and interest in and to any and all subsurface natural gas, oil, minerals and water on or within the Property.
 - 1.14.2 Easements. CITY reserves the right to grant, establish and use easements and rights-of-way over, under, along, across and through the Property for utilities, thoroughfares or access as it deems advisable for the public good.
 - 1.14.3 Repairs. CITY may at all reasonable times enter the Property for the purpose of making repairs to or developing municipal resources and municipal services.
 - 1.14.4 Noninterference. CITY shall not unreasonably interfere with BRAEMAR's use of the Lease Premises. CITY shall pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.

- 1.15 Competent Management. BRAEMAR shall provide competent management of the Allowed Uses and Accessory Uses to CITY's reasonable satisfaction. "Competent management" shall mean management practices generally considered acceptable within BRAEMAR's industry for the management and operation of activities substantially similar to the Allowed Uses and Accessory Uses and in compliance with all laws, rules and regulations of competent governmental authority, and in a fiscally responsible manner. "Fiscally responsible manner" shall mean in accordance with generally accepted accounting principles consistently applied and absent of financial malfeasance.
- 1.16 Security. BRAEMAR shall at all times provide, at BRAEMAR's sole cost and expense, security measures to protect persons and property on the Property, including without limitation maintaining a plan for adequate patrol of all areas of the Property with the goal of preserving order and preventing theft, vandalism and other improper or unlawful use of the Property or any of the facilities thereon.
- 1.17 Public Use; No Discrimination. BRAEMAR shall allow full and continuous public use of the Property for the benefit of the public. BRAEMAR shall make all facilities and services on the Property available to the public without unlawful discrimination, in accordance with Section 11.4 hereof.
- 1.18 Protection of Environment. BRAEMAR shall, at BRAEMAR's sole cost and expense:
- (a) Take all reasonable precautions to prevent pollution or littering of the atmosphere, land and water on, from, in or about the Property, including without limitation the discharge of petroleum products, directly or indirectly into Mission Bay;
 - (b) Maintain noise levels on the Property to prevent a nuisance to persons and property in and in the vicinity of Mission Bay Park and the Property; and
- 1.19 Operating Plan – Lifeguard Division Approval. At least sixty (60) days prior to each October 1 during the term of this Agreement, BRAEMAR shall, at its sole cost and expense, submit to CITY a written, annual operating plan describing how BRAEMAR intends to conduct each of the Allowed Uses in the waters of Mission Bay for the following calendar year beginning in October. Each such operating plan shall be in form and contain content reasonably satisfactory to CITY. Except as required by law, BRAEMAR shall not make any changes to an existing CITY-approved operating plan without CITY's prior written approval in each instance, which approval may not be unreasonably withheld or delayed. BRAEMAR shall conduct each Allowed Use in the waters of Mission Bay in accordance with its most recently CITY-approved operating plan. CITY acknowledges that BRAEMAR has submitted an operating plan for the first Agreement year, which has been approved by the CITY.

SECTION 2: TERM

- 2.1 Term. The term of this Agreement ("Term") shall be ten (10) years, commencing on the Effective Date. If the Effective Date is other than the first day of a calendar month, the partial month after the Effective Date shall be included in the following full calendar month to comprise the first month of the Term so that the second month of the Term will start on the first day of a calendar month. Agreement year ("Agreement Year") as used in this Agreement shall mean each twelve (12)-month period during the Term, calculated from the Effective Date.
- 2.2 Holdover. Any holding over by BRAEMAR after the expiration or earlier termination of this Agreement shall not be considered a renewal or extension of this Agreement. BRAEMAR's occupancy of the Lease Premises after the expiration or earlier termination of this Agreement shall constitute a month-to-month tenancy at will, and all other terms and conditions of this Agreement shall continue in full force and effect, except that CITY may then demand and receive from BRAEMAR rent up to one hundred twenty-five percent (125%) of the then fair market rent for the Premises' highest and best use.
- 2.3 Right to Extend. Provided that BRAEMAR is not in default of this Agreement and has completed the Improvement Obligation of the Lease Premises, as referenced in Section 9.5 below, during the last thirty-six months of the Term, CITY will extend the Term for an additional five (5) years from the end of the Term, subject to all original agreements, consideration, covenants, and conditions, except that the rent shall be adjusted pursuant to Section 4.5 below. To exercise this right, BRAEMAR must give CITY written notice on or before 180 days from the expiration of the Term of the Agreement.
- 2.4 Surrender of Property. Upon the expiration or earlier termination of this Agreement, BRAEMAR shall vacate the Lease Premises and License Area and surrender them to CITY free and clear of all liens and encumbrances, and in a condition reasonably satisfactory to CITY. After the expiration or earlier termination of this Agreement, BRAEMAR shall execute and deliver to CITY a valid and recordable quitclaim deed covering all of the Property. If BRAEMAR fails or refuses to deliver the required quitclaim deed, CITY may prepare and record a notice reciting BRAEMAR's failure to perform this Agreement obligation, and the notice shall be deemed conclusive evidence of the termination of this Agreement and all of BRAEMAR's rights in and to the Property.

SECTION 3: OPERATIONS ON THE PROPERTY

- 3.1 Operation of the Property. BRAEMAR shall conduct its business and operate the Lease Premises and License Area continuously throughout the Term. Based on the seasonal nature of certain Allowed Uses and certain Accessory Uses, not all uses will be operated year-round. BRAEMAR shall diligently furnish services to the public in a creditable manner in conformity with all applicable laws, rules and regulations. BRAEMAR shall ensure that the type and quality of food-handling services furnished by BRAEMAR

qualifies for the conditions and requirements of the "A Card" issued by the County of San Diego Department of Environmental Health to operators of food-handling establishments.

- 3.2 Trash and Refuse. BRAEMAR shall, at its sole cost and expense, provide containers on the Property to receive trash and refuse generated on the Property. BRAEMAR shall ensure that such containers are covered and emptied regularly enough to prevent them from overflowing or creating unhealthful, unsightly or unsanitary conditions. BRAEMAR shall ensure that the contents of the containers are disposed of at authorized landfills or other garbage reception areas as provided under applicable law at the time of collection.
- 3.3 Damaged Equipment. BRAEMAR shall salvage, within twenty-four (24) hours, any property, real or personal, of BRAEMAR's declared by any competent authority (including without limitation CITY, as lessor under this Agreement) 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 on the Property, regardless of ownership. CITY may require that any boats not kept in a clean and operable condition, as determined by CITY in its sole discretion, be removed from the Property.
- 3.4 Compliance with Living on Board Vessels Regulation. BRAEMAR shall ensure the compliance with San Diego Municipal Code section 63.25.71(a), as amended from time to time, in connection with BRAEMAR's use and occupancy of the Property.
- 3.5 Boat Rentals. For purposes of this Agreement, the term "vessels" includes 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. BRAEMAR may rent vessels to the general public subject to CITY's prior written approval as to the number and type of vessels available for rent. A list of the approved number and type of vessels available for rent is attached hereto as **Exhibit D: Approved Vessels for Rent**. Upon notice to BRAEMAR, CITY may reasonably change the number and type of vessels BRAEMAR may rent. 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 BRAEMAR or its sublessee, approved pursuant to this Lease, 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 all times when BRAEMAR is renting a vessel or vessels, BRAEMAR or its sublessee, approved pursuant to this Lease, shall have at least one operational chase boat and staff available to operate the chase boat on the waters of Mission Bay. Unless otherwise allowed, no rental vessel may be stored on public property outside the Lease Premises. CITY may immediately terminate any of BRAEMAR's or its sublessee's, approved pursuant to this Lease, rental activities which are not in compliance with this Agreement or boating laws and regulations.

SECTION 4: RENT

- 4.1 Rent. BRAEMAR shall pay to CITY rent on an Agreement-Year basis in an amount equal to the greater of the “Minimum Annual Rent” (defined below) and the “Percentage Rent” (defined below and payable monthly in arrears) paid during each Agreement Year. If the total Percentage Rent payable during an Agreement Year is less than the Minimum Annual Rent for that Agreement Year, BRAEMAR shall make a lump-sum payment of the difference to CITY when the Percentage Rent for the last month of the Agreement Year is payable. Within thirty (30) days after the end of each month during the Term, BRAEMAR shall deliver to CITY a schedule of BRAEMAR’s “Gross Revenue” (defined below) for the month, together with a statement of the Percentage Rent payable for that month, prepared using generally accepted accounting principles consistently applied, with revenue categorized by source, and deductions categorized by type. Concurrently with the delivery of such schedule and statement, BRAEMAR shall pay to CITY the Percentage Rent for that month.
- 4.2 Gross Revenue. “Gross Revenue” shall mean all revenue derived from all CITY-approved uses of the Lease Premises and License Area, including without limitation all revenue derived from sublessee’s or licensees. Possessory interest taxes or other property taxes shall not be deducted in computing Gross Revenue. Notwithstanding the foregoing, Gross Revenue shall not include: (a) federal, state or municipal taxes collected from consumers (regardless of whether such amount is stated to the consumer as a separate charge) and paid periodically by BRAEMAR to a governmental agency and accompanied by a tax return or statement as required by law; (b) refunds for goods returned for resale on the Lease Premises and License Area or refunds of deposits; (c) boat rentals or fares in conjunction with the operation of any excursion, sightseeing or shuttle boat operated by BH Partnership, a California limited partnership pursuant to the City of San Diego Percentage Lease, filed as Document No. RR-308013 in the office of the City Clerk (e.g., operation of the “Bahia Belle” and “William D. Evans”). BRAEMAR shall clearly indicate the amount of all such taxes and refunds on its books and records.
- 4.3 Minimum Annual Rent. The minimum annual rent (“Minimum Annual Rent”) for the first five (5) Agreement Years shall be Forty One Thousand Dollars (\$41,000) per Agreement Year.
- 4.3.1 Minimum Annual Rent Adjustment. Effective as of the first day of the sixth (6th) Agreement Year and on the first day of the eleventh (11th) Agreement Year, if the Term is extended pursuant to Section 2.3, Right to Extend, the Minimum Annual Rent shall be recalculated to be equal to eighty percent (80%) of the annual average of all rents paid and payable (i.e., “earned”) during the preceding three (3) Agreement Years, including without limitation the rent from Accessory Uses. Notwithstanding the foregoing, no such recalculation of the Minimum Annual Rent shall reduce the Minimum Annual Rent in effect immediately prior to the recalculation. BRAEMAR acknowledges that such adjustments shall be calculated by CITY after receipt of all applicable Gross Revenue schedules and Percentage Rent statements. Until such calculations are completed, BRAEMAR

shall continue paying the most recent Minimum Annual Rent. BRAEMAR further acknowledges that any adjustment shall apply retroactively and shall be payable by BRAEMAR as if in effect on the first day of the Agreement Year in which the adjustment is made. Within thirty (30) days after CITY notifies BRAEMAR of the new Minimum Annual Rent, BRAEMAR shall pay to CITY any and all rent deficiencies between the previous Minimum Annual Rent and the retroactive, adjusted Minimum Annual Rent.

- 4.4 Percentage Rent. "Percentage Rent" shall mean rent in an amount equal to the sum of the percentages of Gross Revenue derived from certain designated business activities, applied as follows:

<u>Percentage of Gross Revenue</u>	<u>Business Activities</u>
Ten Percent (10%)	All operations conducted on the Lease Premises and License Area.

If BRAEMAR requests a use of the Lease Premises or License Area in addition to the Allowed Uses or Accessory Uses, CITY and BRAEMAR shall determine by agreement the Percentage Rent calculation applicable to such use prior to CITY's approval of the use. Without express, written consent to the proposed use and an express written agreement regarding the applicable Percentage Rent for said requested use, the requested use shall be deemed an unauthorized use and all Gross Revenue therefrom shall be payable to CITY.

- 4.5 Percentage Rent Adjustment. In the event the Term is extended pursuant to Section 2.3. Right to extend, CITY may, but shall not be obligated to, adjust the Percentage Rent on the first day the eleventh (11th) Agreement Year to reflect the then-current fair market rent for the Lease Premises and License Area and the Allowed Uses and Accessory Uses, as evidenced by then-recent leases and licenses for similar premises similarly improved, operated and located within the region comprised of Ventura County, Los Angeles County, Orange County, and San Diego County, California. The new Percentage Rent shall be determined by mutual consent or through appraisal as hereinafter set forth. In the event that such adjustment has not been arrived at by mutual consent by ninety (90) days prior to the start of the applicable Agreement Year, then the parties hereto will have the Property appraised under the terms hereinafter set forth.

In the event the parties do not agree upon the amount of adjustment to said percentage rates as provided for in the previous paragraph, then the adjustment shall be determined by a qualified professional independent real estate appraiser selected by mutual consent of the parties to this Agreement from the list of appraisers approved by CITY within ten (10) days of receipt of the list of appraisers. CITY and BRAEMAR agree to equally share the cost of the mutually-selected appraiser. In the event the parties do not reach agreement as to selection of a mutually-acceptable appraiser, then CITY and BRAEMAR 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 BRAEMAR'S percentage rate

adjustment. In the event 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 BRAEMAR with prior notice thereof to the other party. In the event that 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. Said third appraiser, however appointed, 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 BRAEMAR agree to equally share the cost of the third appraiser, however appointed. CITY and BRAEMAR 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 categories set forth in this Agreement, the appraiser shall consider CITY'S interest in the property as a fee simple absolute estate, and as vacant and available on the open market for the authorized purposes of this Agreement 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 communities as listed above, if available.

The new Percentage Rent shall be effective and due as of the first day of the applicable Agreement Year, regardless of when the appraisal is completed. In the event the appraisal is not completed in time to permit the percentage adjustment to be made upon the applicable commencement of the appropriate Agreement Year of adjustment, BRAEMAR agrees to continue to pay rent in accordance with the then-existing Agreement rates, and the adjustment, when determined, will be retroactive to said effective date of rental adjustment as hereinabove established. If any Percentage Rent deficiencies are created by the adjustment process set forth in this section, BRAEMAR shall pay to CITY any and all such rent deficiencies within ninety (90) days after CITY's notice of the Percentage Rent adjustment.

In no event shall the adjusted percentage rate be less than the percentage rate in existence at the time of the adjustment.

- 4.6 Unauthorized-Use Charge. BRAEMAR shall pay CITY one hundred (100%) of the gross receipts from any use of the Lease Premises and License Area that is not allowed by this Agreement, regardless of any related penalties charged BRAEMAR by competent governmental authorities. Such unauthorized use charge shall be payable to CITY within thirty (30) days after BRAEMAR receives such gross receipts. No unauthorized use charges shall satisfy or credit against any other rent obligations of BRAEMAR under this Agreement. The unauthorized use charge shall otherwise be considered "rent" under this Agreement, and shall be subject to all costs and penalties for delinquent payments hereunder. The existence of such unauthorized use charge and CITY's acceptance thereof shall not constitute authorization for the use in question, and shall not waive any of CITY's rights under this Agreement.

- 4.7 Time and Place of Payment. All rent payments shall be made payable to “City Treasurer” and mailed to:

The Office of the City Treasurer
City of San Diego
P.O. Box 129030
San Diego, California 92112-9030

or hand-delivered to:

The Office of the City Treasurer
Civic Center Plaza
1200 Third Avenue, First Floor
San Diego, California 92101

CITY may change the place of payment at any time upon thirty (30) days written notice to BRAEMAR. Mailed 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 received only upon actual receipt.

- 4.8 Records. BRAEMAR shall keep or cause to be kept true, accurate and complete books, records and accounts of all financial transactions in the operation of BRAEMAR’s business and all other business activities conducted on the Lease Premises and License Area, and all financial transactions resulting from BRAEMAR’s use of the Lease Premises and License Area. The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices or other documents (which may be in electronic form) as necessary to allow CITY to easily determine Gross Revenue. All retail sales or charges shall 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. Such registers or other devices shall record sales totals and other transaction numbers and sales details, and shall not be re-settable. Registered totals shall be read and recorded at the beginning and end of each business day. All sales and charges may be recorded by a system other than cash registers or other comparable devices, provided such system is approved by CITY prior to commencing its use.

- 4.8.1 Financial Statements. Within sixty (60) days after the end of each Agreement Year, BRAEMAR shall, at its sole cost and expense, deliver to CITY a statement of annual Gross Revenue for the Agreement Year, prepared using generally accepted accounting principles consistently applied, with revenue categorized by source, and deductions categorized by type. Each such statement shall be signed by an officer, general partner or principal of BRAEMAR attesting to the accuracy and completeness thereof, which shall be legally binding upon BRAEMAR. BRAEMAR shall comply with all reasonable requests by CITY to modify the form and content of such financial statements. BRAEMAR shall provide such additional information reasonably requested by CITY regarding the operation of BRAEMAR’s business and all other business activities conducted on the Lease

Premises and License Area, and all financial transactions resulting from BRAEMAR's use of the Lease Premises and License Area. If BRAEMAR submits any statements or information clearly marked confidential or proprietary, CITY shall protect and treat the same with confidentiality to the extent permitted by law and in conformity with the California Public Records Act ("Act"). Should BRAEMAR request confidentiality and non-disclosure regarding any statement or information, BRAEMAR shall provide CITY with specific and detailed legal grounds, including any applicable case law, upon which CITY may rely for withholding any information in the event CITY receives a request under the Act. CITY shall determine, in its sole discretion, whether information provided to CITY by BRAEMAR pursuant to this Agreement is or is not a public record subject to disclosure under the Act. In the event CITY elects to withhold any requested information based on BRAEMAR's request to withhold such requested information, BRAEMAR shall defend, at BRAEMAR's sole expense, any legal actions or challenges seeking to obtain from CITY any information requested under the Act that CITY may have withheld at BRAEMAR's request. Furthermore, BRAEMAR shall release, indemnify, and hold CITY, and its elected officials, officers and employees, harmless for or from any claim or liability, and defend any action brought against CITY, resulting from CITY's disclosure or non-disclosure of any information requested pursuant to the Act.

4.8.2 BRAEMAR's Waiver. BRAEMAR EXPRESSLY WAIVES ANY CLAIM AGAINST CITY AND ITS ELECTED OFFICIALS, OFFICERS, EMPLOYEES, REPRESENTATIVES AND AGENTS FOR ANY BURDEN, EXPENSE OR LOSS THAT BRAEMAR INCURS AS A RESULT OF CITY'S DISCLOSURE OR NON-DISCLOSURE OF BRAEMAR INFORMATION REQUESTED PURSUANT TO THE CALIFORNIA PUBLIC RECORDS ACT.

4.8.3 CITY's Right to Inspect and Audit. BRAEMAR shall keep all of its books of account, records and supporting documentation throughout the Term, including the extension of the Term pursuant to Section 2.3 above, plus five (5) years. BRAEMAR shall make such books, records and documentation available for inspection and audit by CITY in one location within the County of San Diego. BRAEMAR shall maintain separate books and records related to BRAEMAR's use of the Lease Premises and License Area. Upon reasonable prior notice, CITY may inspect and audit the operation of BRAEMAR's business and all other business activities conducted on the Lease Premises and License Area, and all financial transactions resulting from BRAEMAR's use of the Lease Premises and License Area, as CITY may deem necessary, in its sole discretion, to protect CITY's rights under this Agreement. If required by competent governmental authority, BRAEMAR shall promptly deliver to CITY, at CITY's reasonable request and at BRAEMAR's sole cost and expense, any and all data reasonably needed to fully comply with such authority's requirements related to the operation of BRAEMAR's business and all other business activities conducted on the Lease Premises and License Area, and all financial transactions resulting from BRAEMAR's use of the Lease Premises and License Area. Notwithstanding

anything to the contrary contained herein, CITY's right to audit the books and operations shall expire for each Agreement Year on the date five (5) years from the end of that Agreement Year.

4.8.4 Audit Cost. The full cost of each CITY audit shall be borne by CITY, unless one or both of the following conditions exists, in which case BRAEMAR shall reimburse CITY for all costs of the audit:

- (a) For any given Agreement Year, if an audit reveals an underpayment of rent of more than five percent (5%), calculated as the difference between the rent reported as payable by BRAEMAR and the rent payable as determined by the audit; or
- (b) BRAEMAR failed to maintain true, accurate and complete books, records, accounts and supporting source documents as required by this Agreement.

Any rent deficiency determined by the audit shall be delinquent rent, subject to all penalties and remedies provided to CITY for delinquent rent under this Agreement. CITY shall credit any overpayment determined by the audit, without interest, against future rents due under this Agreement. If no future rents are then due under this Agreement, CITY shall refund to BRAEMAR any overpayment determined by the audit, without interest, within sixty (60) days after CITY's certification of the audit.

4.9 Delinquent Payments. If BRAEMAR fails to make any payment under this Agreement when due, BRAEMAR shall pay to CITY, in addition to the unpaid amount, five percent (5%) of the unpaid amount, which shall be additional rent. If any amount of such payment remains unpaid after fifteen (15) days past due, BRAEMAR shall pay to CITY an additional five percent (5%) of the unpaid amount [being a total of ten percent (10%)], which shall be additional rent. Notwithstanding the foregoing, in no event shall the charge for late payment of rent be less than Twenty-Five Dollars (\$25). After thirty (30) days past due, unpaid amounts due CITY under this Agreement may be referred to the San Diego City Treasurer for collection, and shall be subject to San Diego Municipal Code section 22.1707, as may be amended from time to time. BRAEMAR shall pay to CITY any collection-referral fee and all other fees and charges plus interest as may then be charged by the San Diego City Treasurer under authority of the San Diego Municipal Code. Acceptance of late charges and any portion of the late payment by CITY shall neither constitute a waiver of BRAEMAR's breach or default with respect to the late payment nor prevent CITY from exercising any other rights and remedies available at law or in equity. As required by law, BRAEMAR is hereby notified that a negative credit report may be submitted to a credit reporting agency if amounts due CITY are not paid when due.

SECTION 5: ENCUMBRANCES; ASSIGNMENT & SUBLETTING

- 5.1 Encumbrances. No encumbrances of the Lease Premises or License Area will be permitted without the prior written consent of the CITY.
- 5.2 Assignment and Subletting. Assignment and Subletting. BRAEMAR shall not assign this Agreement or any interest in this Agreement, and shall not sublet the Lease Premises or any part of the Lease Premises or sublicense the License Area or any part of the License Area, or grant any license or other right or appurtenant privilege to the Lease Premises or License Area, or permit any other person, except BRAEMAR's employees, agents and guests, to use or occupy the Lease Premises and License Area or any part of the Lease Premises and License Area without CITY's prior written consent. Any such consent shall not be deemed consent to any subsequent assignment, subletting, sublicense, occupation or use by another person. Neither this Agreement nor any interest in it shall be assignable, as to BRAEMAR's interest, by operation of law, without CITY's written consent. "Assignment" shall include without limitation the transfer of any interest in this Agreement and, if BRAEMAR is other than a natural person, the transfer of a controlling interest in BRAEMAR or any of BRAEMAR's general partners, principals or controlling shareholders. Provided, however, that "Assignment" shall not include an "Allowed Assignment," so long as said person or individual has made a full and complete disclosure of his or her name and identity prior to the Effective Date, defined as (i) any transfer of any ownership interest in BRAEMAR among existing partners of BRAEMAR or the spouse of any existing partner of BRAEMAR at the time of such transfer; (ii) any transfer of any ownership interest in BRAEMAR upon the death or disability of any partner to any first- or second-generation (one degree or two degrees of sanguinity) descendant of Anne Ledford Evans who, in the case of a first-generation descendant of Anne Ledford Evans, is an existing partner of BRAEMAR at the time of such transfer or the spouse of such person, or a trust created for the benefit of any such individual(s); or (iii) the transfer of this Lease to any entity where a majority-in-interest of the ownership is held by Anne Ledford Evans, any descendant within one degree or two degrees of sanguinity of Anne Ledford Evans and, who, in the case of a first-generation descendant of Anne Ledford Evans, is an existing partner of BRAEMAR at the time of such transfer, or who, in the case of a second-generation descendant of Anne Ledford Evans, is also a first-generation descendant of an existing partner of BRAEMAR at the time of such transfer, and (or) a trust or trusts created for the benefit of any such individuals.
- 5.2.1 Consent Conditions. CITY may require, as a condition to consenting to any encumbrance, assignment, sublease, sublicense or other grant of rights related to the use and occupancy of the Lease Premises and License Area, that this Agreement be revised to comply with then-current CITY lease and license provisions, and that the sublease, sublicense or other grant of rights be subject and subordinate to each and every provision of this Agreement.
- 5.2.2 Charter Section 225. Pursuant to San Diego City Charter section 225, BRAEMAR and each of its subtenants, sublicensees and assignees shall make a full and complete disclosure of the name and identity of any and all persons directly or

indirectly involved or interested in this Agreement, and in any sublease, sublicense or assignment, and the precise nature of all interests of all such persons. Every person or entity proposed to have an interest in this Agreement must be reviewed and approved by CITY, in its sole discretion.

5.3 Additional Consideration to CITY. In the event of an Assignment (as defined in Section 5.2); in the event of a subletting of the majority portion of the leasehold; in the event of a sublicense of the majority of the License; or in the event of a refinancing creating an encumbrance against the leasehold, BRAEMAR shall pay to CITY two percent (2%) of the gross amount paid for the leasehold in connection with an approved Assignment of the Agreement, two percent (2%) of any amount paid BRAEMAR in consideration of a sublease of all or a majority portion of the leasehold, two percent (2%) of any amount paid BRAEMAR in consideration of a sublicense or all or a majority portion of the License, or two percent (2%) of the amount of any new loan or encumbrance against the property over and above the amount of the encumbrance then in place plus, if applicable, the cost of the new improvements constructed on the Lease Premises or License Area as required or allowed under this Agreement. 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, less the amount listed in BRAEMAR'S most recent federal tax return as the current depreciated value of the improvements upon the Lease Premises and License Area. Prior to CITY'S consent to any assignment, majority subletting or sublicense, or refinancing, BRAEMAR shall deliver to CITY a written statement of all sums due and owing to CITY from BRAEMAR pursuant to the provisions of this paragraph, together with an acknowledgment from the proposed assignee, sublessee, sublicensee, 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, a sublicense, or a refinancing. For majority subleases or sublicenses, such additional consideration shall be payable to CITY when accrued regardless of actual receipt by BRAEMAR. Any assignment, subletting, sublicense, 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 Allowed Assignment as defined in Section 5.2, Assignment and Subletting;
- (b) such other assignment deemed by CITY, in its sole reasonable discretion, not to materially affect the legal and equitable ownership interests in the leasehold or license, such as a change in the legal or fictitious name of the BRAEMAR without any other change in the equity in, beneficial use of, or legal title to, the leasehold or license as an asset or the income produced thereby.

SECTION 6: DEFAULT AND REMEDIES

6.1 Default. BRAEMAR shall be in default of this Agreement if any of the following occurs:

- (a) BRAEMAR fails to make any payment required under this Agreement when due and fails to cure the breach within five (5) days following written notice thereof from CITY;
- (b) BRAEMAR breaches any of its obligations under this Agreement, other than those requiring payment to CITY, and fails to cure the breach within thirty (30) days following written notice thereof from CITY, or if not curable within thirty (30) days, fails to commence to cure the breach within thirty (30) days and diligently pursue the cure to completion;
- (c) BRAEMAR voluntarily files or involuntarily has filed against it any petition under any bankruptcy or insolvency act or law and, in the case of an involuntary bankruptcy only, where such petition is not dismissed within sixty (60) days;
- (d) BRAEMAR is adjudicated a bankrupt; or
- (e) BRAEMAR makes a general assignment for the benefit of creditors.

6.2 Remedies. Upon BRAEMAR's default, CITY may, at its option, give BRAEMAR, or any person claiming rights through BRAEMAR, a written "Three Day Notice to Pay or Quit," or CITY may terminate the Agreement and all rights of BRAEMAR, and all persons claiming rights through BRAEMAR, to the Property or to possession of the Property. Upon termination, CITY may enter and take possession of the Property, and may recover from BRAEMAR the sum of:

- (a) the worth at the time of award of any unpaid rent that was due at the time of termination;
- (b) the worth at the time of award of the amount by which the unpaid rent that would have been earned after termination until the time of award exceeds the amount of rental loss, if any, that BRAEMAR affirmatively proves could have been reasonably avoided;
- (c) the worth at the time of award of the amount by which the unpaid rent for the balance of the Term, and any extension thereof, after the time of award exceeds the amount of rental loss, if any, that BRAEMAR affirmatively proves could be reasonably avoided;
- (d) any other amount necessary to compensate CITY for all the detriment proximately caused by BRAEMAR's breach and default, 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 at law or in equity.

As used in clauses (a) and (b), above, the "worth at the time of award" is computed by allowing interest at the rate of the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus two percent (2%). As used in clause (c), above, 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 rent and any and all other amounts payable by BRAEMAR under this Agreement.

6.3 Default if Leasehold or License is Encumbered. If there is a CITY-approved encumbrance on BRAEMAR's leasehold interest or license, CITY shall give the mortgagee or beneficiary written notice of BRAEMAR's default under this Agreement, and the same mortgagee or beneficiary shall have thirty (30) days from the notice to cure the default, or, if the default is not curable within thirty (30) days, to commence to cure the default and diligently pursue the cure to completion. CITY may extend the cure period if the mortgagee or beneficiary uses reasonable diligence to pursue a cure, as determined in CITY'S sole discretion. If the mortgagee or beneficiary chooses to cure the default through litigation or foreclosure, then CITY may exercise any of the following options:

- (a) CITY may correct the default and charge the costs to the account of BRAEMAR, which charge shall be due and payable on the date that the rent is next due after CITY's notice of such costs to BRAEMAR, and mortgagee or beneficiary;
- (b) CITY may correct the default and pay the costs from the proceeds of any insurance fund held by CITY, CITY and BRAEMAR, 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 or to pay the costs of correction performed by or at the direction of CITY; and
- (c) CITY may terminate this Agreement as to the rights of BRAEMAR by assuming or causing the assumption of liability for any trust deed or mortgage. BRAEMAR shall 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 the terminated BRAEMAR with a new lessee or licensee reasonably satisfactory to the mortgagee or beneficiary. BRAEMAR shall pay to CITY all reasonable costs incurred by CITY in re-leasing or re-licensing to a new lessee or licensee.

If the default is non-curable by BRAEMAR, then any lender holding a beneficial interest in the Property, whose qualifications as an assignee have been approved by CITY, shall have the absolute right to substitute itself to the estate of BRAEMAR hereunder and to commence performance of this Agreement. If the mortgagee or beneficiary gives notice in writing of its election to substitute itself within the thirty (30) day period after receiving CITY's written notice of a default, and the default, if curable, is cured by the mortgagee or beneficiary, then this Agreement 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 Agreement with all the rights and obligations of BRAEMAR, subject to the

curing of the default, if possible, by mortgagee or beneficiary. In that event, BRAEMAR shall assign to mortgagee or beneficiary all of its interest in and to the leasehold estate and license under this Agreement.

- 6.4 Abandonment by BRAEMAR. If BRAEMAR abandons the Property, this Agreement shall continue in effect as long as CITY does not terminate this Agreement, and CITY may enforce all of its rights and remedies under this Agreement, including without limitation the right to recover rent as it becomes due, plus damages.
- 6.5 Waiver. Any waiver by CITY of a breach or default by BRAEMAR shall not be a waiver of any other breach or default. No waiver shall be valid and binding unless in writing and executed by CITY. CITY's delay or failure to enforce a right or remedy shall not be a waiver of that or any other right or remedy under this Agreement. The enforcement of a particular right or remedy for a breach or default shall not waive any other right or remedy for the same breach or default, or for any other or later breach or default. CITY's acceptance of any rents shall not be a waiver of any default preceding such payment. BRAEMAR acknowledges that the Property is a part of publicly-owned property held in trust for the benefit of the citizens of the City of San Diego, and that any failure by CITY to discover a breach or default, or take prompt action to require the cure of any breach or default, shall not result in an equitable estoppel, but CITY shall at all times have the legal right to require the cure of any breach or default. CITY's acceptance of a partial payment of rent shall not constitute a waiver of the balance of the rent payment due.

SECTION 7: EMINENT DOMAIN

- 7.1 Eminent Domain. If all or part of the Property is taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of CITY and BRAEMAR (or beneficiary or mortgagee) shall be as follows:
- 7.1.1 Full Taking. If the entire Property is taken, this Agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- 7.1.2 Partial Taking - Remainder Unusable. If a partial taking of the Property occurs, and in the opinion of CITY, the remaining part of the Property is unsuitable for continued Agreement operation, this Agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- 7.1.3 Partial Taking - Remainder Usable. If a partial taking of the Property occurs, and in the opinion of CITY, the remaining part of the Property is suitable for continued Agreement operation, this Agreement shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken. The rent shall be equitably reduced to reflect the portion of the Property taken, only to the extent that BRAEMAR's operations are reduced or impaired.

- 7.1.4 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. BRAEMAR shall be entitled to any award attributable to the taking of, or damages to, BRAEMAR's then-remaining leasehold interest in installations or improvements owned by BRAEMAR. CITY shall have no liability to BRAEMAR for any award not provided by the condemning authority.
- 7.1.5 Transfer. CITY has the right to transfer CITY's interests in the Property in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, BRAEMAR shall retain whatever interest it may have in the fair market value of any BRAEMAR-owned improvements on the Property in accordance with this Agreement.
- 7.2 No Inverse Condemnation. The exercise of any CITY right under this Agreement shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for condemnation or inverse condemnation.

SECTION 8: INDEMNITY; HOLD HARMLESS; INSURANCE

- 8.1 Indemnification & Hold Harmless. BRAEMAR shall protect, defend, indemnify, and hold CITY and its elected officials, officers, employees, representatives, and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to BRAEMAR's officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with BRAEMAR's acts or omissions in the performance of its obligations under this Agreement, and all expenses of investigating and defending against same, including without limitation reasonable attorneys' fees and costs; provided, however, that BRAEMAR's duty to indemnify and hold CITY harmless shall not include any established liability arising from the gross negligence or willful misconduct of CITY and its elected officials, officers, employees, representatives, and agents. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, BRAEMAR shall pay all of the costs related thereto, including without limitation reasonable attorney fees and costs.
- 8.2 Insurance. BRAEMAR shall obtain and maintain throughout the Term, and any extension of said Term, at its sole cost and expense, all insurance required by this Agreement. BRAEMAR's liabilities under this Agreement, including without limitation BRAEMAR's indemnity obligations, shall not be deemed limited in any way to the insurance coverage required herein. BRAEMAR's maintenance of the required insurance coverage is a material consideration for this Agreement. Notwithstanding any provision of this Agreement to the contrary, if BRAEMAR fails to maintain or renew the insurance coverage required herein, or fails to deliver evidence of same to CITY, BRAEMAR shall be in

default of this Agreement. BRAEMAR shall not modify any policy or endorsement thereto which increases CITY's exposure to loss. BRAEMAR shall obtain and deliver to CITY's Real Estate Assets Department a current certificate of insurance and relevant endorsements for (and subject to CITY's written approval of same):

- (1) Commercial General Liability Insurance ("CGL") written on an ISO Occurrence form CG 00 01 07 98 or an equivalent form providing coverage at least as broad which shall cover liability arising from any and all personal injury, including death, and property damage with limits of at least Two Million Dollars (\$2,000,000) per occurrence, subject to an annual aggregate of at least Four Million Dollars (\$4,000,000). There shall be no endorsement or modification of the CGL limiting the scope of coverage for either insured vs. insured claims or contractual liability. All defense costs shall be outside the limits of the policy.;
- (2) Commercial Automobile Liability Insurance, providing coverage for all bodily injury, including death, and property damage on an ISO form CA 00 01 12 90 or a later version of such form or an equivalent form providing coverage at least as broad for a combined single limit of at least One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of any vehicle (including owned, hired, and non-owned vehicles) operated in performing any and all work pursuant to this Agreement.
- (3) Workers' Compensation Insurance, as required by all applicable laws, for all of BRAEMAR's employees who are subject to this Agreement, with employers' liability coverage with a limit of at least One Million Dollars (\$1,000,000), and an endorsement that the insurer waives the right of subrogation against The City of San Diego and its elected officials, officers, employees, representatives and agents.
- (4) Protection and Indemnity Insurance, providing coverage for the operation of the boats, for all bodily injury, including death, personal injury, and property damage with limits of at least Two Million Dollars (\$2,000,000) per occurrence, subject to an annual aggregate of at least Four Million Dollars (\$4,000,000). Such insurance shall cover liability arising out of any boat (including owned, hired, and non-owned boats) operated in performing any and all work pursuant to this Agreement.

8.2.1 Additional Insureds. To the fullest extent allowed by law, including without limitation California Insurance Code section 11580.04, each policy must be endorsed to include as an insured "The City of San Diego and its elected officials, officers, employees, representatives and agents" with respect to liability arising out of: (a) ongoing operations performed by BRAEMAR or on BRAEMAR's behalf; (b) BRAEMAR's products; (c) BRAEMAR's work, including without limitation BRAEMAR's completed operations performed by BRAEMAR or on BRAEMAR's behalf; or (d) the Property.

- 8.2.2 Primary & Non-Contributory. Each policy shall be endorsed such that the coverage is primary to any insurance or self-insurance of The City of San Diego and its elected officials, officers, employees, representatives and agents as respects operations of the named insured. Any insurance maintained by The City of San Diego and its elected officials, officers, employees, representatives and agents shall be in excess of BRAEMAR's insurance and shall not contribute to it.
- 8.2.3 Severability of Interest. Each policy must be endorsed to provide that BRAEMAR's insurance shall apply separately to each insured against whom claim is made or suit is bought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage
- 8.2.4 Qualified Insurer(s). All insurance required by the terms of this Agreement must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved by CITY. CITY may accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Eligible Surplus Lines Insurers (i.e., the LESLI list). All policies of insurance carried by non-admitted carriers shall be subject to all of the requirements for policies of insurance provided by admitted carriers described herein. Each insurer shall be subject to CITY's approval in each instance.
- 8.2.5 Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of BRAEMAR and must be disclosed and acceptable to CITY at the time evidence of insurance is provided.
- 8.2.6 Continuity of Coverage. All policies shall be in effect on or before the first day of the Term, except "course of construction fire insurance" shall be in force on commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. The policies shall be kept in force for the duration of the Term, and any extension thereof. At least thirty (30) days prior to the expiration of each insurance policy, BRAEMAR shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Agreement. BRAEMAR shall provide proof of continuing insurance at least annually during the Term and otherwise upon CITY's request. If insurance lapses or is discontinued for any reason, BRAEMAR shall immediately notify CITY and obtain replacement insurance as soon as possible.
- 8.2.7 Modification. To assure protection from and against the kind and extent of risk existing with the Allowed Uses, Accessory Uses or any other CITY-approved uses, CITY, at its discretion, may require the revision of amounts and coverage at any time by giving BRAEMAR thirty (30) days prior written notice. BRAEMAR shall also obtain any additional insurance required by CITY for new improvements,

changed circumstances, or CITY's reasonable re-evaluation of risk levels related to the Allowed Uses, Accessory Uses or approved uses.

8.2.8 Accident Reports. BRAEMAR shall immediately report to CITY any accident causing property damage in the amount above One Thousand Dollars (\$1,000) or injury to persons on the Property. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.

8.2.9 Causes of Loss - Special Form Property Insurance. BRAEMAR shall obtain and maintain, at its sole cost, Causes of Loss - Special Form Property Insurance on all of BRAEMAR's insurable property related to the Allowed Uses and Accessory Uses on the Property under this Agreement or the Property, in an amount to cover 100 percent (100%) of the replacement cost. BRAEMAR shall deliver a certificate or certificates of such insurance to CITY's Real Estate Assets Department.

SECTION 9: IMPROVEMENTS; ALTERATIONS; REPAIRS; MAINTENANCE

9.1 Waste, Damage, or Destruction. BRAEMAR shall not commit or allow to be committed any waste or any public or private nuisance on the Property, shall keep the Property clean and clear of refuse and obstructions, and shall dispose of all garbage, trash and rubbish in a manner satisfactory to CITY. If the Property is put into a condition which is not decent, safe, healthy and sanitary, BRAEMAR shall restore the Property to a decent, safe, healthy and sanitary condition within a reasonable time and to CITY's reasonable satisfaction.

9.2 Acceptance of Premises. By signing this Lease, BRAEMAR represents and warrants that it has independently inspected the Property and made all tests, investigations and observations necessary to satisfy itself as to the condition of the Property and its suitability for the Allowed Uses and Accessory Uses. BRAEMAR further represents and warrants that it is not relying on any representation by CITY as to the condition of the Property or its suitability for the Allowed Uses, Accessory Uses or any particular use, and that BRAEMAR is relying solely on its own and independent inspections, tests, investigations and observations of the Property in entering into this Agreement. BRAEMAR accepts the Property in its current condition. BRAEMAR acknowledges and agrees that unless set forth in this Agreement, CITY neither had nor has any obligation to improve, modify, repair, replace, alter or otherwise develop the Property at any time either prior to, on or after the Effective Date. BRAEMAR shall not hold CITY responsible for any defects in the Property, excepting defects resulting from established liability arising from the gross negligence or intentional misconduct of CITY or its elected officials, officers, employees, representatives or agents. BRAEMAR accepts and assumes all risk of harm to all persons and property, including without limitation BRAEMAR's employees, agents, guests, invitees, sublessees, sublicensees and subtenants, from any defects in the Property, and shall be solely responsible therefor..

- 9.3 Entry and Inspection. CITY may at all times enter and inspect the Property and the operations conducted on the Property. Provided further that CITY's right to entry and inspection of the Lease Premises, in the absence of any emergency or other proper authorization, shall require reasonable notice and be limited to reasonable business hours.
- 9.4 Maintenance. BRAEMAR shall maintain the Lease Premises and License Area in a decent, safe, healthy and sanitary condition reasonably satisfactory to CITY, including without limitation performing all regular maintenance, repair and replacements, and all maintenance, repair, and services to the structural components of improvements on the Lease Premises and License Area. BRAEMAR shall, at its sole cost and expense, obtain and maintain trash receptacles and trash-removal service. CITY shall have no obligation or responsibility to remove debris, or to maintain, repair or replace improvements on the Lease Premises or License Area.
- 9.5 Capital Improvement Obligation. Within the last thirty six (36) months of the Term of this Agreement, BRAEMAR shall expend at least Twenty Thousand Dollars (\$20,000) on capital improvements and refurbishment on the Lease Premises that maintain and increase the value or the useful life of the leasehold improvements and not recurring in nature ("Improvement Obligation"). On or before one hundred eighty (180) days prior to the expiration of the Term, LESSEE shall have completed the Improvement Obligation and LESSEE shall deliver to CITY evidence of its expenditures for such Improvement Obligation in form and content reasonably acceptable to City. CITY shall review and approve such Improvement Obligation within sixty (60) days from the date of submittal by LESSEE, and provide LESSEE written notice of whether CITY is satisfied with the Improvement Obligation, in the CITY's sole discretion. If CITY fails to respond within the sixty (60) days of LESSEE's submittal, CITY shall be deemed unsatisfied with the Improvement Obligation.
- 9.6 No Dredging of Mission Bay. CITY shall have no obligation to dredge Mission Bay or any part of the Lease Premises and License Area. BRAEMAR expressly waives any claim against CITY from any responsibility or liability related to any real or perceived need for such dredging. BRAEMAR expressly agrees that it will not seek indemnity from the CITY for any responsibility or liability related to any real or perceived need for such dredging.
- 9.7 Improvements/Alterations. No new improvements, structures or installations shall be constructed on the Property, and the Property may not be altered by BRAEMAR without CITY's prior written approval. BRAEMAR shall not make any structural, electrical or architectural design alterations to approved improvements, structures or installations on the Lease Premises without CITY's prior written approval, which shall not be unreasonably withheld. This provision shall not apply to or relieve BRAEMAR of any maintenance or repair obligation under this Agreement. CITY shall not be obligated by this Agreement to make or assume any expense for any improvements or alterations to the Property.

- 9.8 Utilities. BRAEMAR shall order, obtain and pay for all water, utilities, and service and installation charges in connection with the operation of the Lease Premises and License Area. All utilities shall be installed underground.
- 9.9 Construction Bond. If (i) BRAEMAR constructs new improvements on the Lease Premises and License Area, or (ii) BRAEMAR conducts any maintenance, repair, or replacement of improvements on the Lease Premises or License Area which are estimated to cost in excess of ten thousand dollars (\$10,000), CITY may require BRAEMAR to 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 BRAEMAR shall be completed in accordance with the plans approved by CITY or, at the option of CITY, that the uncompleted construction shall be removed and the Lease Premises and License Area restored to a condition satisfactory to CITY. The bond or cash shall be held in trust by CITY for the purpose specified above, or at CITY's option may be placed in an escrow approved by CITY.
- 9.10 Liens. BRAEMAR shall protect, defend, indemnify and hold CITY harmless from and against all claims for labor or materials in connection with operations, improvements, alterations or repairs on or to the Property and the costs of defending against such claims, including without limitation reasonable attorney fees. If BRAEMAR causes improvements, alterations or repairs to be made to the Property, and a lien or notice of lien is filed against the Property, BRAEMAR shall notify CITY of the lien within five (5) days after BRAEMAR first becomes aware of the existence of the lien, and within thirty (30) days after the filing either: (a) take all actions necessary to record a valid release of the 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.
- 9.11 Signs. BRAEMAR shall not erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings or similar devices or advertising without CITY's written consent. If any such unauthorized item is found on the Property, BRAEMAR shall remove the item at its expense within twenty-four (24) hours after notice by CITY, or CITY may thereafter remove the item at BRAEMAR's cost. CITY acknowledges that all such items covered by this section and existing as of the Effective Date of this Agreement are authorized.
- 9.12 Ownership of Improvements and Personal Property. BRAEMAR shall own all improvements, fixtures, structures and installations or additions to the Property constructed or installed on the Property by BRAEMAR. Upon expiration or termination of this Agreement, all such improvements, fixtures, structures and installations or additions shall be deemed a part of the Property and owned by CITY. Notwithstanding the foregoing, CITY may, upon notice to BRAEMAR upon termination or at any time prior to the expiration of this Agreement, elect to have part or all of such improvements, fixtures, structures and installations or additions removed by BRAEMAR. In that case, BRAEMAR shall, at BRAEMAR's sole cost and expense, remove those items designated

for removal in CITY's notice and restore the Property to CITY's reasonable satisfaction as soon as practicable, but in no event later than one hundred eighty (180) days after the expiration or earlier termination of this Agreement. BRAEMAR, at its sole cost and expense, shall be responsible for the repair of any and all damage resulting from the removal of such items. If BRAEMAR fails to remove the items as required in this section, CITY may, at its option, remove them at BRAEMAR's sole cost and expense.

9.12.1 Personal Property. BRAEMAR shall remove BRAEMAR-owned machines, appliances, equipment, trade fixtures and other items of personal property upon the expiration of this Agreement, or as soon as practicable after termination of this Agreement. Any such items which BRAEMAR fails to remove shall be deemed abandoned and become CITY's property free of all claims and liens, or CITY may, at its option, remove such items at BRAEMAR's sole cost and expense. BRAEMAR, at its sole cost and expense, shall be responsible for the repair of any and all damage resulting from the removal of its personal property from the Property.

9.12.2 Late Removal. Notwithstanding any provision of this Agreement to the contrary, BRAEMAR shall pay rent to CITY for any period of time needed after the expiration or termination of this Agreement to remove improvements or personal property as required by this Agreement, whether removal is done by CITY or BRAEMAR. Such rent shall be calculated on a per diem basis using the then-current fair market rental rate as determined by an appraisal prepared by a qualified appraiser.

9.12.3 CITY's Right to Acquire Personal Property. If BRAEMAR wants to dispose of any of its personal property used in its operations on the Property upon expiration or termination of this Agreement, CITY shall have the first right to acquire such personal property.

SECTION 10: DEVELOPMENT PLAN

10.1 Development Plan. BRAEMAR developed the Property in accordance with the Development Plans approved by the CITY pursuant to Permit 11304-D, which plan is incorporated by this reference. If BRAEMAR elects to redevelop the Property, BRAEMAR shall redevelop the Property in accordance with plans to be approved by the CITY. CITY may authorize changes to any approved plans, provided that the principal components as defined in the approved plans may not be modified without City Council approval. Documentation evidencing any approved changes shall be filed in the Office of the San Diego City Clerk.

10.2 Coastal Commission; Permits. BRAEMAR shall, at its sole cost and expense, seek and obtain from the California Coastal Commission and all other competent governmental authorities all necessary permits and approvals for any and all development,

redevelopment, work or activities on the Property, or for any changes to any applicable permit now in effect for the Property.

SECTION 11: GENERAL PROVISIONS

- 11.1 Notices. Any notice required or permitted to be given under this Agreement shall be in writing and may be served personally or by United States Postal Service, postage prepaid and addressed as follows:

If to BRAEMAR:

ATTN: Julia De Beers
General Counsel
EVANS HOTELS
998 West Mission Bay Drive
San Diego, California 92109

If to CITY:

THE CITY OF SAN DIEGO
Attention: Director, Real Estate Assets Department
1200 Third Avenue, Suite 1700 (MS 51A)
San Diego, California 92101

- 11.2 Compliance with Law. BRAEMAR shall at all times in the construction, maintenance, occupancy, restoration and operation of the Property comply with all applicable laws, rules and regulations of competent legal authority, at BRAEMAR's sole cost and expense. BRAEMAR shall promptly, upon request by CITY, deliver to CITY copies of all documentary evidence of such compliance received by or otherwise available to BRAEMAR (e.g., validation of periodic inspection of BRAEMAR fire-suppression equipment).
- 11.3 Taxes. Subject to the provisions of Article XIII, Section 3(d) of the California Constitution and Section 202.2 of the California Revenue and Taxation Code, BRAEMAR shall pay, before delinquency, all taxes, assessments and fees assessed or levied upon the Property or upon BRAEMAR's use and occupancy of the Property, including without limitation taxes upon licenses and permits, and including taxes upon the land and any improvements or fixtures installed or maintained by BRAEMAR thereon. BRAEMAR acknowledges that this Agreement may create a possessory interest subject to property taxation and that BRAEMAR may be subject to the payment of taxes levied on that possessory interest. BRAEMAR alone shall pay all such possessory interest taxes. BRAEMAR's payment of taxes, fees and assessments shall not reduce any rent due to the CITY. CITY shall not incur or assume any responsibility for any taxes whatsoever resulting from BRAEMAR's possession, use or occupancy of the Property.

- 11.4 Unavoidable Delay. If the performance of an act required by this Agreement is directly prevented or delayed by a cause beyond the reasonable control of the party required to perform the act, that party shall be excused from performing the act for a period equal to the period of the prevention or delay. This provision shall not apply to obligations to pay rent. The party claiming a delay shall notify the other party in writing within ten (10) days after the beginning of any claimed delay.
- 11.5 Restriction on Food Containers. BRAEMAR shall not provide to its customers any prepared, takeout, or supplied/resale food in polystyrene foam packaging, nor shall BRAEMAR obtain or keep any such customer food packaging at or on the Property. BRAEMAR's food packaging for all foods shall be recyclable plastic or recyclable paper, and BRAEMAR shall deliver to CITY, upon request, evidence in the form of paid invoices for the purchase of recyclable plastic or recyclable paper containers in amounts sufficient to indicate compliance with this section. Post-consumer recycled plastic or recycled paper is preferred for all customer food packaging related to the use and operation of the Property. No biodegradable or compostable packaging is to be used by BRAEMAR in lieu of recyclable plastic or recyclable paper unless with the prior written approval of CITY's Environmental Services Department. "Prepared food" means all food or beverage prepared on the Property for immediate consumption at the Property or elsewhere in the Property. "Takeout food" means all food or beverage to be consumed off of the Property or elsewhere in the Property. "Supplied/Resale food" means foods or beverages which are supplied by a third party to BRAEMAR for either preparing food or beverages onsite or direct sell. "Food packaging" means all bags, sacks, wrapping, containers, bowls, plates, trays, cartons, cups, straws and lids which are not intended for reuse, and on or in which any prepared food or takeout food is provided on or from the Property. BRAEMAR should also limit its distribution of plastic bags to its customers.
- 11.6 California Public Records Act. CITY shall determine, in its sole discretion, whether information provided to CITY by BRAEMAR is or is not a public record subject to disclosure under the CPRA. If BRAEMAR notifies CITY that it objects to the disclosure of certain information to a third party, BRAEMAR shall deliver to CITY with such notice specific and detailed legal grounds, including any applicable case law, upon which CITY may rely for withholding any information requested pursuant to the CPRA. If CITY withholds disclosure of information in reliance on such legal analysis provided by BRAEMAR, BRAEMAR shall protect, defend, indemnify and hold CITY and its elected officials, officers, employees, representatives and agents harmless for and from legal actions or challenges seeking to obtain the information from CITY and all costs incurred by CITY associated therewith, and shall defend, at BRAEMAR's sole expense, any action brought against CITY resulting from CITY's nondisclosure of the information. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, BRAEMAR shall pay all of the costs related thereto, including without limitation reasonable attorney fees and costs.
- 11.6.1 CITY shall not be liable or obligated for any burden or loss (financial or otherwise)

incurred by BRAEMAR as a result of CITY's disclosure or non-disclosure of BRAEMAR information requested pursuant to the CPRA.

11.6.1.1 BRAEMAR's Waiver. BRAEMAR EXPRESSLY WAIVES ANY CLAIM AGAINST CITY AND ITS ELECTED OFFICIALS, OFFICERS, EMPLOYEES, REPRESENTATIVES AND AGENTS FOR ANY BURDEN, EXPENSE OR LOSS THAT LESSEE INCURS AS A RESULT OF CITY'S DISCLOSURE OR NON-DISCLOSURE OF BRAEMAR INFORMATION REQUESTED PURSUANT TO THE CPRA.

- 11.7 Equal Opportunity. BRAEMAR 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 all other laws, rules and regulations of competent governmental authority. BRAEMAR shall not discriminate against any employee or applicant for employment based on race, religion, color, ancestry, age, gender, sexual orientation, disability, medical condition or place of birth. BRAEMAR shall cause the foregoing provisions to be inserted in all subleases, sublicenses and all contracts for any work covered by this Agreement so that such provisions will be binding upon each sublessee, sublicensee and contractor. Upon CITY's request, BRAEMAR shall submit a current Workforce Report and, if authorized by law and required by CITY, an Equal Opportunity Plan which set forth the actions BRAEMAR will take to achieve the City of San Diego's goals for the employment of African Americans, Native Americans, Asians, Latinos, women and people with disabilities. BRAEMAR acknowledges that failure to comply with the requirements of this section and/or submitting false information in response to these requirements may result in termination of this Agreement and debarment from participating in CITY contracts for a period of not less than one (1) year.
- 11.8 Equal Benefits. BRAEMAR shall comply with San Diego Municipal Code sections 22.4301-22.4308, as may be amended from time to time, which require lessees of CITY-owned property to offer the same employment benefits to employees with spouses and employees with registered domestic partners. BRAEMAR shall certify that it will maintain such equal benefits throughout the term of this Agreement. BRAEMAR's failure to maintain equal benefits shall be a default of this Agreement.
- 11.9 Disabled Access Compliance. BRAEMAR shall, as applicable to the Property and BRAEMAR's possession, use and occupancy thereof, comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 ("ADA"); and all other applicable laws, rules and regulations of competent governmental authority protecting the rights of people with disabilities. BRAEMAR's compliance shall include without limitation the following:
- 11.9.1 BRAEMAR 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.

- 11.9.2 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 BRAEMAR.
- 11.9.3 BRAEMAR shall include language in each sublease and sublicense agreement which indicates the sublessee's and sublicensee's agreement to abide by the foregoing provisions. BRAEMAR, sublessees and sublicensees shall be individually responsible for their own ADA employment programs.
- 11.9.4 Where required by law, any improvements made to the Property by BRAEMAR shall comply with municipal disabled-access requirements by bringing up to code and making accessible any areas of the Property which deny access to disabled persons. All improvements and alterations shall be at the sole cost of BRAEMAR.
- 11.9.5 BRAEMAR shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
- 11.9.6 BRAEMAR understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall be a default of this Agreement.
- 11.10 Drug-free Workplace. BRAEMAR shall 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:
 - 11.10.1 Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of controlled substances are prohibited on the Property and specifying the actions that will be taken against employees for violations of the prohibition; and
 - 11.10.2 Establish a drug-free awareness program to inform employees about all of the following:
 - 11.10.3 The dangers of drug abuse in the workplace;
 - 11.10.4 BRAEMAR's policy of maintaining a drug-free workplace;
 - 11.10.5 Any available drug counseling, rehabilitation, and employee assistance programs; and
 - 11.10.6 The penalties that may be imposed upon employees for drug abuse.

BRAEMAR shall include in each of its subleases, sublicenses and contracts related to this Agreement language obligating each sublessee, sublicensee and contractor to comply with

the provisions of this section to maintain a drug-free workplace. BRAEMAR, and each of its sublessees, sublicensees and contractors, shall be individually responsible for their own drug-free workplace program.

- 11.11 CITY Employee Participation Policy. CITY may unilaterally and immediately terminate this Agreement if BRAEMAR employs an individual who, within the twelve (12) months immediately preceding such employment did, in their capacity as a City of San Diego officer or employee, participate in negotiations with or otherwise have an influence on a recommendation made to the City Council related to the selection of BRAEMAR for this Agreement. It is not the intent of this policy that these provisions apply to members of the City Council.
- 11.12 Local Business and Employment. BRAEMAR acknowledges that CITY seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. For work associated with this Agreement and to the extent legally possible, BRAEMAR shall use its best efforts to solicit applications for employment and bids and proposals for contracts from local residents and firms as opportunities occur. BRAEMAR shall use its best efforts to hire qualified local residents and firms whenever practicable.
- 11.13 Hazardous Substances. BRAEMAR shall not allow the installation or release of hazardous substances in, on, under, or from the Property, except for those substances that are customarily and regularly used in the operation of BRAEMAR's business, and are stored and utilized in accordance with all manufacturer's instructions and applicable laws and regulations. BRAEMAR and BRAEMAR'S sublessees, sublicensees, agents and contractors shall not store, utilize, or sell any hazardous substance on the Property without CITY'S prior written consent.
- 11.13.1 Release. For the purposes of this Agreement, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or otherwise disposing of hazardous substances.
- 11.13.2 Hazardous substances. For purposes of this Agreement, "hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly reports and any other substances incorporated into the State of California's list of hazardous substances. "Hazardous substances" shall include wastes of hazardous substances, and all types of petroleum-related substances and their chemical constituents. 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 Agreement.
- 11.13.3 Remediation. If BRAEMAR'S occupancy, use, development, maintenance, or restoration of the Property (BRAEMAR'S Operations) results in a release of a hazardous substance, BRAEMAR shall pay all costs of remediation and removal of the hazardous substance in accordance with all applicable laws, rules and regulations of governmental authorities.

- 11.13.4 Indemnity. BRAEMAR shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from BRAEMAR'S Operations on the Property or area surrounding the Property, 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.
- 11.13.5 Removal. If BRAEMAR or BRAEMAR's contractor, agent, sublessee or sublicensee has received approval and permits to store, utilize, generate or install, or otherwise bring hazardous substances to the Property, BRAEMAR and/or BRAEMAR's contractor, agent, sublessee or sublicensee shall remove all hazardous substances in all containers, equipment or devices from the Property immediately upon or prior to the expiration or earlier termination of this Agreement. CITY reserves the right to conduct inspections of the Property and/or request documentation demonstrating the legal removal and/or disposal of the hazardous substances or containers, equipment or devices containing hazardous substances from the Property. BRAEMAR shall pay any and all costs incurred by CITY to remove any container, equipment or device requiring disposal or removal as required by this provision.
- 11.13.6 Notice of Release. If BRAEMAR knows or has reasonable cause to believe that a hazardous substance has been released on, under, or from the Property, BRAEMAR shall immediately notify CITY and any appropriate regulatory or reporting agency pursuant to Title 19 of the California Code of Regulations, and deliver a written report thereof to CITY within three (3) days of receipt of the knowledge or cause for belief and submit any required written reports to regulatory or reporting agencies as required by regulation or law. If BRAEMAR knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, BRAEMAR shall take all actions necessary to alleviate the danger. BRAEMAR shall notify CITY immediately of any notice of violation received or initiation of environmental actions or private suits related to the Property.
- 11.13.7 Environmental Assessment. Upon reasonable cause to believe that BRAEMAR'S Operations resulted in any hazardous substance being released on or beneath the Property or area surrounding the Property, CITY may cause an environmental assessment to be performed 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 BRAEMAR'S sole cost and expense, and shall establish what, if any, hazardous substances have more likely than not been caused by BRAEMAR'S Operations on, in, or under the Property or the area surrounding the Property, and in what quantities. If any such hazardous substances exist in quantities greater than allowed by CITY, county,

state, or federal laws, statutes, ordinances, or regulations, or require restricted use of the Property, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes and to effect unrestricted and lawful re-use of the Property, and estimates of the cost of such remediation or removal. BRAEMAR shall cause, or if BRAEMAR fails to do so within a reasonable period of time, CITY may cause, the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved, and BRAEMAR shall pay all costs and expenses therefor.

- 11.14 Water Quality – Best Management Practices. CITY and BRAEMAR are committed to the implementation of controls (best management practices, or BMPs) to manage activities on the Property in a manner which aids in the protection of CITY's precious water resources. It is BRAEMAR's responsibility to identify and implement an effective combination of BMPs so as not to cause pollutant discharges to the storm drain system in violation of San Diego Storm Water Management and Discharge Control Ordinance (San Diego Municipal Code sections 43.0301 to 43.0312).

Therefore, BRAEMAR shall, at a minimum, implement and comply, as applicable, with the Minimum Industrial and Commercial BMPs adopted under the San Diego Municipal Code section 43.0307(a).

It is ultimately BRAEMAR's responsibility to prevent pollutant discharges to the storm drain system. Therefore, BRAEMAR will identify and implement any additional BMPs that may be required to avoid the discharge of pollutants to the storm drain system

- 11.15 Waiver. The property constituting the Property is publicly owned and held in trust for the benefit of CITY's citizens. CITY's failure to insist upon the strict performance of any of BRAEMAR's obligations under this Agreement, in one or more instance, shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. CITY's waiver of a default shall not be a waiver of any other default. Any waiver of a default must be in a writing executed by CITY to constitute a valid and binding waiver. CITY's delay or failure to exercise a right or seek a remedy shall not be deemed a waiver of that or any other right or remedy under this Agreement, at law or in equity. The exercise of any particular right or the use of any particular remedy for any default shall not waive the use of any other right or remedy for the same default or for another or later default. CITY's acceptance of any rents shall not be a waiver of any default preceding the rent payment. CITY's failure to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY may at any and all times require the cure of the default.
- 11.16 Nondiscrimination. This Agreement is made and accepted upon and subject to the covenant and condition, which shall run with the land, that BRAEMAR or any person claiming under or through BRAEMAR shall not establish or allow any discrimination against or segregation of any person or group of persons on account of race, color, religion,

gender, disability, sexual orientation, marital status, national origin, ancestry, familial status or source of income in the possession, use or occupancy of the Property or in the selection, location, number, use or occupancy of tenants, subtenants, sublicensees, or vendees in the Property.

- 11.17 Accessibility Assessment. In accordance with California Civil Code section 1938, CITY hereby states that the Property has not been inspected by a Certified Access Specialist (CASp).
- 11.18 Cumulative Remedies. CITY's rights and remedies under this Agreement are cumulative and shall not limit or otherwise waive or deny any of CITY's rights or remedies at law or in equity.
- 11.19 Survival. Any obligation which accrues under this Agreement prior to its expiration or termination shall survive such expiration or termination.
- 11.20 Joint and Several Liability. If BRAEMAR is comprised of more than one person or legal entity, such persons and entities, and each of them, shall be jointly and severally liable for the performance of each and every obligation of BRAEMAR under this Agreement.
- 11.21 No Affiliation. Nothing contained in this Agreement shall be deemed or construed to create a partnership, joint venture or other affiliation between CITY and BRAEMAR or between CITY and any other entity or party, or cause CITY to be responsible in any way for the debts or obligations of BRAEMAR or any other party or entity.
- 11.22 Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes any and all prior understandings, representations, warranties and agreements between them pertaining to this Agreement and BRAEMAR's occupancy, use, development, maintenance and restoration of the Property. Any modification, alteration or amendment of this Agreement shall be in writing and signed by all the parties hereto. Each party represents and warrants that this Agreement is binding upon such party in accordance with its terms.
- 11.23 Partial Invalidity. If any term, covenant, condition or provision of this Agreement is found invalid, void or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.
- 11.24 Authority to Contract. Each individual executing this Agreement on behalf of another person or legal entity represents and warrants that they are authorized to execute and deliver this Agreement on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws or other written rules of conduct or governing agreement, and that this Agreement is binding upon such person or entity in accordance with its terms. Each person executing this Agreement on behalf of another person or legal entity represents and warrants such entity is a valid, qualified corporation, limited liability company, partnership or other unincorporated association in good standing in its home

state and that such entity is qualified to do business in California.

- 11.25 Controlling Law/Venue. This Agreement and all Agreement documents shall be deemed to be made under, and shall be construed in accordance with and governed by the laws of the State of California without regard to the conflicts or choice of law provisions thereof. The venue for any suit or proceeding concerning this Agreement, including the interpretation or application of any of its terms or any related disputes, shall be in the County of San Diego, State of California.

[REMAINDER OF THIS PAGE LEFT BLANK INTENTIONALLY]

IN WITNESS WHEREOF, this Agreement is executed to be effective as of the Effective Date.

BRAEMAR PARTNERSHIP, a California limited partnership

Date: September 29, 2016

By: 9th Braemar, Inc. a California corporation
Its: Managing General Partner

By: Anne L. Evans
Anne L. Evans, Chairman

THE CITY OF SAN DIEGO, a California municipal corporation

Date: 12/13/16

By: Cybele Thompson
Cybele Thompson,
Director, Real Estate Assets Department

Approved as to form this 14th day of
December, 2016:
MARA W. ELLIOTT
JAN I. GOLDSMITH, CITY ATTORNEY

By: Hilda R. Mendez
Name: Hilda R. Mendez
Title: Deputy City Attorney

Exhibit A: Legal Description of Property
Exhibit B: Aerial Map of the Property
Exhibit C: New License Area
Exhibit D: Approved Vessels for Rent

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Exhibit A: Legal Description of Property

Lease Premises

THAT PORTION OF THE TIDELANDS AND SUBMERGED OR FILLED LANDS OF MISSION BAY, FORMERLY FALSE BAY, ACCORDING TO MAP THEREOF MADE BY JAMES PASCOE IN 1870, A COPY OF SAID MAP WAS FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO, NOVEMBER 14, 1921, AND IS KNOWN AS MISCELLANEOUS MAP NO. 36, ALL BEING IN THE CITY AND COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWESTERLY CORNER OF LOT 1 OF BRAEMAR RE-SUBDIVISION NO. 1, ACCORDING TO MAP NO. 4050 ON FILE IN THE OFFICE OF THE COUNTY RECORDER; THENCE ALONG THE SOUTHERLY LINE OF SAID MAP NO. 4050 NORTH 79°45'12" EAST 48.46 FEET; THENCE NORTH 11°51'23" WEST 3.74 FEET; THENCE NORTH 52°11'39" EAST 281.47 FEET; THENCE NORTH 49°20'40" EAST 7.33 FEET TO THE ***TRUE POINT OF BEGINNING***; THENCE LEAVING SAID SOUTHERLY LINE SOUTH 53°27'18" EAST 415.23 FEET; THENCE SOUTH 36°32'42" WEST 132.50 FEET; THENCE NORTH 53°27'18" WEST 298.51 FEET; THENCE SOUTH 24°18'22" WEST 46.45 FEET; THENCE NORTH 53°27'18" WEST 176.02 FEET TO THE SOUTHERLY LINE OF SAID MAP NO. 4050; THENCE ALONG THE SOUTHERLY LINE OF SAID MAP NO. 4050 NORTH 52°11'39" EAST 177.32 FEET; THENCE NORTH 49°20'40" EAST 7.33 FEET TO THE ***TRUE POINT OF BEGINNING***.

License Area A:

THAT PORTION OF THE TIDELANDS AND SUBMERGED OR FILLED LANDS OF MISSION BAY, FORMERLY FALSE BAY, ACCORDING TO MAP THEREOF MADE BY JAMES PASCOE IN 1870, A COPY OF SAID MAP WAS FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO, NOVEMBER 14, 1921, AND IS KNOWN AS MISCELLANEOUS MAP NO. 36, ALL BEING IN THE CITY AND COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWESTERLY CORNER OF LOT 1 OF BRAEMAR RE-SUBDIVISION NO. 1, ACCORDING TO MAP NO. 4050 ON FILE IN THE OFFICE OF THE COUNTY RECORDER; THENCE ALONG THE SOUTHERLY LINE OF SAID MAP NO. 4050 NORTH 79°45'12" EAST 48.46 FEET; THENCE NORTH 11°51'23" WEST 3.73 FEET; THENCE NORTH 52°11'39" EAST 281.47 FEET; THENCE NORTH 49°20'40" EAST 7.33 FEET TO THE ***TRUE POINT OF BEGINNING***; THENCE LEAVING SAID SOUTHERLY LINE SOUTH 53°27'18" EAST 125.40 FEET; THENCE NORTH 43°57'38" EAST 47.53 FEET;

THENCE NORTH 53°27'18" WEST 120.83 FEET TO THE SOUTHERLY LINE OF SAID MAP NO. 4050 THENCE ALONG SAID SOUTHERLY LINE SOUTH 49°20'40" WEST 48.33 FEET TO THE **TRUE POINT OF BEGINNING**.

License Area B:

THE BEACH AREA ADJACENT TO SAIL BAY IN MISSION BAY PARK BOUNDED ON THE EAST BY THE MEAN HIGH TIDE LINE OF MISSION BAY; ON THE WEST BY THE EASTERN BOUNDARY LOT 1 OF BRAEMAR RE-SUBDIVISION NO. 1; ON THE SOUTH BY A LINE PARALLEL TO AND 100 FEET NORTH OF THE CATAMARAN PIER; AND ON THE NORTH BY A LINE PARALLEL TO AND 200 FEET NORTH OF THE CATAMARAN PIER, CONSISTING OF APPROXIMATELY 11,598 SQUARE FEET.

License Area C:

THAT PORTION OF THE TIDELANDS AND SUBMERGED OR FILLED LANDS OF MISSION BAY, FORMERLY FALSE BAY, ACCORDING TO MAP THEREOF MADE BY JAMES PASCOE IN 1870, A COPY OF SAID MAP WAS FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO, NOVEMBER 14, 1921, AND IS KNOWN AS MISCELLANEOUS MAP NO. 36, ALL BEING IN THE CITY AND COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWESTERLY CORNER OF LOT 1 OF BRAEMAR RE-SUBDIVISION NO. 1, ACCORDING TO MAP NO. 4050 ON FILE IN THE OFFICE OF THE COUNTY RECORDER; THENCE ALONG THE SOUTHERLY LINE OF SAID MAP NO. 4050 NORTH 79°45'12" EAST, 48.46 FEET; THENCE NORTH 11°51'23" WEST 3.73 FEET ; THENCE NORTH 52°11'39" EAST, 281.47 FEET; THENCE NORTH 49°20'40" EAST 158.21 FEET TO THE **TRUE POINT OF BEGINNING**; THENCE CONTINUING ALONG SAID LINE NORTH 49°20'40" EAST 91.81 FEET MORE OR LESS TO AN ANGLE POINT IN THE SOUTHERLY LINE OF LOT 5 PER BRAEMAR SAIL BAY MAP NO. 11444; THENCE ALONG THE SOUTHERLY LINE OF SAID MAP NO. 11444, NORTH 58°20'40" EAST, 116.40 FEET MORE OR LESS TO THE SOUTHEAST CORNER OF LOT 3 OF MAP NO. 11444; THENCE ALONG THE SOUTHERLY PROLONGATION OF THE EASTERLY LINE OF SAID LOT 3 OF MAP NO. 11444, SOUTH 14°28'48" EAST, 122.00 FEET MORE OR LESS TO THE APPROXIMATE MEAN HIGH WATER LINE (ELEVATION 2.01 FEET MEAN SEA LEVEL DATUM PER CATAMARAN RESORT HOTEL PIER DRAWING PREPARED BY LINTVEDT, MCCOLL JOB# 11585), DATED 3/17/1992; THENCE ALONG SAID APPROXIMATE MEAN HIGH WATER LINE SOUTH 57°54'37" WEST 129.79 FEET ; THENCE NORTH 53°27'18" WEST 111.13 FEET MORE OR LESS TO THE **TRUE POINT OF BEGINNING**.

License Area D:

THAT PORTION OF THE TIDELANDS AND SUBMERGED OR FILLED LANDS OF MISSION BAY, FORMERLY FALSE BAY, ACCORDING TO MAP THEREOF MADE BY

JAMES PASCOE IN 1870, A COPY OF SAID MAP WAS FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO, NOVEMBER 14, 1921, AND IS KNOWN AS MISCELLANEOUS MAP NO. 36, ALL BEING IN THE CITY AND COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWESTERLY CORNER OF LOT 1 OF BRAEMAR RE-SUBDIVISION NO. 1, ACCORDING TO MAP NO. 4050 ON FILE IN THE OFFICE OF THE COUNTY RECORDER; THENCE ALONG THE SOUTHERLY LINE OF SAID MAP NO. 4050 NORTH $79^{\circ}45'12''$ EAST, 48.46 FEET; THENCE NORTH $11^{\circ}51'23''$ WEST, 3.73 FEET TO THE ***TRUE POINT OF BEGINNING***; THENCE NORTH $52^{\circ}11'39''$ EAST, 104.15 FEET; THENCE SOUTH $53^{\circ}27'18''$ EAST, 176.12 FEET MORE OR LESS TO THE APPROXIMATE MEAN HIGH WATER LINE (ELEVATION 2.01 FEET MEAN SEA LEVEL DATUM PER CATAMARAN RESORT HOTEL PIER DRAWING PREPARED BY LINTVEDT, MCCOLL JOB# 11585, DATED 3/17/1992); THENCE SOUTHWESTERLY 38.74 FEET ALONG AN ARC CONCAVE SOUTHEASTERLY ALONG SAID APPROXIMATE MEAN HIGH WATER LINE HAVING A RADIUS OF 323.77', FROM WHICH A RADIAL LINE BEARS NORTH $69^{\circ}48'27''$ WEST THROUGH A CENTRAL ANGLE OF $06^{\circ}51'17''$; THENCE NORTH $69^{\circ}49'52''$ WEST, 226.50 FEET MORE OR LESS TO THE ***TRUE POINT OF BEGINNING***.

[illegible]

Exhibit C: New License Area

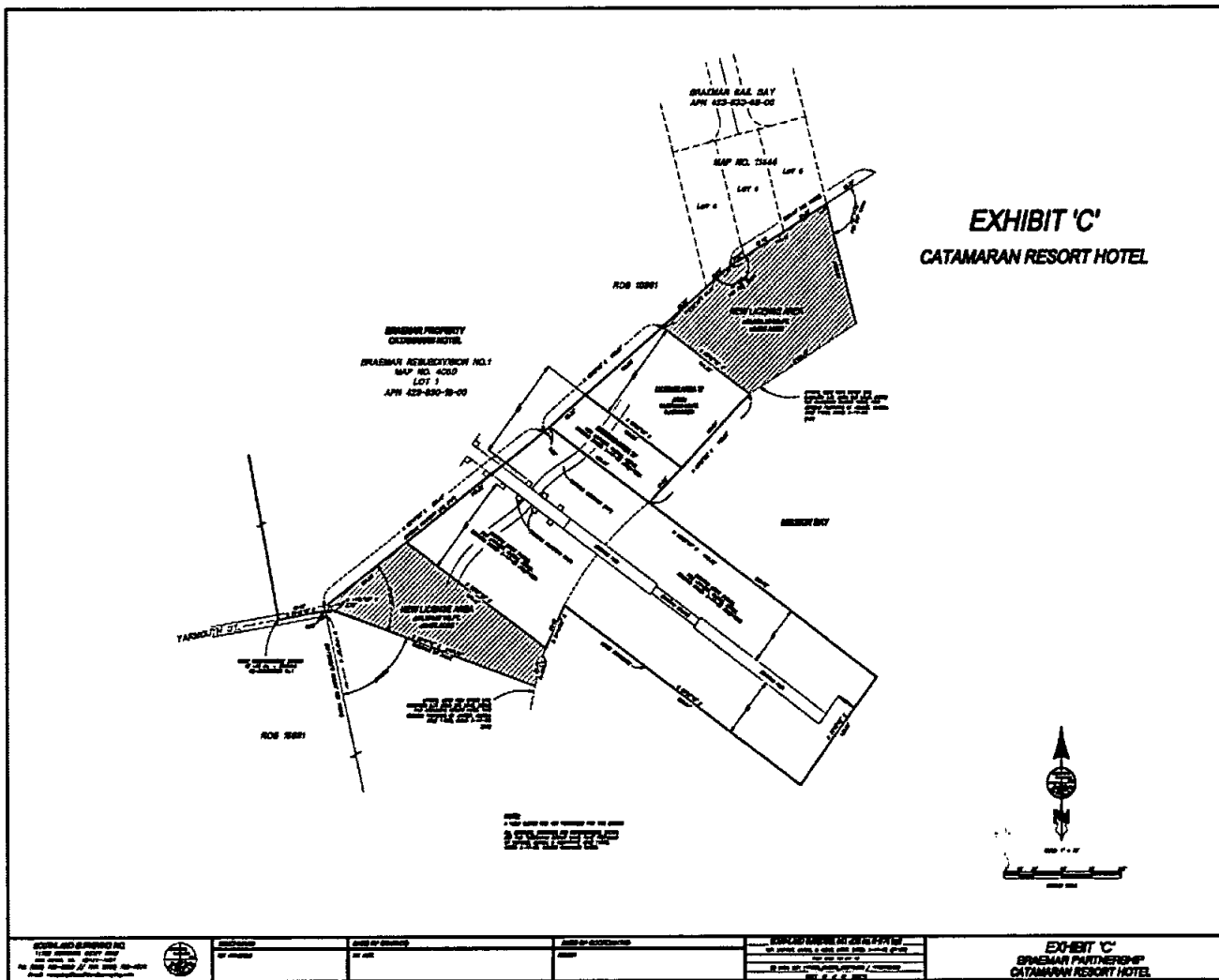


Exhibit D: Approved Vessels for Rent

Catamaran Resort Equipment list

- 1 X 17' Rinker motorboat
- 1 X 19' Rinker motorboat
- 1 X 20' Hurricane motorboat
- 1 X 20' Pontoon boat
- 4 X 14' Sailboat
- 1 X 18' Sailboat
- 1 X 22' Sailboat
- 25 X Stand Up Paddleboards
- 5 X paddleboats
- 12 X Kayak
- 5 X Fun Cat electric lounge chair

RESOLUTION NUMBER R- 310779

DATE OF FINAL PASSAGE DEC 01 2016

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN DIEGO AUTHORIZING THE EXECUTION OF THE CITY OF SAN DIEGO PERCENTAGE LEASE AND LICENSE AGREEMENT BETWEEN THE CITY OF SAN DIEGO AND BRAEMAR PARTNESHIP, FOR THE LEASE OF THAT CERTAIN PORTION AND THE USE OF THOSE PORTIONS OF THE CITY-OWNED PROPERTY LOCATED IN MISSION BAY PARK, ALL OF WHICH ARE LOCATED ADJACENT TO THE CATAMARAN RESORT HOTEL AND SPA WHICH IS LOCATED AT 3999 MISSION BOULEVARD, SAN DIEGO, CALIFORNIA.

WHEREAS, the City of San Diego (City) owns approximately 0.64 acres of land and 0.85 acres of water commonly known as the Catamaran Pier (Lease Premises), located adjacent to the Catamaran Resort Hotel and Spa, which is located at 3999 Mission Boulevard, San Diego, CA 92109 (Catamaran Hotel), in Mission Bay Park; and

WHEREAS, City further owns the following areas which are located adjacent to the Catamaran Hotel, in Mission Bay Park: (1) approximately 0.133 acres of land (License Area A); (2) approximately 0.266 acres of land (License Area B); (3) approximately 0.595 acres of land (License Area C); and (4) approximately 0.405 acres of land (License Area D); and

WHEREAS, in 1977, City entered into a lease agreement (Original Lease) with William D. Evans, predecessor in interest to Braemar Partnership, a California limited partnership (Braemar), for the construction, operation and maintenance of the Lease Premises; and

WHEREAS, in 2004, City and Braemar entered into a license agreement (License Agreement) for the operation of beach chair, umbrella, boat rentals, and food and beverage service for Catamaran Hotel guests and the general public on License Area A; and

WHEREAS, the Original Lease and the License Agreement expired in November 2014; since that time Braemar has continued to have use and occupancy rights to the Lease Premises and License Area A by means of legal holdover status under the Original Lease and License Agreement; and

WHEREAS, in 2013, City and Braemar entered into a permit (Permit) for operation of beach chair, umbrella, complimentary movie screening, and food and beverage service for Catamaran Hotel guests and the general public on License Area B; and

WHEREAS, the Permit expired in August 2016; since that time Braemar has continued to have use and occupancy rights to License Area B by means of legal holdover status under the Permit; and

WHEREAS, Braemar has requested a new ten-year lease and license agreement (Agreement), with an option to extend the Agreement for an additional five years, for the same uses as authorized in the Original Lease, License Agreement and Permit; the Agreement will consolidate into one document all of the terms and conditions concerning the Lease Premises and License Areas A and B, and will also include the use of new license areas License Area C and License Area D (collectively the "Premises"); and

WHEREAS, the current annual rent under the Original Lease is the greater of \$30,272 annually or 10% of gross revenue of all operations on the Lease Premises; the current annual rent under the License Agreement is the greater of \$500 annually or 10% of gross revenue of all operations on License Area A; and the current annual rent under the Permit is the greater of \$250 annually or 10% gross revenue of all operations on License Area B; and

WHEREAS, the initial rent under the proposed Agreement will be the greater of \$41,000 annually or 10% of gross revenue of all operations conducted on the Premises; beginning on the

commencement of the fifth lease year, the rent will increase to 80% of the annual average of all rents paid during the preceding three years; and

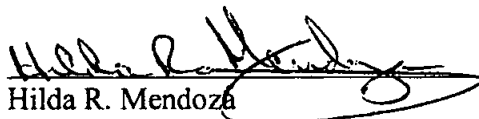
WHEREAS, staff recommends entering into the Agreement because the Agreement will provide for improved services and products to the general public on the Premises, as well as to Catamaran Hotel guests; and

WHEREAS, the market value of the real estate subject to the Agreement, as appraised by City staff, is \$620,000; NOW, THEREFORE,

BE IT RESOLVED, by the City Council of the City of San Diego, that the Mayor, or his designee, is authorized and directed to execute the City of San Diego Percentage Lease and License Agreement between the City of San Diego and Braemar Partnership, the terms of which are more fully set forth therein, and which is on file in the Office of the City Clerk as Document No. RR- 310779.

APPROVED: JAN I. GOLDSMITH, City Attorney

By


Hilda R. Mendoza
Deputy City Attorney

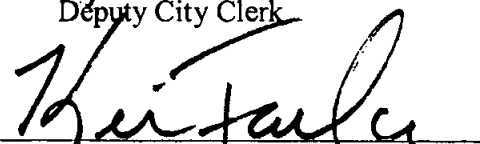
HRM:als
11/01/2016
Or.Dept: Real Estate Assets
Doc. No.: 1377118

I certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of NOV 15 2016.

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 11/28/16
(date)


KEVIN L. FAULCONER, Mayor

Vetoed: _____
(date)

KEVIN L. FAULCONER, Mayor

Passed by the Council of The City of San Diego on NOV 15 2016, by the following vote:

Councilmembers	Yeas	Nays	Not Present	Recused
Sherri Lightner	☒	☐	☐	☐
Lorie Zapf	☐	☐	☒	☐
Todd Gloria	☐	☐	☒	☐
Myrtle Cole	☒	☐	☐	☐
Mark Kersey	☒	☐	☐	☐
Chris Cate	☒	☐	☐	☐
Scott Sherman	☒	☐	☐	☐
David Alvarez	☒	☐	☐	☐
Marti Emerald	☐	☐	☒	☐

Date of final passage DEC 01 2016

(Please note: When a resolution is approved by the Mayor, the date of final passage is the date the approved resolution was returned to the Office of the City Clerk.)

AUTHENTICATED BY:

KEVIN L. FAULCONER
Mayor of The City of San Diego, California.

(Seal)

ELIZABETH S. MALAND
City Clerk of The City of San Diego, California.

By Linda Krueger, Deputy

Office of the City Clerk, San Diego, California

Resolution Number R- 310779

Passed by the Council of The City of San Diego on November 15, 2016, by the following vote:

YEAS: **LIGHTNER, COLE, KERSEY, CATE, SHERMAN, ALVAREZ.**

NAYS: **NONE.**

NOT PRESENT: **ZAPF, GLORIA, EMERALD.**

RECUSED: **NONE.**

AUTHENTICATED BY:

KEVIN L. FAULCONER

Mayor of The City of San Diego, California

ELIZABETH S. MALAND

City Clerk of The City of San Diego, California

(Seal)

By: **Jeannette I. Santos**, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of
RESOLUTION NO. **R-310779**, approved on **November 28, 2016**. The date of final
passage is **December 1, 2016**.

ELIZABETH S. MALAND

City Clerk of The City of San Diego, California

(Seal)

By: , Deputy