

● DUPLICATE ●

SECOND AMENDMENT TO PERCENTAGE LEASE

THIS SECOND AMENDMENT TO PERCENTAGE LEASE ("Second Amendment") is made by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), as lessor, and R & D PROPERTIES LLC, a California limited liability company, and RALPH BURNI, individually and as Trustee of the Ralph Burni Trust u/d/t dated April 10, 1989, as amended, together as lessee (jointly and severally, "LESSEE"), to be effective as of the date of execution by CITY (the "Second Amendment 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 and LESSEE are parties to that certain PERCENTAGE LEASE dated October 17, 1983 and filed in the Office of the San Diego City Clerk as Document No. RR-259434 on October 17, 1983 (the "Lease").
- B. LESSEE is currently the borrower under a Pacific Western Bank leasehold improvement loan in the amount of Nine Million Two Hundred Twenty-One Thousand One Hundred Ninety-One Dollars (\$9,221,191).
- C. LESSEE intends to obtain a new loan from Great Eastern Investment Fund, LLC, in the original principal amount of Nine Million Three Hundred Thousand Dollars (\$9,300,000), to be secured by a leasehold deed of trust on LESSEE's leasehold under the Lease.
- D. The term of the Lease will expire on October 31, 2033. To enable the refinancing of its leasehold improvement loan, LESSEE has requested an extension of the Lease term to expire 40 years after the first day of the calendar month following the Second Amendment Effective Date.
- E. Pursuant to Lease Section 24, Ownership of Improvements, CITY has the right ("CITY's Ownership Right") to assume ownership of LESSEE's improvements at the end of the Lease term.
- F. WHEREAS, the present value of CITY's Ownership Right deferred to LESSEE if the Lease term is extended 40 years is estimated by CITY (using generally accepted appraisal techniques) is One Million Two Hundred Twenty-Two Thousand Five Hundred Dollars (\$1,222,500) (the "Extension Compensation").
- G. As consideration for CITY's agreement to extend the Lease term, LESSEE will execute and deliver this Second Amendment and pay the Extension Compensation to CITY.

- H. CITY has agreed to amortize the payment of the Extension Compensation over the 40-year Lease term extension at an interest rate of six percent (6%), payable by LESSEE as additional monthly rent ("Second Amendment Additional Monthly Rent") under the Lease in the amount of Six Thousand Seven Hundred Twenty-Six Dollars and Thirty-Six Cents (\$6,726.36).

AGREEMENT

1. Term. Lease Section II A, COMMENCEMENT AND TERMINATION, is hereby deleted in its entirety and replaced with the following:

A. Term. The term of this agreement shall be fifty (50) years commencing November 1, 1983. Notwithstanding the foregoing, the term of this lease shall be extended to forty (40) years after the first day of the calendar month following the date CITY executed that certain Second Amendment to Percentage Lease relating to this lease.

2. Second Amendment Additional Monthly Rent. The following section is hereby added as new Lease Section III. H. Second Amendment Additional Monthly Rent:

H. Second Amendment Additional Monthly Rent. In addition to all other amounts payable under this lease, and as required by that certain Second Amendment to Percentage Lease relating to this lease, LESSEE shall pay to CITY additional monthly rent (the "Second Amendment Additional Monthly Rent") in the amount of Six Thousand Seven Hundred Twenty-Six Dollars and Thirty-Six Cents (\$6,726.36). The Second Amendment Additional Monthly Rent shall be due and payable on the first day of each month commencing on the first day of the second calendar month following the date CITY executed that certain Second Amendment to Percentage Lease relating to this lease.

3. Additional Covenants. Lease Section IV. B, LESSEE COVENANTS, is hereby amended to include the following additional sections:

17. Hazardous Substances. LESSEE shall not allow the illegal installation, storage, utilization, generation, sale or release of hazardous or otherwise regulated substances in, on, under, or from the leased premises. LESSEE and LESSEE's agents and contractors shall not install, store, utilize, generate, or sell any hazardous substance on the leased premises without CITY's prior written consent. LESSEE shall obtain and maintain all required licenses

and permits from applicable regulatory agencies, including without limitation the San Diego County Department of Environmental Health, local fire agencies, the San Diego County Department of Weights and Measures, the San Diego County Air Pollution Control District, and the San Diego Regional Water Quality Control Board. Installing, utilizing, storing, or any other presence of a hazardous substance includes boxes, bags, bottles, drums, cylinders, above or below ground tanks, equipment with tanks, or any other type of container, equipment, or device which holds or incorporates a hazardous substance or hazardous waste.

- a. **Release.** For the purposes of this provision, a release shall include without limitation any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean any hazardous liquid, solid, or gaseous material substances listed by the Environmental Protection Agency or the State of California as a hazardous substance, and any type of petroleum-related substances and their chemical constituents.
- b. **Remediation.** If LESSEE's occupancy, use, development, maintenance, or restoration of the leased premises results in a release of a hazardous substance, or petroleum related substance or its chemical constituents, LESSEE shall pay all costs of remediation and removal to the CITY's satisfaction for unrestricted reuse of the leased premises, and in accordance with all applicable laws, rules, and regulations of governmental authorities.
- c. **Removal.** If LESSEE or LESSEE's contractor or agent has received approval and permits to store, utilize, generate, or install, or otherwise bring hazardous materials or hazardous wastes to the leased premises, LESSEE and/or LESSEE's contractor or agent shall remove all hazardous substances and hazardous wastes in any type of container, equipment, or device from the leased premises immediately upon or prior to the expiration or earlier termination of this lease. CITY reserves the right to conduct inspections of the leased premises and/or request documentation demonstrating the legal removal and/or disposal of the

hazardous materials, wastes or other containers, equipment, or devices from the leased premises. LESSEE shall be responsible for any and all costs incurred by CITY to remove any container, equipment, or device requiring disposal or removal as required by this provision.

- d. Indemnity. LESSEE shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from LESSEE's occupancy, use, development, maintenance, or restoration of the leased premises, including without limitation: (i) costs of environmental assessments; (ii) costs of regulatory remediation oversight; (iii) costs of remediation and removal; (iv) any necessary CITY response costs; (v) all fines, penalties, or fees assessed by any regulatory agency; (vi) damages for injury to natural resources, LESSEE's officers, employees, invitees, guests, agents, or contractors, or the public; and (vii) all costs of any health assessments or health effect studies. CITY shall protect, defend, indemnify, and hold LESSEE harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from CITY's occupancy, use, development, maintenance or restoration of the leased premises.
- e. Notice of Release. If LESSEE knows or has reasonable cause to believe that a hazardous substance or petroleum related substance or its chemical constituents has been released on, from, or beneath the leased premises, LESSEE shall immediately notify CITY and any appropriate regulatory or reporting agency per California Administrative Code Title 19 and any other applicable laws or regulations. LESSEE shall deliver a written report thereof to CITY within three (3) days after 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 LESSEE knows or has reasonable cause to believe that such substance is an imminent release or is an imminent substantial danger to public health and safety, LESSEE shall take all actions necessary to alleviate the danger. LESSEE shall immediately notify CITY in writing of any violation, notice to comply, or notice of violation received or the

initiation of environmental actions or private suits related to the leased premises.

- f. **Environmental Assessment.** Upon reasonable cause to believe that LESSEE's occupancy, use, development, maintenance, or restoration of the leased premises ("LESSEE's Operations"), resulted in any hazardous substance being released on, from or beneath the leased premises, CITY may cause an environmental assessment under regulatory oversight of the suspect area 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 LESSEE's sole cost and expense, and shall establish what, if any, hazardous substances have more likely than not been caused by LESSEE's Operations on, in, from or under the leased premises, 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 future restricted re-use of the leased premises, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect unrestricted re-use and in compliance with those laws or statutes, and estimates of the cost of such remediation or removal. LESSEE shall cause, or if LESSEE fails to do so within a reasonable period of time, as determined by CITY in its sole discretion, CITY may cause the remediation and/or removal recommended in the environmental assessment such that unrestricted re-use of the leased premises and compliance with environmental law and regulations are achieved, and LESSEE shall pay all costs and expenses therefor.

18. **Water Quality Assurances.** LESSEE shall comply with San Diego Municipal Code Article 3, Division 3: **Stormwater Management and Discharge Control** (the "Stormwater Code"), and employ "Best Management Practices" including a "Storm Water Pollution Prevention Plan" as those terms are defined by the Stormwater Code (collectively, "Prevention Plan") and as approved by CITY under its Stormwater Management Program. LESSEE shall submit a Prevention Plan satisfactory to CITY that

will control erosion and reduce the amount of "Pollutants," as defined by the Stormwater Code, and other sediments discharged from the leased premises. CITY may review the Prevention Plan periodically. Within thirty (30) days after written notice from CITY requesting an update of the Prevention Plan, LESSEE shall submit an updated Prevention Plan to CITY's satisfaction. LESSEE shall implement all changes to the Prevention Plan as required by CITY and to ensure compliance with all applicable laws, ordinances, and regulations. LESSEE shall inform its employees, contractors, subcontractors, agents and vendors of the Prevention Plan and ensure their compliance therewith.

19. Equal Benefits. LESSEE shall comply with San Diego Municipal Code sections 22.4301-22.4308, which require lessees of City-owned property to offer the same employment benefits to employees with spouses and employees with domestic partners. LESSEE shall certify that it will maintain such equal benefits throughout the term of this lease. LESSEE's failure to maintain equal benefits shall be a default of this lease.

4. No Other Changes. All other terms and conditions of the Lease shall remain in full force and effect. Any conflict between the terms and conditions of this Second Amendment and those of the Lease shall be resolved in favor of the terms and conditions of this Second Amendment.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

5. Authority. Each individual executing this Second Amendment on behalf of another person or legal entity represents and warrants that they are authorized to execute and deliver this Second Amendment 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 Second Amendment is binding upon such person or entity in accordance with its terms. Each person executing this Lease 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.

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

Date: 2-16-12

R & D PROPERTIES LLC, a California
limited liability company

By: Ralph Burni
Name: RALPH BURNI
Title: MANAGING PARTNER

Date: 2-16-12

Ralph Burni
RALPH BURNI, individually and as Trustee
of the Ralph Burni Trust u/d/t dated April
10, 1989, as amended

Date: 4/6/12
Second Amendment Effective Date

THE CITY OF SAN DIEGO, a California
municipal corporation

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

Approved as to form and legality:

JAN L. GOLDSMITH, CITY ATTORNEY

By: Debra F. Baker
Name: Debra F. Baker
Title: Dep City Atty

RESOLUTION NUMBER R- 307331DATE OF FINAL PASSAGE MAR 28 2012

A RESOLUTION OF THE COUNCIL OF THE
CITY OF SAN DIEGO AUTHORIZING A LEASE
EXTENSION FOR THE PROPERTY KNOWN AS
FOUR POINTS SHERATON SAN DIEGO.

WHEREAS, the City leased certain real property located at 8110 Aero Drive, San Diego, California 92123, and commonly known as the Four Points Sheraton San Diego, for 50 years pursuant to San Diego Resolution R-259434 (October 17, 1983); and

WHEREAS, the lease is scheduled to expire on October 31, 2033; and

WHEREAS, R & D Properties LLC, a California limited liability company doing business as "Four Points Sheraton San Diego" (Lessee), acquired the leasehold in 2006, and currently operates the property, which consists of an approximately 194,000 square foot hotel with 225 quest rooms and related amenities; and

WHEREAS, the Lessee is seeking to refinance an existing loan that encumbers Lessee's improvements on the leasehold; and

WHEREAS, Lessee is unable to find a lender who is willing to refinance the loan with only 21 years remaining on the term of its lease; and

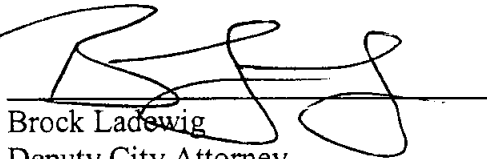
WHEREAS, City staff have negotiated a 19-year lease extension through 2052, which will enable the Lessee to refinance its loan; and

WHEREAS, in exchange for granting the lease extension, the Lessee will pay the City \$80,716 per year as additional rent; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, that the Mayor or his designee is authorized to execute and deliver a Second Amendment to Percentage Lease between the City and R&D Properties LLC, a California limited liability company doing business as "Four Points Sheraton San Diego," to extend the term of the current lease an additional nineteen years for the property located at 8110 Aero Drive, San Diego, California 92123, and commonly known as the Four Points Sheraton San Diego. Such Second Amendment to Percentage Lease is on file in the Office of the City Clerk as Document No. RR- 307331.

APPROVED: JAN I. GOLDSMITH, City Attorney

By


Brock Ladewig
Deputy City Attorney

BLL:mm

02/29/2012

Or.Dept:Real Estate Asset Dept.

Doc. No. 326471

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of MAR 20 2012

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 3.28.12
(date)


JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor

Passed by the Council of The City of San Diego on March 20, 2012, by the following vote:

YEAS: LIGHTNER, FAULCONER, GLORIA, YOUNG, DEMAIO, ZAPF, EMERALD, & ALVAREZ.

NAYS: NONE.

NOT PRESENT: NONE.

RECUSED: NONE.

AUTHENTICATED BY:

JERRY SANDERS

Mayor of The City of San Diego, California

ELIZABETH S. MALAND

City Clerk of The City of San Diego, California

(Seal)

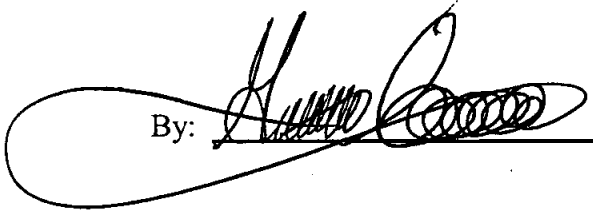
By: GIL SANCHEZ, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of
RESOLUTION NO. R-307331, approved by the Mayor of The City of San Diego,
California on March 20, 2012.

ELIZABETH S. MALAND

City Clerk of The City of San Diego, California

(Seal)

By:  Deputy