

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

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**COMPLAINT**

CARL ERNST JR. VS. MONIQUE MOYER et al

001C03382930

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF SAN FRANCISCO

11 CARL ERNST, JR.,  
12 Plaintiff,  
13  
14 vs  
15 MONIQUE MOYER; THE SAN  
16 FRANCISCO PORT COMMISSION; THE  
17 PORT OF SAN FRANCISCO; THE CITY  
18 AND COUNTY OF SAN FRANCISCO  
19 and DOES 1 through 20, inclusive,  
20 Defendants.

Case No. CGC-10-501887  
**SECOND AMENDED COMPLAINT**  
**(JURY TRIAL DEMANDED)**

**BY FAX**

22 Plaintiff Carl Ernst, Jr. alleges as follows:

23 **PARTIES**

24 1. Ernst is a resident of San Francisco, California. Since 1996, his principal  
25 occupation has been to develop, manage and operate marine-related businesses at Pier 38, a unique  
26 and valuable real property within the City and County of San Francisco (the "City"), which was  
27 leased from the City by and through the San Francisco Port Commission (the "Port"). By order of the  
28 United States Bankruptcy Court for the Northern District of California signed and filed July 13, 2010,

1 Ernst acquired all of Pier 38 Maritime Recreation Center, Inc.'s, right, title and interest in the claims  
2 that are subject to this Second Amended Complaint.

3 2. Defendant City and County of San Francisco (the "City") is a municipality organized  
4 and existing under the laws of the State of California. As it pertains to this complaint, the City may  
5 act either separately, or by and through the Port. The Port is an instrumentality of the City and  
6 operates as a for-profit enterprise agency. Under applicable California public trust law (the "Burton  
7 Act"), the Port is also the trustee for the people of California with respect to the maritime properties  
8 within its portfolio, including Pier 38. Unless otherwise noted, references in this complaint to the  
9 Port mean the City acting by and through the Port.

10 3. Defendant Monique Moyer is the Executive Director of the Port. The Port's  
11 activities are administered by various officers under the direction of Defendant Moyer and her  
12 predecessors (the "Port Director"), who reports to the San Francisco Port Commission, a body  
13 comprised of five members, appointed by the Mayor of San Francisco and his predecessors ("the  
14 Mayor").

15 4. The Port Director, and Does 1-20, who are certain officers and staff of the Port who  
16 have dealt with Ernst, are referred to collectively herein as the "Port Defendants."

17 5. Defendants DOES 1-20, inclusive, are sued herein under fictitious names. Among  
18 these Doe Defendants are the culpable Port officers and staff referred to in paragraph 4, as well as  
19 others who are not employed by the Port. The true names and full capacities of DOES 1-20 are  
20 unknown to Ernst, who will seek leave to amend this complaint to include their names and capacities  
21 when ascertained.

22 6. Ernst is informed and believes and on that basis alleges that at all relevant times each  
23 of the defendants was the agent, and/or employee of each of the other Defendants, and, in doing the  
24 acts and omissions described herein, was knowingly acting within the scope of such agency, and/or  
25 employment - as well as with the permission and consent of each oth the other Defendants. Further,  
26 each Defendant ratified each of the other Defendants' acts.

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**BACKGROUND FACTS I:**  
**THE ORIGINAL AND 2002 PIER 38 LEASES AND RELATED DEVELOPMENTS**

7. Sometime in 1994, Ernst became interested in developing a dry boat storage facility and related maritime businesses to serve San Francisco boaters. He approached the Port about leasing a portion of Pier 38 for that purpose. At that time, Pier 38 had been vacant for a number of years and was publicly posted with a "For Lease" sign.

8. After approving Ernst's proposed tenancy in concept, the Port designated a senior member of its Commercial Property staff, Nicolas Dempsey, a licensed attorney, to oversee the negotiation, drafting and finalization of a written lease agreement for Pier 38. Other Port officers and staff members, including Real Estate staff member Mark Lozovoy, also participated in these activities. During the negotiations, Ernst was informed that the Port did not want to lease a portion of Pier 38, but instead preferred to lease the entire Pier 38 premises to a developer-joint venturer who would provide some capital and accomplish long-term improvements for Pier 38, and would manage it as a "maritime recreation center".

9. Ernst agreed to undertake the additional responsibility of developing and managing the entire Pier 38 facility in cooperation with the Port, as well as obtaining the capital necessary to develop and manage Pier 38.

10. Ernst also acquiesced to the Port's request that he form a new corporate entity, Pier 38 Maritime Recreation Center, Inc., to conduct the daily business of Pier 38 (the "Management Company") and that both he and the Management Company would sign any Pier 38 lease as co-tenants.

11. At all relevant times, pertaining to this Complaint, Ernst was the sole shareholder and CEO of the Management Company.

12. Ernst negotiated with Dempsey and the Port the terms of the Pier 38 Lease, including the Port's obligations to make or underwrite necessary Pier 38 repairs and maintenance, the monthly rents to be paid (including income-sharing), the co-tenant's rights to certain rent credits, and the permitted uses for the leasehold.

13. Dempsey and the Port prepared the original lease documents. In agreeing to sign the

1 proffered Pier 38 lease document, Ernst relied on explanations and on other representations by  
2 Dempsey and the Port, many of which later proved untrue.

3 14. On or about January 13, 1996, Ernst - acting for himself and for the Management  
4 Company - signed the agreement prepared by Dempsey and the Port in order to lease the non-  
5 residential property and surrounding waters commonly known as Pier 38 until the year 2016. Shortly  
6 thereafter, the Pier 38 lease document signed by Ernst was presented to the Port Commission and it  
7 was approved and signed (the "Original Pier 38 Lease").

8 15. On October 24, 1996, on the joint application of Ernst and the Port, the San  
9 Francisco Bay Conservation and Development Commission ("BCDC") issued Permit No. 5-96 for  
10 the development of a maritime recreation center at Pier 38. This permit contemplated significant  
11 recreational boat berthing and servicing facilities.

12 16. On March 26, 1997, Ernst and the Management Company agreed with the Port to  
13 make certain modifications to the Original Pier 38 Lease, including corrections to the property line  
14 of Pier 38.

15 17. On May 6, 1997, with the full knowledge, participation, and consent of the Port,  
16 Ernst and the Management Company received a loan in the amount of \$1,465,000 from the California  
17 Department of Boating and Waterways ("DBW") for the development of the facility infrastructure at  
18 Pier 38. Loan related documents were also recorded with the county recorder's office. For the next  
19 three years, Ernst's development of the maritime recreation center proceeded.

20 18. In or about 2000 - in reliance on promises and representations by the Port which  
21 assured fulfillment of the Port's obligations under the Original Pier 38 Lease and cooperation in the  
22 development of an expanded business plan for the entire Pier 38 leasehold - Ernst sold valuable real  
23 property owned by him at below-market value in order to meet certain option requirements of the  
24 Original Pier 38 Lease and thus to extend the term of the leasehold from 2016 to the year 2031.

25 19. Sometime in 2001, pursuant to the Port's promises and assurances, Ernst proposed a  
26 modified business plan for the development of Pier 38, which incorporated a large luxury yacht  
27 marina (the "Mega Yacht Development"). The Port Defendants reacted enthusiastically to this  
28 proposal. The Port urged Ernst to pursue this business plan and agreed that the Port would join with

1 him to make the Mega Yacht Development a reality and share in the resulting profits.

2         20.       In early June 2001, Ernst and the Management Company agreed with the Port and  
3 Port staff on certain modifications to the Original Pier 38 Lease. Among other things, the  
4 modifications made the long-term berthing of boats a specifically permitted use, reconfigured the  
5 pier layout to provide for the docking of very large yachts, and confirmed that the water area under  
6 lease was "447,985 square feet" (the "Mega Yacht Attachments"). Then, without explanation, the  
7 Port delayed formal adoption of the Mega Yacht Amendments.

8         21.       On June 26, 2001, at the request of the Mayor's Office, the proposal for the Mega  
9 Yacht Amendments was removed from the Port Commission's agenda, literally 5 minutes before the  
10 scheduled vote of the Port Commission and after they had been polled as to their intention to  
11 approve the amendments.

12         22.       On August 7, 2001, the Port Director wrote to Ernst detailing "new" issues to be  
13 addressed and, on October 3, 2001, wrote Ernst that "the Port Commission no longer supports" the  
14 Mega Yacht Amendments.

15         23.       On June 25, 2002, after attempting to resolve their differences with the Port, Ernst  
16 and the Management Company filed suit against the City, the Mayor (Willie Brown) and Ken  
17 Harrington (a senior member of the Mayor's office), alleging - among other things - violations of the  
18 City Charter and unlawful interference in the Port's administration of the leasehold for Pier 38 and of  
19 Ernst's interest therein (the "2002 Ernst Lawsuit"). Negotiations followed.

20         24.       By mid-August 2002, Ernst reached an agreement with the City and the Port under  
21 which the Mega Yacht Amendments were to be approved, the Port was to re-affirm the terms of the  
22 Original Pier 38 Lease (including terms which required the Port to take responsibility for public  
23 access, substructure repairs and maintenance, which were of critical importance to the Mega Yacht  
24 Development) and Ernst was to dismiss his lawsuit (the "2002 Settlement Agreement").

25         25.       On August 28, 2002, the Port Commission voted to adopt the Mega Yacht  
26 Amendments, and included in the amended lease agreement significant clarifications of the Port's  
27 financial and scheduling obligations for the repair and maintenance of the roof, walls, pier  
28 substructure and apron at Pier 38 (as so amended, the "2002 Pier 38 Lease").

1           26.     On September 5, 2002, Ernst dismissed his Complaint in the 2002 Ernst Lawsuit in  
2 compliance with the 2002 Settlement Agreement.

3           27.     By September 2002, Pier 38 had become a much more valuable property than it had  
4 been when the Original Pier 38 Lease was signed. In early 1996, Pier 38 had been surrounded by the  
5 ruins of the Loma Prieta earthquake and was located in a generally unattractive neighborhood. By  
6 2002, Muni rail service and a new baseball stadium had been constructed, municipal railway service  
7 had begun, and the neighborhood had been substantially improved by new residential and related  
8 properties, facilitated by an influx of funds managed by the City and its Redevelopment Agency.  
9 Moreover, Ernst had put very large amounts of his own money, time, and effort into the development  
10 of Pier 38. Together with the Port, he had secured loan approvals and loans of \$1,465,000 from the  
11 California Department of Boating and Waterways ("DBW") and, again together with the Port, he had  
12 secured master plan approvals and development permits from BCDC and other agencies.

13           28.     Ernst believed in and relied upon the agreements that led to the new terms of the  
14 2002 Pier 38 Lease, in the related representations and actions of the Port, and in the parties' course  
15 of dealing which added meaning to those terms and representations. He thought his bargain with the  
16 City and the Port was secure. But Ernst now believes that the Port had neither the intention nor the  
17 resources to carry out their obligations - and that when the Port came to understand that the Mega  
18 Yacht Development that Ernst planned was potentially very profitable, they began to engage in acts  
19 that were designed to coerce Ernst to surrender the Pier 38 leasehold or to renegotiate its terms so as  
20 to provide more income to the Port.

21           29.     Sometime in 2003, internal correspondence among the Port began to reflect a desire  
22 to co-opt some or all of the profits to be had from the proposed Mega Yacht Development and to  
23 renegotiate the 2002 Pier 38 Lease so as to accomplish this result. Instead of conveying such views  
24 to Ernst, the Port allowed him to believe that the Port continued to support the 2002 Settlement  
25 Agreement, the Mega Yacht Amendments and the 2002 Pier 38 Lease.

26           30.     In or about April 2004, Ernst is informed and believes that Moyer became the  
27 Executive Director of the Port of San Francisco.

28           31.     On July 23, 2004, Ernst requested that the Port Defendants process the Management

1 Company's application for a building permit to accomplish work necessary to comply with BCDC's  
2 permit for the Mega Yacht Development. The Port sat on this request.

3 32. Then the Port began a series of actions apparently designed to wrest control of Pier  
4 38 away from Ernst. Ernst is informed and believes that Moyer had personal knowledge of the  
5 Port's actions to take control of Pier 38 away from Ernst. Ernst is further informed and believes that  
6 Moyer took personal action against Ernst and/or ratified the actions taken by her employees and/or  
7 the other Port against Ernst.

8 33. On October 7, 2004, the Port filed a lawsuit against Ernst and the Management  
9 Company in San Francisco Superior Court, which alleged non-payment of some \$377,00 in rent (the  
10 "First Eviction Action"). Ernst and the Management Company responded that no rent was due  
11 because the Port had failed to undertake major repairs and maintenance obligations required by the  
12 2002 Settlement Agreement and the 2002 Pier 38 Lease, that these obligations had instead been met  
13 by the co-tenants, and that under the lease the co-tenants were thus entitled to rent credits that  
14 exceeded the amount claimed by the Port.

15 34. Despite the Port's prosecution of the First Eviction Action, Ernst continued to pursue  
16 what he understood to be his obligations under the 2002 Pier 38 Lease, and - as one result - on  
17 January 28, 2005, BCDC approved the joint application of the Management Company and the Port  
18 to amend BCDC Permit 5-96 to encompass two 900 foot floating docks and other aspects of the  
19 Mega Yacht Development proposal. To further the actual development of the approved development  
20 plans, on October 5, 2005 Ernst applied for an additional loan of \$2,625,000 from the DBW, and on  
21 December 1, 2005 Ernst also applied for a Federal Infrastructure Grant in the amount of \$1,500,000.

22 35. On December 1, 2005, the Port served a second set of eviction papers on Ernst and  
23 the Management Company alleging un-permitted sale of Christmas trees (the "Second Eviction  
24 Action").

25 **BACKGROUND FACTS II:**  
26 **THE 2005 SETTLEMENT AGREEMENT AND THE PORT'S NON-COMPLIANCE**

27 36. On December 13, 2005, the Port, Ernst and the Management Company settled the  
28 First Eviction Action (and all other known disputes based on the 2002 Pier 38 Lease) by an  
agreement under which the Port: (1) accepted for rent credits some \$947,039 worth of construction



1 and maintenance work done by the co-tenants; (2) scheduled a substantial amount of additional work  
2 for timely verification by the Port as "pending rent credits"; and (3) agreed to "timely process" future  
3 applications for rent credits and for building permits ("the 2005 Settlement Agreement"). Under the  
4 2005 Settlement Agreement, the terms of the 2002 Pier 38 Lease (including the Mega Yacht  
5 Amendments) were reaffirmed by the parties. On behalf of the Port, Moyer was a signatory of the  
6 2005 Settlement Agreement. As a result, Ernst then reasonably believed that the parties' differences  
7 had been put to rest.

8 37. Nevertheless, on February 1, 2006, and despite the pending rent credits memorialized  
9 in the 2005 Settlement Agreement, Moyer took the position that the Port could not consider joining  
10 Ernst in seeking permit extensions from BCDC, among others, because rent was overdue. Several of  
11 the Port's employees assured Ernst that this was not so, and Ernst reasonably believed these  
12 representations. Accordingly, on April 12, 2006, after learning that the \$1.5 million grant had been  
13 awarded, Ernst submitted to the Port a plan for a proposed water attenuator - necessary for the Mega  
14 Yacht Development - to be reviewed for the issuance of a routine Port building permit.

15 38. On May 1, 2006, an internal Port writing documented the Port's concern that issuing  
16 a permit for the wave attenuator would trigger the Port's contractual obligation to make extensive  
17 repairs to the pedestrian "apron" which surrounded Pier 38 - and that these repairs would cost more  
18 money than the Port wanted to expend.

19 39. As an apparent result, on May 3, 2006, Port Environmental Program Manager John  
20 Mundy wrote to the Port's chief building permit officer: "We need to put a hold on [issuing] the  
21 building permit until Carl Ernst secures permits from Corps of Engineers and Regional Water  
22 Quality Board." Neither this writing nor the Port's intention to stall was disclosed to Ernst.

23 40. On May 11, 2006, the Port sent a letter to Ernst indicating that he needed to obtain  
24 prior outside agency approvals, including approvals from BCDC, the Regional Water Control Board  
25 and the Army Corps of Engineers, before the Port would issue its own permit. This contention was  
26 untrue. Nevertheless, the Port reaffirmed this position in a second letter dated June 6, 2006.

27 41. On or about June 1, 2006, agents of the Port posted 28 or more large signs along  
28 most of the interior perimeter of the Pier 38 facility. These signs read "Unsafe Area - Do Not Enter".

1 The Port Defendants also caused outside barriers and prohibitory signs to be erected. These postings  
2 by the Port prevented pedestrians and marine access to most of the Pier 38 leasehold.

3 42. The Port's purported justification for these postings was the existence of "dangerous  
4 conditions" which, it said, had been discovered during a "facility assessment" conducted by Port  
5 personnel - two years before. It was the Port's contractual obligation to repair and maintain the areas  
6 blocked by the posted signs - and this they have never done.

7 43. These premises were essential to Ernst's then-existing businesses, and to the  
8 proposed Mega Yacht Development - which development was, by these postings, effectively brought  
9 to a standstill.

10 44. Ernst attempted to negotiate to get the Port to fulfill the Port's repair obligations  
11 under the 2002 Pier 38 Lease and to honor its promises to cooperate in the Mega Yacht Development  
12 under the 2005 Settlement Agreement. But, although the Port continued to reassure Ernst, no  
13 progress was made. Eventually, the Port delayed these negotiations until after the extensions and  
14 entitlements that Ernst had obtained from BCDC and other agencies had expired and until the Port  
15 had finally refused to sign on to Ernst's applications for further permit and loan extensions.

16 45. On July 3, 2006 David Beaupre, a Port officer, sent an email to Ernst saying that the  
17 wave attenuator plan and permit request "is being rejected by the Port's Planning and Development  
18 Division." This rejection was then confirmed by a formal letter dated July 7, 2006 and followed  
19 directly on the heels of the June 27, 2006 approval of the new \$2,375,000 loan by the DBW  
20 commission.

21 46. On July 14, 2006, seven months after the 2005 Settlement Agreement had been  
22 signed, Ernst applied to the Port for "Section 35 rent credits in the amount of \$56,934.45" for "work  
23 for which the Port was responsible under the terms of the lease," which work had been "begun and  
24 completed by [the Management Company] pursuant to the settlement agreement and understanding  
25 with the Port and for which prior rent credits have been granted."

26 47. On July 19, 2006, Port Senior Property Manager Elliott Riley wrote to his supervisor,  
27 Mirian Saez, to propose that the Port deny the July 14, 2006 application for rent credits on the  
28 grounds of lack of pre-approval - despite the fact that Riley knew this was contrary to the parties'

1 course of dealings and despite the fact that he conceded that there was "no cap" on contractual rent  
2 credits for "work identified as the Port's but otherwise completed by the tenant, so the credit is  
3 acceptable from this perspective." This writing was not disclosed to Ernst. Thereafter, for more  
4 than four months, the Port did nothing to approve - or disallow - any part of the July 14, 2006  
5 application for \$56,934 in rent credits.

6 48. On October 16, 2006, the California Department of Boating and Waterways  
7 ("DBW") entered into an agreement with Ernst - based on an earlier application endorsed by the Port  
8 - to loan \$2,375,000 to "make new improvements to the public access aprons ... construct 10,807  
9 square feet of boating docks [and] construct a wave attenuator [among other things]" - all in  
10 furtherance of the Mega Yacht Development.

11 49. On November 28, 2006, Ernst wrote to Moyer requesting that the Port "finalize rent  
12 credit submissions" which were "more than enough to pay the rent credit half of . . . [our] base rent  
13 through April 2007." Ernst also requested that the Port "honor its commitment to BCDC [and to  
14 Ernst] to repair the Pier 38 apron, which is the Port's responsibility per the lease," and to live up to  
15 its agreement to cooperate to carry out the Mega Yacht Development.

16 **BACKGROUND FACTS III:**  
17 **ERNST'S 2007 GOVERNMENT CLAIM AND HIS CIVIL LITIGATION**  
18 **WITH DEFENDANTS**

19 50. On January 14, 2007, internal documents show that Moyer was advised that "one  
20 benefit of allowing Pier 38 [and the Port] to amend [the BCDC] permit is that [if Ernst's Pier 38  
21 Lease ever terminates] "we would have an existing entitled [Mega Yacht] project." This writing -  
22 which evidenced the Port's desire to co-opt the development of the Pier 38 leasehold - was not  
23 disclosed to Ernst.

24 51. Also in January 2007, Port Property Manager Riley wrote to Moyer suggesting that  
25 the Port should: (1) refuse to co-sign any Ernst application for a BCDC permit extension past  
26 December 31, 2006; and (2) require from Ernst a construction schedule [for the Mega Yacht  
27 Development] with lease-terminating sanctions for failure to meet the schedule. This and other  
28 internal communications evidenced the Port's intention to terminate Ernst's tenancy and take over  
the "existing entitled [Mega Yacht] project." These writings and these intentions were not disclosed

1 to Ernst.

2 52. On January 23, 2007, the Port decided that even if apron repairs were legally the  
3 Port's responsibility, "we won't spend . . . the Port's budget on such repairs." This decision was not  
4 disclosed to Ernst.

5 53. At no time did the Port provide Ernst with written notice that the Port would not or  
6 could not perform the maintenance or repairs that Ernst requested the Port perform.

7 54. In the end, despite their continuing representations to the contrary, the Port refused to  
8 agree to any extension of the BCDC permit beyond its original expiration date.

9 55. On February 6, 2007, the Port again posted three-day and thirty-day notices at Pier  
10 38 and, on March 27, 2007, the Port filed another lawsuit against Ernst and the Management  
11 Company (the "Third Eviction Action").

12 56. On May 10, 2007, Ernst and the Management Company filed a government claim  
13 against the Port and the City (the "May 2007 Government Claim"). This claim alleged ongoing and  
14 continuing breaches of contract, misrepresentations leading to reliance and promissory estoppel, and  
15 other wrongful acts "designed to thwart the development of Pier 38" - and sought both specific  
16 performance of the Port's obligations and damages in excess of \$53 million dollars. The May 2007  
17 Government Claim is attached as **Exhibit A**.

18 57. On June 25, 2007, the May 2007 Government Claim was denied by the Port and the  
19 City. Ernst adopts the claims set forth in the May 2007 Government Claim and incorporates them  
20 herein.

21 58. On September 17, 2007, Ernst and the Management Company filed another  
22 government claim against the Port and the City alleging ongoing wrongful partial eviction, (based on  
23 the posting of the "Do Not Enter" signs) and ongoing and continuing breaches of contract and  
24 misrepresentations including withholding of rent credits - and sought declaratory relief and specific  
25 performance of the 2002 Pier 38 Lease (as amended and reaffirmed by the 2005 Settlement  
26 Agreement) and damages of over nine-hundred thousand dollars (the "September 2007 Government  
27 Claim"). The September 2007 Government Claim is Attached as **Exhibit B**. This claim was also  
28 denied by the Port and the City. Ernst adopts the claims set forth in the September 2007

1 Government Claim and incorporates them herein.

2 59. On September 26, 2007, the San Francisco Superior Court granted summary  
3 judgment in favor of Ernst and the Management Company and against the Port in the Third Eviction  
4 Action and, in later proceedings, the court awarded costs and attorneys fees to Ernst amounting to  
5 \$49,910. Instead of paying this award, the Port Defendants filed a notice of appeal.

6 60. Shortly thereafter, the Port commenced yet another eviction lawsuit against Ernst and  
7 the Management Company, again alleging underpayment of rent - this time amounting to some  
8 \$472,000 (the "Fourth Eviction Action").

9 61. On November 5, 2007, upon receiving the notice of the Port's Fourth Eviction  
10 Action, and in anticipation of another legal battle which it could not fund from its operating  
11 revenues, the Management Company petitioned for protection and reorganization under Chapter 11  
12 of the Bankruptcy Code (the "Management Company Bankruptcy").

13 **BACKGROUND FACTS IV:**  
**ERNST'S 2010 GOVERNMENT CLAIMS AGAINST DEFENDANTS**

14 62. Throughout 2008 and 2009 and ongoing, the Port continued to breach its obligations  
15 arising under the 2002 Pier 38 Lease and the 2005 Settlement Agreement, as well as under the Port's  
16 joint undertaking to develop with Ernst a Mega Yacht facility at Pier 38 - and the Port continued to  
17 make promises Ernst upon which he relied.

18 63. Also throughout 2008 and 2009 and ongoing, the Port continued to interfere with  
19 Ernst's present and prospective business dealings and Ernst's justifiably expected economic gains.

20 64. Ernst continued to manage the daily business of Pier 38 for the Management  
21 Company during the bankruptcy proceedings until August 1, 2009. Thereafter, the Management  
22 Company's co-tenancy at Pier 38 was terminated by an order the Bankruptcy Court - which was  
23 designed to give the Management Company relief from further expenses. The Port stipulated to that  
24 relief and to the provision that such relief would not affect Ernst's rights under the lease. From then  
25 on, Ernst alone managed the business of Pier 38 as the remaining co-tenant under the Pier 38 lease.

26 65. Before the completion of the Bankruptcy Court proceedings, Ernst purchased from  
27 the estate of the Management Company all claims against the Port which the Management Company  
28 might have - whether to resume its role as co-tenant or for money damages. The Bankruptcy Court

1 confirmed this purchase without objection from the Port, which approved the court's order as to  
2 form.

3 66. On November 5, 2009, the Port filed another lawsuit against Ernst seeking to end his  
4 tenancy at Pier 38 ("the Fifth Eviction Action"). The principal basis of the Fifth Eviction Action was  
5 the Port's allegation that the actions of the Management Company, in seeking Bankruptcy Court  
6 protection and/or "rejecting the lease" amounted to a material breach - by Ernst - of the Pier 38 lease.  
7 After Ernst demurred to this claim, the Port Defendants filed and amended complaint of December  
8 17, 2009. Ernst's demurrer was again sustained with leave to amend.

9 67. On February 2, 2010, Ernst filed another government claim against the City and the  
10 Port (the "February 2010 Government Claim") alleging further and continuing wrongful  
11 conduct by the Port. The February 2010 Government Claim is attached as **Exhibit C.**<sup>1/</sup>

12 68. The February 2010 Government Claim alleged: (1) breach of contract and bad faith  
13 with respect to the 2002 Pier 38 Lease and 2005 Settlement Agreement; (2) interference with  
14 prospective economic advantage; (3) promissory estoppel - with respect to procuring the Pier 38  
15 Lease and its several amendments, modifications, and related oral agreements - as well as with  
16 respect to procuring Ernst's continuing performance; (4) wrongful partial evidence; and (5)  
17 malicious prosecution. The February 2010 Government Claim also alleged misrepresentations and  
18 breaches by the Port in connection with the Port/Ernst joint venture or "private/public partnership".

19 69. Ernst adopts the claims set forth in the February 2010 Government Claim and  
20 incorporates them herein.

21 70. The February 2010 Government Claim also alleged that Ernst's investment loss and  
22 damages to the date of the claim were approximately \$7,500,000 and that Ernst's prospective  
23 economic losses for the remaining term of the Pier 38 lease were approximately \$600,00 per month  
24 over the remaining life of the lease.

25 71. In March 2010, the February 2010 Government Claim was rejected by the City and  
26 the Port as a legal result of their failure to accept or deny this claim in writing within 45 days.

27  
28 <sup>1/</sup>The claim form is dated January 29, 2009. The year is a typographical error. The form was prepared in 2010 and was submitted to the City in February, 2010.

1 72. On July 22, 2010, Ernst filed a Government Claim alleging further and continuing  
2 tortuous conduct and contractual breaches by the Port since the filing of his previous government  
3 claim ("the July 2010 Government Claim"). The July 2010 Government Claim is attached as  
4 **Exhibit D**, and Ernst adopts the claims set forth in that claim and incorporates them herein.

5 73. On September 1, 2010, the City and the Port rejected the July 2010 Government  
6 Claim as a legal result of their failure to accept or deny the claim in writing within 45 days.

7 **BACKGROUND FACTS V:**  
8 **RECENT EVENTS**

9 74. Ernst is informed and believes that in the period from February 3 through July 16,  
10 2010 the Mayor and/or his representatives, the Port Director and Port employees engaged in a series  
11 of meetings and communications with agents and representatives of the current America's Cup  
12 defender syndicate, BMW Oracle Racing, including Larry Ellison, and with members of the Golden  
13 Gate Yacht Club ("the America's Cup Defenders"): the subject of these meetings and  
14 communications was the impending defense of the America's Cup, the advantages of the City as a  
15 locale for this defense, and the availability of one-of-a-kind Port facilities to support this defense -  
16 including Pier 38, which is uniquely situated and qualified for this use. Further, one important  
17 purpose of these meetings and communications was to convince the America's Cup Defenders to  
18 join with the City and the Port in the rehabilitation of Pier 38, and then to lease Pier 38 from the Port  
19 - and not from Ernst - for use as a principal support facility for the America's Cup defense.

20 75. Despite the fact that Ernst had himself previously met and communicated with the  
21 America's Cup Defenders about using Pier 38 for the same purposes and despite the fact - on  
22 information and belief - that Defendants knew that Ernst had done so, Ernst was not invited to be a  
23 part of the Defendants' meetings or communications with the America's Cup Defendants - nor was  
24 he told of them.

25 76. Ernst first learned of these meetings and communications by Defendants, when he  
26 read about them in the newspaper.

27 77. Ernst is informed and believes that Defendant also met and communicated with  
28 several potential America's Cup challengers for the same or similar purposes - and that more such  
communications and meetings have been planned.

1 78. Ernst is informed and believes that at each of these meetings and in each of these  
2 communications, Defendants disparaged Ernst and his ability to cooperate with the America's Cup  
3 Defenders and/or challengers to provide and prepare Pier 38 facilities to support the defense of the  
4 America' Cup and/or the races necessary to determine the challenger - and that Defendants extolled  
5 the Port's own abilities to provide, prepare and then lease Pier 38 to the America's Cup Defenders  
6 and/or prospective challengers for such purposes.

7 79. On July 10, 2010, Ernst was given notice by the Port that they would be "conducting  
8 a walk-through" at Pier 38 on the following morning. The next day, Ernst learned that the purpose  
9 of the walk-through was to "show off one of the properties" that was available for use in connection  
10 with the defense of the America's Cup.

11 80. In doing these and other acts, these Defendants intentionally sought to interfere with  
12 Ernst's prospective economic advantage and to convert Ernst's business opportunities and potential  
13 profits to the use of the Port.

14 **FIRST CAUSE OF ACTION**  
15 **Intentional Interference with Economic Advantage**  
**(Against the City, Moyer and Does 1-20)**

16 81. Ernst incorporates by reference paragraphs 1 through 80, above.

17 82. At all relevant times alleged herein, Ernst was in an economic relationship with third  
18 parties that would have resulted in, and did result in, an economic benefit to Ernst. These  
19 relationships included, but are not limited to, existing contracts for the use of Pier 38 that resulted in  
20 revenue being generated for Pier 38, negotiations with America's Cup Defenders for use of Pier 38  
21 for the America's Cup and potential investors in Mega Yacht Development. Specifically, Ernst is  
22 informed and believes and thereon alleges that Moyer held a meeting with potential investors in the  
23 Mega Yacht Development that Ernst identified. Moyer excluded Ernst from the meeting. After the  
24 potential investors indicated an existing relationship with Pier 38 and an interest in developing Pier  
25 38 for Mega Yachts with Ernst, Moyer stated that she would not discuss any proposal that involved  
26 the development of Pier 38.

27 83. Ernst is informed and believes and thereon alleges that Defendants were aware of the  
28 economic relationships between Ernst and third parties described herein.



1           84. Defendants acted in a wrongful attempt to limit Ernst's prospective financial benefits  
2 from his Pier 38 leasehold – and to convert some or all of these benefits to the Port's use – by,  
3 among other things, wrongfully seeking to oust Ernst from his tenancy at Pier 38 and to diminish the  
4 work of that tenancy, as follows:

5           a. The Port refused to perform its obligations under the 2002 Pier Lease and  
6 the 2005 Settlement Agreement (as Amended and modified, the "Pier 38 Lease Contract"<sup>2/</sup>) in at  
7 least the following ways:

- 8           i. The Port failed to make required contractual repairs;  
9           ii. The Port failed to maintain the premises;  
10           iii. The Port failed to act timely on applications for necessary permits,  
11           extensions, outside agency loans and rent credits;  
12           iv. The Port failed to cooperate in the joint pursuit of the Mega Yacht  
13           Development;  
14           v. The Port sought to convert to the Port's own advantage the development of  
15           Pier 38 for commercial purposes, including business and sublease  
16           opportunities arising in connection with the imminent defense of the  
17           America's Cup in San Francisco Bay as set forth herein.

18           b. The Port wrongfully sought to deny and/or evade the promises made to

19 Ernst:

- 20           i. To maintain and repair Pier 38;  
21           ii. To cooperate with Ernst in the Mega Yacht Development and other Pier 38  
22           business opportunities and to perform the Port's further obligations under  
23           the Port/Ernst "Public-Private Partnership;"  
24           iii. To act in a timely manner on matters material to the success of the Mega  
25           Yacht Development and the Port/Ernst Public-Private Partnership and other  
26           Pier 38 business opportunities.

27  
28           <sup>2/</sup>The documents comprising the 2002 Pier 38 Lease and amending and modifying it so as to  
comprise the Pier 38 Lease Contract are appended as compilation Exhibit E.

1 c. The Port denied – on a pretextual basis – Ernst’s requests for issuance of one  
2 or more Port building permits for critical portions of the Mega Yacht Development.

3 d. The Port wrongfully posted 28 large “Do Not Enter” signs, which precluded  
4 access by Ernst’s existing and potential subtenants and customers to the Pier 38 premises.

5 e. The Port publicly denied Ernst’s tenancy and his right to occupy and  
6 sublease the Pier 38 premises.

7 85. Each of the Defendants was at all relevant times aware of the wrongful aims and  
8 objectives of the other defendants and each took at least one action to further this mutually accepted  
9 aim. Further, each of the Defendants who acted together with the Port to cause harm to Ernst was  
10 aware of the acts of the other Defendants and authorized, approved, cooperated in, or ratified each of  
11 the other Defendants’ actions.

12 86. Ernst is informed and believes and thereon alleges that Moyer and other Port  
13 employees’ actions as described herein were ministerial in nature.

14 87. Ernst was harmed by the actions of these Defendants in an amount to be proved at  
15 trial, and each Defendant’s action was a substantial factor in causing this harm to Ernst.

16 88. Ernst is informed and believes and thereon alleges that Moyer and other Port  
17 employees’ conduct was willful, malicious, outrageous and oppressive, and justify the awarding of  
18 exemplary and punitive damages.

19 Wherefore, Ernst prays for judgment as set forth below.

20 **SECOND CAUSE OF ACTION**  
21 **Negligent Interference with Prospective Business Advantage**  
22 **(Against the City, Moyer and Docs 1-20)**

23 89. Ernst incorporates by reference paragraphs 1 through 88, above.

24 90. At all relevant times alleged herein, Ernst was in an economic relationship with third  
25 parties that would have resulted in, and did result in, an economic benefit to Ernst. These  
26 relationships included, but are not limited to, existing contracts for the use of Pier 38 that resulted in  
27 revenue being generated for Pier 38, negotiations with America’s Cup Defenders for use of Pier 38  
28 for the America’s Cup and potential investors in Mega Yacht Development. Specifically, Ernst is  
informed and believes and thereon alleges that Moyer held a meeting with potential investors in the

1 Mega Yacht Development that Ernst identified. Moyer excluded Ernst from the meeting. After the  
2 potential investors indicated an existing relationship with Pier 38 and an interest in developing Pier  
3 38 for Mega Yachts with Ernst, Moyer stated that she would not discuss any proposal that involved  
4 the development of Pier 38.

5 91. Ernst is informed and believes and thereon alleges that Defendants were aware of the  
6 economic relationships between Ernst and third parties described herein.

7 92. Defendants negligently engaged in the following conduct that wrongfully interfered  
8 with Ernst's economic relationships:

9 a. The Port refused to perform its obligations under the Pier 38 Lease Contract  
10 in at least the following ways:

- 11 i. The Port failed to make required contractual repairs;
- 12 ii. The Port failed to maintain the premises;
- 13 iii. The Port failed to act timely on applications for necessary permits,  
14 extensions, outside agency loans and rent credits;
- 15 iv. The Port failed to cooperate in the joint pursuit of the Mega Yacht  
16 Development;
- 17 v. The Port sought to convert to the Port's own advantage the development of  
18 Pier 38 for commercial purposes, including business and sublease  
19 opportunities arising in connection with the imminent defense of the  
20 America's Cup in San Francisco Bay as set forth herein.
- 21 b. The Port wrongfully sought to deny and/or evade the promises made to

22 Ernst:

- 23 i. To maintain and repair Pier 38;
- 24 ii. To cooperate with Ernst in the Mega Yacht Development and other Pier 38  
25 business opportunities and to perform the Port's further obligations under  
26 the Port/Ernst "Public-Private Partnership;"
- 27 iii. To act in a timely manner on matters material to the success of the Mega  
28 Yacht Development and the Port/Ernst Public-Private Partnership and other

Pier 38 business opportunities.

c. The Port denied – on a pretextual basis – Ernst’s requests for issuance of one or more Port building permits for critical portions of the Mega Yacht Development.

d. The Port wrongfully posted 28 large “Do Not Enter” signs, which precluded access by Ernst’s existing and potential subtenants and customers to the Pier 38 premises.

e. The Port publicly denied Ernst’s tenancy and his right to occupy and sublease the Pier 38 premises.

93. Each of the Defendants was at all relevant times aware of the wrongful aims and objectives of the other defendants and each took at least one action to further this mutually accepted aim. Further, each of the Defendants who acted together with the Port to cause harm to Ernst was aware of the acts of the other Defendants and authorized, approved, cooperated in, or ratified each of the other Defendants’ actions.

94. Ernst is informed and believes and thereon alleges that Moyer and other Port employees’ actions as described herein were ministerial in nature.

95. Ernst was harmed by the actions of these Defendants in an amount to be proved at trial, and each Defendant’s action was a substantial factor in causing this harm to Ernst.

Wherefore, Ernst prays for judgment as set forth below.

**THIRD CAUSE OF ACTION**  
**Breach of Contract**  
**(Against the City and Does 1-20)**

96. Ernst incorporates by reference paragraphs 1 through 95 above.

97. The Port entered into a contract with Ernst, under which the premises of Pier 38 in San Francisco were leased to Ernst and the Management Company as co-tenants (the “Original Pier 38 Lease.”)

98. The Original Pier 38 Lease was, by the agreement of the parties, modified and amended from time to time, but the principal duties of the parties remained substantially unchanged – and the binding nature and continuing viability of the contractual relationship and the obligations of the parties were repeatedly reaffirmed orally, by conduct and in writings, including the MegaYacht Amendments, the 2002 Pier 38 Lease, and the 2002 and 2005 Settlement Agreements (as

1 thus modified, amended and reaffirmed, the "Pier 38 Lease Contract").

2 99. Ernst and/or the Management Company did all of the material acts that the Pier 38  
3 Lease Contract required them to do, with the exception of those things which were excused or  
4 prevented by the Port.

5 100. During the fourteen-year term of the Pier 38 Lease Contract, all conditions  
6 required for the Port's performance occurred.

7 101. The Port failed to do a number of things that the Pier 38 Lease Contract required it to  
8 do, including, but not limited to:

- 9 a. Making necessary repairs to the Pier 38 premises, including the repairs and  
10 reconstruction of the wood pier apron in three phases, as required by the Pier 38 Lease Contract;  
11 b. Maintaining the Pier 38 premises, including the facility roof, exterior walls,  
12 pier and apron pilings and pier and apron substructures, all as required by the Pier 38 Lease Contract;  
13 c. Promptly processing the co-tenants' applications for rent credits;  
14 d. Fulfilling its obligations to maintain and extend the permits and loan grants  
15 that were jointly obtained by the co-tenants and the Port;

16 e. Timely, effectively and financially supporting the MegaYacht Development;  
17 and

18 f. Pursuing prospective economic advantage in connection within the  
19 America's Cup defense in full and fair cooperation with Ernst.

20 102. Ernst was harmed by the Port's failure to perform its obligations under the Pier 38  
21 Lease Contract in an amount to be proved at trial, and the Port's actions were a substantial factor in  
22 causing Ernst's harm.

23 Wherefore, Ernst prays for judgment as set forth below.

24 **FOURTH CAUSE OF ACTION**  
25 **Promissory Estoppel**  
**(Against the City and Does 1-20)**

26 103. Ernst incorporates by reference paragraphs 1 through 102, above.

27 104. To induce Ernst to enter into the Pier 38 Lease Contract, and into each of its  
28 amendments and reaffirmations -- including the lease extension to 2031, the Mega Yacht

1 amendments and the 2002 Pier 38 Lease and the 2002 and 2005 Settlement Agreements –

2 Defendants repeatedly promised Ernst the following:

3 a. That the Port approved each of Ernst's business plans for a Maritime  
4 Recreation Center at Pier 38;

5 b. That the Port would join with Ernst in a "Public-Private Partnership" to  
6 develop all of Pier 38 into a maritime recreation center according to Ernst's business plans, including  
7 the plan for a Mega Yacht Development;

8 c. That the Port would timely repair and maintain major portions of the Pier 38  
9 premises so these objectives would be accomplished;

10 d. That the Port would cooperate in timely permitting necessary work to be  
11 done by Ernst and the Management Company – and in timely obtaining out-of-agency permits and  
12 loans;

13 e. That the Port would cooperate with Ernst and the Management Company to  
14 allow them to undertake critical portions of the Port's contractual work and obtain contractual rent  
15 credits without undue delay and bureaucracy; and

16 f. That the Port would pursue the development of an economically viable Pier  
17 38 maritime recreation center as a joint venture with Ernst so that both lessor and lessee could share  
18 in increased revenues from present and prospective users of the Pier 38 premises.

19 105. Ernst reasonably relied on these Defendants' false promises.

20 106. Ernst's reasonable reliance on the promises caused Ernst a substantial detriment.

21 107. Ernst's reliance on these promises was a substantial factor in causing him harm in an  
22 amount to be proven at trial.

23 Wherefore, Ernst prays for judgment as set forth below.

24 **FIFTH CAUSE OF ACTION**  
25 **Breach of the Covenant of Good Faith and Fair Dealing**  
**(Against the City and Does 1-20)**

26 108. Ernst incorporates by reference paragraphs 1 through 107, above.

27 109. The Port owed Ernst a duty of good faith and fair dealing.

28 110. The Port breached that duty by wrongfully interfering with Ernst's right to receive

1 the benefits of the Pier 38 Lease Contract.

2 111. The acts and conduct of the Port, which caused or constituted breaches of the Port's  
3 covenant of good faith and fair dealing included but are not limited to:

4 a. Numerous intentional and material misrepresentations by the Port including  
5 those facts set forth in the paragraphs above;

6 b. Failing to issue one or more building permits for work necessary to the  
7 already-approved Mega Yacht Development;

8 c. Improperly posting twenty-eight "Do Not Enter" signs, which had the effect  
9 of excluding access to most of the Pier 38 premises, thus greatly diminishing the ability of present  
10 and prospective boaters and pedestrians to use the Pier 38 leasehold and damaging any businesses  
11 housed or to be housed herein;

12 d. Unreasonably refusing to co-sign applications;

13 e. Seeking to wrest control of the proposed Mega Yacht Development from  
14 Ernst for the Port's benefit; and

15 f. Failing to include Ernst in discussions regarding the prospective use of Pier  
16 38 for the America's Cup Defense.

17 112. Ernst was harmed by these breaches in an amount to be proved at trial.

18 113. The conduct of the Port in doing each of the acts set forth above was a substantial  
19 factor in causing Ernst's harm.

20 Wherefore, Ernst prays for judgment as set forth below.

21 **SIXTH CAUSE OF ACTION**  
22 **Wrongful Partial Eviction**  
23 **(Against the City and Does 1-20)**

24 114. Ernst incorporates by reference paragraphs 1 through 113, above.

25 115. By posting the "Do Not Enter" signs and by failing to meet its obligations to repair  
26 and maintain the Pier 38 premises, the Port caused an eviction of Ernst and the Management  
27 Company from a part of their leasehold.

28 116. Ernst and the Management Company continued to occupy the remainder of their  
leasehold during the partial eviction.

1           117. Ernst and the Management Company continued to pay – and the Port continued to  
2 accept – rents ostensibly due under the Pier 38 Lease Contract.

3           118. Ernst was damaged by this wrongful partial eviction - and by the collection of  
4 unjustified rent and otherwise - in an amount to be proved at trial.

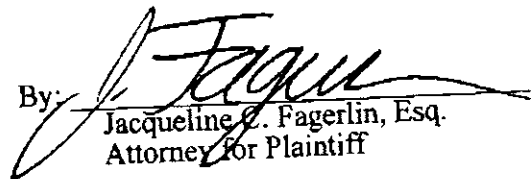
5           119. The conduct of the Port was a substantial fact in causing Ernst's harm.

6           WHEREFORE PLAINTIFF SEEKS JUDGMENT AS FOLLOWS:

- 7           1. For compensatory damages according to proof;  
8           2. For punitive damages according to proof against such defendants as are shown to  
9 have acted tortiously and with malice or with conscious disregard of Plaintiff's rights;  
10          3. For Costs of suit, including attorney's fees are provided by the Pier 38 lease  
11 contracts, and such other and further relief as the Court may deem proper.

12 Dated: November 10, 2011

**THE CARDOZA LAW OFFICES, INC.**

By:   
Jacqueline C. Fagerlin, Esq.  
Attorney for Plaintiff

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EX - ERNST COMPLAINT - 000001

# EXHIBIT A

Exhibit for Complaint for Carl Ernst, Jr.

### CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO

Before completing this form, please read the instructions on the back. You have only 6 months from the date of incident to submit this form and supporting documentation to the Controller or the Clerk of the Board of Supervisors.

<b>1. Claimant's Name and Home Address (Please Print Clearly)</b> Pier 38 Maritime Rescuation Center Inc. and Carl Ernst, Jr. City Pier 38, San Francisco Ca 94107 Telephone 415-494-4477 - N/A		<b>2. Send Official Notices and Correspondence to:</b> Jeffrey B. Neustadt 2740 Van Ness Avenue, Suite 500 City San Francisco Ca 94104 Telephone 415-444-4477 - N/A	
<b>3. Date of Birth</b> N/A	<b>4. Social Security Number</b> N/A	<b>5. Date of Incident</b> See Attached	<b>6. Time of Incident (AM or PM)</b> See Attached
<b>7. Location of Incident or Accident</b> Pier 38 - San Francisco		<b>8. Claimant Vehicle License Plate #, Type and Year</b> N/A	
<b>9. Basis of Claim. State in detail all facts and circumstances of the incident. Identify all persons, vehicles, property and City departments involved. State why you believe the City is responsible for the alleged injury, property damage or loss.</b> Breach of Contract / Specific Performance (See Attached)			
<b>Name, LD Number and City Department of City Vehicle who allegedly caused injury or loss</b> Pier 38 San Francisco	<b>Type of City Vehicle</b> N/A	<b>Vehicle License Number and Bus or Train Number</b> N/A	
<b>10. Description of Claimant's injury, property damage or loss</b> Breach of Contract Specific Performance (See Attachment - 2 pages)		<b>11. Amount of Claimant's property damage or loss and method of computation. Attach supporting documentation. (See instructions)</b> ITEMS See Attachment \$ _____ \$ _____ \$ _____ \$ _____ <b>TOTAL AMOUNT</b> \$ 53,746,000.00 Court Jurisdiction: <input type="checkbox"/> Limited Civil <input checked="" type="checkbox"/> Unlimited Civil	
<b>12. Witnesses (if any) Name Address Telephone</b> 1. Subject to Discovery - Employees of Post of San Francisco 2.		<b>13. Do Not Write in This Space</b> 43497 NW 07/10/07	
<b>14. Signature of Claimant or Representative</b> [Signature] 5/10/07 Jeffrey B. Neustadt Attorney		<b>Relationship to Claimant</b> Attorney	

**CRIMINAL PENALTY FOR PRESENTING A FALSE OR FRAUDULENT CLAIM IS IMPRISONMENT OR FINE OR BOTH, (PENAL CODE 572)**

5. On or about May 31, 2006 or June 1, 2006, the Defendant Port breached its obligations under lease by failing to commence work for the repair of the pier and pier apron pilings and pier and pier apron substructures. As of the date of this claim, the Port has failed to commence work for the repair of the pier and pier apron pilings and pier and pier apron substructures. Defendant Port further breached its obligations on or about May 11, 2006 by denying a permit, in writing, to Pier 38 on grounds that Defendant Port knew to be untrue; that Claimants must receive approval of the permit from other regulatory agencies first. Claimants are informed and believe and thereon allege that Defendant Port made such false statements due to their belief that should defendant Port approve such a permit it would trigger defendant Port's obligations to commence the repair of the pier and pier apron pilings and pier and pier apron substructures.

6. In or about July 28, 2006, the Port breached its agreement under the lease to timely process a rent credit application for tenant improvements for painting work that was submitted to the Port on July 14, 2006 by claimant tenants. On or about September 14, 2006, the Port breached its obligation under the lease to timely process a rent credit application for tenant improvements consisting of substantial improvements to Pier 38 including new construction to Pier 38, which improvements are hereinafter referred to as the area separation construction. The area separation construction rent credit application was submitted to the Port on August 29, 2006. In reliance upon the obligations of the Port to timely process rent credit applications, and in conformance with the prior practices of the parties, Claimants deducted the appropriate amounts for rent credits for each monthly bill and submitted a check to the Port for the balance of the rent due. The Port accepted these checks. On or about February 8, 2007, Claimants received a letter from the Port denying the rent credit applications for the painting and the area separation construction on the basis of technicalities and even though the Port acknowledges that the work has been done.

7. As a proximate result of defendant Port's breaches of contract, Claimants have been damaged including but not limited to (a) 2.5 million dollars for repairs and maintenance of the pier and pier apron pilings and pier and pier apron substructures; (b) \$216,000.00 for rent credits to which claimants are entitled or \$24,000.00 per month for excess rent paid from the date of breach; (c) \$48,000,000.00 for lost profit based on \$200.00 per square foot of 240,000 square feet of leaseable water space; (d) 3 million dollars for the cost of improvements made by Claimants to Pier 38 to date; and (e) costs incurred by Pier 38 for wrongly denied permits in the amount of \$30,000.00. Claimants are entitled to interest on the damages from the date of breach. The lease agreement provides that the prevailing party is entitled to attorney's fees.

8. Defendant Port is estopped from relying on any provision of the lease limiting damages due to their repeated representations that they would repair and maintain the pier and pier apron pilings and pier and pier apron substructures, Claimants' reliance on those representations and refraining to take action, and Defendant Port's knowledge of Claimants' reliance and Defendant Port's breach of the covenant of good faith and fair dealing contained in the lease.

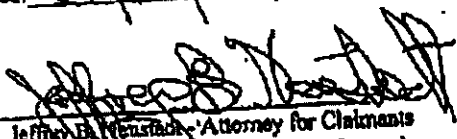
**CLAIM #1 - SPECIFIC PERFORMANCE**

9. Claimants incorporate by reference, as though fully set forth herein, paragraphs 1-8 above.

10. Claimants seek an order from the Court compelling defendant Port to comply with their obligations under the lease to repair and maintain the pier and pier apron pilings and pier and pier apron substructures within one year from the date of judgment. This order for specific performance is necessary given that the Port has engaged in conduct designed to thwart the development of Pier 38 and Claimants are informed and believe that unless such order is made the Port will continue to engage in such conduct, including the refusal to process permits applications in the timely manner and raise other obstacles to the development process. Therefore, money damages will not be sufficient as development will be thwarted unless defendant Port is required to comply within a set time period.

11. Wherefore claimants request a Judgment of Specific performance compelling the port to commence and complete their obligation to repair and maintain the pier and pier apron pilings and pier and pier apron substructures within one year from the date of judgment.

Dated: 5/10/07

By:   
Jeffrey B. Weinstock - Attorney for Claimants  
Pier 38 Maritime Recreation Center Inc. and  
Carl Ernst Jr.

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EX - ERNST COMPLAINT - 000005

# EXHIBIT B

Exhibit for Complaint for Carl Ernst Jr.

FORM 17-2007 12/54

## CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO

Before completing this form, please read the instructions on the back. You have only 6 months from the date of incident to submit this form and supporting documentation to the Controller or the Clerk of the Board of Supervisors.

<b>1. Claimant's Name and Home Address (Please Print Clearly)</b> PIER 38 MARITIME RECREATION CENTER INC. AND CARL ERNST JR. City: _____ Zip: _____ Telephone: (415) 775-3838 N/A		<b>2. Send Official Notices and Correspondence to:</b> SAJAHN BLATTEN City: SAN FRANCISCO Zip: _____ Telephone: _____	
<b>3. Date of Birth</b> 2-17-41	<b>4. Social Security Number</b> 065 32 8107	<b>5. Date of Incident</b> SEE ATTACHED	<b>6. Time of Incident (AM or PM)</b> SEE ATTACHED
<b>7. Location of Incident or Accident</b> PIER 38, SAN FRANCISCO		<b>8. Claimant Vehicle License Plate #, Type and Year</b> _____	
<b>9. Basis of Claim.</b> State in detail all facts and circumstances of the incident. Identify all persons, entities, property and City departments involved. State why you believe the City is responsible for the alleged injury, property damage or loss. DECLARATORY RELIEF RE: WRONG PARTIAL EVICTION; RESTITUTION; PROMISSORY ESTOPPEL (SEE ATTACHED)			
<b>10. Description of Claimant's Injury, property damage or loss</b> DBC-ARATORY RELIEF RE: WRONGFUL PARTIAL EVICTION; RESTITUTION; PROMISSORY ESTOPPEL	<b>11. Amount of Claimant's property damage or loss and method of computation. Attach supporting documentation. (See instructions)</b> ITEMS DECLARATORY RELIEF \$ _____ RESTITUTION \$ 576,000 PROMISSORY ESTOPPEL \$ 385,207.45 TOTAL AMOUNT \$ 961,207.45 Court Jurisdiction: United CA <input type="checkbox"/> Unlimited CA <input checked="" type="checkbox"/>		
<b>12. Witnesses (if any) Name Address Telephone</b> 1. Subject to discovery - EMPLOYEES OF PORT OF SAN FRANCISCO 2. _____			
<b>13. Signature of Claimant or Representative</b> Carl Ernst Jr. Date: 9/7/07 CARL ERNST JR. Relationship to Claimant: SELF		Do Not Write in This Space RECEIVED SEP 17 2007 3:40 CLERK OF BOARD OF SUPERVISORS CITY AND COUNTY OF SAN FRANCISCO	

CRIMINAL PENALTY FOR PRESENTING A FALSE OR FRAUDULENT CLAIM IS IMPRISONMENT OR FINE OR BOTH. PENAL CODE (17)

TOTAL P.65



## I. Declaratory Relief Re: Wrongful, Partial Eviction

Pier 38 Maritime Recreation Center Inc and Carl Ernst Jr entered into a lease with the City and County of San Francisco, by and through its Port Commission. A copy of the lease is attached hereto. The lease agreement with the Port requires the Port to maintain and repair and keep in good working order among other things, the pier and pier apron substructure. (See section 1.9 of the lease). The main business of Pier 38 is dry storage of boats, planing in and removing boats from the water, the docking of transient boats in the water and the lease of slips to boat owners. Therefore, the apron around the pier is a critical and substantial portion of the demise premises. Without the use of the apron, Pier 38 loses a substantial portion of the water space demise as well as the use of the apron itself as no boats can be tied up to the apron and no access to boats can be made from the apron. There is approximately 2000 lineal feet of apron surrounding the pier. Approximately one year ago, in or about June or July 2006, Port personnel entered the demise premises and posted large signs at most entrances to the apron which state: "UNSAFE AREA - DO NOT ENTER - 602 (m) P.C.". There are 28 of these signs that run the length of both sides of the pier shed. The signs are currently in place and prohibit access to the apron. There are also outside barriers to prevent access to approximately 1800 lineal feet of the apron surrounding the pier and the signs are posted on these barriers as well. Thus, the Port, acting under authority of law, has physically evicted Pier 38 from a substantial and critical portion of the demise premises and prevented it from using those premises. This is a continuing eviction.

It is the law in California that if a tenant is forcibly evicted from a substantial part of the demise premises, by the landlord, and the lease is not terminated, but the tenant still continues to occupy, under the lease, the part of which he retains possession, the tenant cannot be compelled to pay the rent reserved, for, in such case, there can be no apportionment of rent and there is no rent due. (*Grand v. Marich* (1931) 29 Cal.App.2d 543, 547-549).

The Port continues to demand rent for the premises. The parties dispute whether there has been a wrongful partial eviction and as to whether any rent is owed by Pier 38 Maritime Recreation Center Inc and Carl Ernst Jr to the Port. Therefore, Pier 38 Maritime Recreation Center Inc and Carl Ernst Jr request a determination and declaration from the court as to whether there has been a wrongful partial eviction and concerning the rights and duties of the parties as to whether any rent is owed.

## II. Restitution

Pier 38 Maritime Recreation Center Inc and Carl Ernst Jr incorporate by reference as though fully set forth herein. Pier 38 Maritime Recreation Center Inc and Carl Ernst Jr have paid rent to the Port during the time period when there has been a wrongful partial eviction. Pier 38 Maritime Recreation Center Inc and Carl Ernst Jr request restitution of rent paid to the Port while the wrongful partial eviction has occurred or as authorized by law for this continuing eviction.

## III. Promissory Estoppel

The lease provides that Pier 38 Maritime Recreation Center Inc and Carl Ernst Jr (hereinafter Pier 38) are entitled to rent credits for improvements made by them, which rent credits can be applied to the rent due to the Port. The lease provides that time is of the essence as to all provisions of the lease. The Port and Pier 38 had prior litigation concerning rent credits. The settlement agreement ultimately reached also specifically sets forth: "The Port shall timely process all building permits and rent credit applications pursuant to the terms of the lease".

On July 14, 2006, Pier 38 submitted a rent credit application to the Port for painting work necessary to make the walls water tight pursuant to section 35 of the lease (an obligation of the Port). This rent credit application was in the amount of \$56,934.45. By July 19, 2006, Port personnel had reviewed this rent credit application and were in a position to respond to it. The Port did not respond to this rent credit submittal until February 2007.

On August 29, 2006, Defendants submitted an application for rent credits in the amount of \$278,275.00 pursuant to section 34 of the lease and for a project which was specifically identified in the settlement agreement of December 2005 as eligible for rent credits. This was received by the Port on August 29, 2006. By mid September 2006, the Port was in a position to act on August rent credit application. The Port did not respond to this August 2006 rent credit submittal until February 2007.

On November 28, 2006, Ernst wrote a letter to the Executive Director of the Port. In that letter Ernst complained about the failure of the Port to timely act on the rent credit submittals in violation of the Port's obligations under the settlement agreement and indicated that because the Port had taken so long that Pier 38 believed the rent credits had been approved. The Executive Director did not respond to this letter.

The City knew that Pier 38 was relying on rent credits to pay a portion of its rent and knew that Pier 38 was relying on the obligations and express representations of the City that it would timely process all rent credit applications. The city did nothing for 7 and 5 months respectively and then in February 2007 the Port wrongfully denied the credits.

Based upon the promises of the Port, the reliance thereon by Pier 38, and the long delay by the Port in acting on the rent credit applications, the Port is estopped from denying those rent credits.

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EX - ERNST COMPLAINT - 000008

# EXHIBIT C

Exhibit for Complaint for Carl Ernst Jr.

## CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO

Before completing this form please carefully read the instructions on the back. Unfiled claims will be returned. Please submit this form and supporting documentation to the Controller's Office at City Hall in person or by mail.

* = REQUIRED ** = REQUIRED IF KNOWN															
<b>1. Claimant's Name and Home Address (Please Print Clearly)</b> a. Carl Ernst Jr Pier 38, The Embarcadero City San Francisco Zip 04107 Telephone (415) 975-3638	<b>2. Best Official Notice and Correspondence to:</b> a. Jeffrey B. Nouriedt, Esq 2740 Van Ness Avenue, Suite 300 City San Francisco Zip 04109 Telephone (415) 434-4440														
<b>3. Date of Birth</b> N/A	<b>4. Social Security Number</b> N/A	<b>5. Date of Incident</b> see attached	<b>6. Time of Incident (a.m. or p.m.)</b> see attached												
<b>7. Location of Incident or Accident</b> Pier 38 - San Francisco		<b>8. Claimant Vehicle License Plate #, Type, Make, and Year</b> N/A													
<b>9. Basis of Claim. State in detail all facts and circumstances of the incident. Identify all persons, entities, property and City departments involved. State why you believe the City is responsible for the alleged injury, property damage or loss.</b> • Tortious Interference/Breach of Contract/Violations of Public Policy including Wrongful Partial Eviction/Defamation/Abuse of Process/Malicious Prosecution/ Fraud in the Inducement/False Light Invasion of Privacy/Unfair Business Practices/Une process/ Intentional Infliction of Emotional Distress, among others -- ONGOING -- (see attached for detail)															
<b>10. Name, I.D. Number and City Department of City Employee who allegedly caused injury or loss</b> The Port of San Francisco	<b>Type of City Vehicle</b>	<b>Vehicle License Number and Bus or Train Number</b>													
<b>11. Description of Claimant's injury, property damage or loss - (see attachment for explanation)</b> lost business revenues, emotional distress, investment loss, loss of use of real property, medical expenses, punitive damages, damages are ongoing and accruing at approximately \$800,000 per month, or \$181,045,044 for the remainder of the lease term thru May 2032		<b>11. Amount of Claimant's property damage or loss and method of computation. Attach supporting documentation. (See instructions)</b> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center;">ITEMS</td> <td></td> </tr> <tr> <td>• damages</td> <td style="text-align: right;">\$ 310,100,000.0</td> </tr> <tr> <td>• punitive/exemplary damage</td> <td style="text-align: right;">\$ 512,000,000.0</td> </tr> <tr> <td></td> <td style="text-align: right;">\$</td> </tr> <tr> <td></td> <td style="text-align: right;">\$</td> </tr> <tr> <td><b>TOTAL AMOUNT</b></td> <td style="text-align: right;"><b>\$ 822,100,000.00</b></td> </tr> </table> Court Jurisdiction: Limited (up to \$25,000) <input type="checkbox"/> Unlimited (over \$25,000) <input checked="" type="checkbox"/>		ITEMS		• damages	\$ 310,100,000.0	• punitive/exemplary damage	\$ 512,000,000.0		\$		\$	<b>TOTAL AMOUNT</b>	<b>\$ 822,100,000.00</b>
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	\$														
<b>TOTAL AMOUNT</b>	<b>\$ 822,100,000.00</b>														
<b>12. Witnesses (if any) Name</b> 1. subject to discovery 2.		<b>Address</b> employees, current and former of The Port of San Francisco <b>Telephone</b>													
<b>13. Signature of Plaintiff or Representative</b> Jeffrey B. Nouriedt, Esq Print Name: Jeffrey B. Nouriedt Date: 1/29/2009 Relationship to Claimant: Attorney		Do Not Write in This Space     01/29/09													

ORIGINAL PENALTY FOR PRESENTING A FALSE OR FRAUDULENT CLAIM IS IMPRISONMENT OR FINE OR BOTH. (PENAL CODE §72)

Appendix for Claim Against the City and County of San Francisco

On or about 13 January 1996, Carl Ernst Jr (hereinafter, the "Tenant") and the City and County of San Francisco (hereinafter "CCSF") entered into a lease agreement for Pier 38 with surrounding waters, a property managed in trust by the Port Commission of the City and County of San Francisco for the People of the State of California pursuant to the "Burton Act."

THE AGREEMENT

The lease between the parties has been modified by the parties through various written agreements and changes in public policy. Those modifications consist of: (1) an "Addendum" of even date with the lease; (2) the "First Amendment" dated March 26, 1997; (3) the "Second Amendment" dated August 6, 2002; (3) the "Settlement Agreement" dated December 13, 2005; (4) the various building permits issued by the Port of San Francisco; (5) the various BCDC permits and amendments thereto issued by the San Francisco Bay Conservation and Development Commission which the CCSF subscribed to; (6) the loan agreements with the California Department of Boating and Waterways ("DBAW"); (7) the practice of the parties; (8) the "Waterfront Development Plan" of the CCSF and (9) all other agreements which modify the relationship between the parties. Taken together, the original lease with all stated modifications, is hereinafter referred to as the "Agreement".

BREACHES OF CONTRACT AND ASSOCIATED COVENANTS

The Agreement has been substantially breached by the CCSF on multiple occasions, and the breaches are ongoing and cumulative. Specifically, the CCSF has breached and continues to breach each and every of the following provisions of the Agreement and covenants accorded under public policy:

- 1) Breach of Covenant of Good and Fair Dealing, in that the CCSF unfairly interfered with the Tenant's right to receive the benefits of the contract by orchestrating a campaign of contractual breaches and torts more fully described herein;
- 2) Paragraph 1.9, in that the CCSF has failed to maintain the facility roof;
- 3) Paragraph 1.9, in that the CCSF has failed to maintain the exterior walls;
- 4) Paragraph 1.9, in that the CCSF has failed to maintain the pier pilings;
- 5) Paragraph 1.9, in that the CCSF has failed to maintain the pier apron pilings;
- 6) Paragraph 1.9, in that the CCSF has failed to maintain the pier substructures;
- 7) Paragraph 1.9, in that the CCSF has failed to maintain the pier apron substructures;
- 8) Paragraph 21, in that the CCSF has failed to act in a manner consistent with "time is of the essence";

CARL ERNST JR  
CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO

Page 1 of 9

- 9) Phase II of the Second Lease Amendment, in that the CCSF has failed to repair the 4,440 sqft of wooden apron described therein;
- 10) Phase III of the Second Lease Amendment, in that the CCSF has failed to repair the 8,730 sqft of wooden apron described therein;
- 11) Phase IV of the Second Lease Amendment, in that the CCSF has failed to demolish and reconstruct the wood apron described therein;
- 12) Paragraph 6 of the Addendum, in that the CCSF has failed to use its good faith efforts to cooperate with the Tenant to obtain various governmental approvals;
- 13) Paragraph 6 of the Addendum, in that the CCSF has failed to use its good faith efforts to work with the Tenant to obtain various governmental approvals;
- 14) Paragraph 6 of the Addendum, in that the CCSF has failed to use its good faith efforts to assist the Tenant to obtain various governmental approvals;
- 15) Paragraph 12 of the Addendum, in that the CCSF has failed to provide rent credits of 50% of the cost of certain tenant improvements;
- 16) Paragraph 13 of the Addendum, in that the CCSF has failed to provide rent credits of 100% of the costs of certain repairs and maintenance otherwise the obligation of the CCSF;
- 17) Paragraph 14 of the Addendum, in that the CCSF has failed to remove and/or drive new pilings;
- 18) Paragraph 17 of the Addendum, in that the CCSF has publicly repudiated the lease term extension options granted therein by causing the publications of statements that the options belong to the CCSF and that it would not exercise them;
- 19) Paragraph 17 of the Addendum, in that the CCSF has failed to recognize the effect of the "Starker Exchange" (commonly known as a "1031 Exchange") which the Tenant performed by selling his interest in real property to Dennis Herrera, Esq., who is now the City Attorney for CCSF, and investing the proceeds into the leasehold created by the Agreement, fulfilling his obligation as condition precedent to his exercise of the lease term extension options
- 20) Paragraph 18 of the Addendum, in that the CCSF determined that it was financially infeasible or impractical for the CCSF to perform maintenance or repairs, but refusing to provide the Tenant with formal written notice with respect thereto;
- 21) Paragraph 7 of the "Settlement Agreement", in that the CCSF has withheld approval of the rent credits for work described in Exhibit C thereto;
- 22) Paragraph 12 of the Addendum, in that the CCSF has failed to provide any written approvals or reasoned denials for various tenant improvements;
- 23) Paragraph 13 of the Addendum, in that the CCSF has failed to provide any written approvals for those repairs and maintenance otherwise the obligation of the CCSF;

- 24) Anticipatory Breach of the Contract, in that the CCSF published its "10 year capital plan" in which on Page 97 it designated Pier 38 as "unfunded" for purposes of capital improvements, indicating that the CCSF would not fulfill the bargain which they had entered into with the Tenant;
- 25) Anticipatory Breach of the Contract, in that the CCSF published its "10 year capital plan" in which on Page 97 it deemed that Pier 38 would have to be closed and demolished, indicating that the CCSF would not fulfill the bargain which they had entered into with the Tenant;
- 26) Anticipatory Breach of the Contract, in that the CCSF caused to be published in the San Francisco Chronicle, and other forums, information wherein it publicly stated that Pier 38 would have to be demolished, indicating that the CCSF would not fulfill the bargain which they had entered into with the Tenant;
- 27) Breach of Covenant of Quiet Enjoyment and Possession, in that the CCSF has constructively evicted the Tenant from portions of the leasehold by the CCSF failure to maintain the premises in the condition called for in the Agreement, depriving the Tenant of such Possession;
- 28) Breach of Covenant of Quiet Enjoyment and Possession, in that the CCSF has actually evicted the Tenant from portions of the leasehold by posting in excess of 28 separate signs reading "Unsafe Area -- Do Not Enter" in June of 2006 and creating barriers to entry for substantial portions of the premises which it is the duty of the CCSF to maintain, depriving the Tenant of such Possession;
- 29) CCSF Breached the Agreement and forced expiration of the BCDC permit(s) by deliberately failing to act on building permits and other essential prerequisites tendered to the CCSF by the Tenant;
- 30) CCSF has also breached its agreed obligation to remove the remains of Pier 36 which currently prevent Tenant from using the leasehold in a manner consistent with the Development Plan approved by the BCDC.

**TORTS COMMITTED BY CCSF AND EMPLOYEES OF CCSF**

On each and every occasion where the Tenant has insisted on the performance by the CCSF of its duties and obligations under both public policy and the Agreement with respect to repairs or maintenance, and when the Tenant requested building permits which triggered provisions of the BCDC permit to require increased public access via repairs, maintenance, and reconstruction of the pier apron by CCSF, the CCSF and various of its employees, have cumulatively responded with the following torts:



- 31) CCSF has violated the Tenant's due process rights under the 5th and 14th Amendments to the Constitution of the United States of America by acts and omissions described further herein;
- 32) CCSF has issued, and not retracted, defamatory statements regarding the Tenant's leasehold in public forums, both orally and in writing, outside of any legally authorized process, and without regard to the Tenant's due process rights;
- 33) CCSF has interfered with the Prospective Economic advantage of the Tenant by, among other things, excluding the Tenant from a public meeting between the CCSF and "Camper and Nicholsons" who had come to meet the CCSF at the invitation of the Tenant for the benefit of the leasehold; CCSF instead tried to divert the investment opportunity to other properties managed by CCSF;
- 34) CCSF has interfered with the Prospective Economic advantage of the Tenant by, among other things by filing an unlawful detainer action on legal insufficient grounds directly after meeting with "Conroy Development" who had come to meet the CCSF at the invitation of the Tenant for the benefit of the leasehold;
- 35) CCSF has interfered with the Prospective Economic advantage of the Tenant by, among other things, removing the Second Amendment from the agenda of the Port Commission, at the direct request of the Mayor of CCSF, just moments before it was to be voted on and approved by the Port Commission who had already been polled as to their voting intentions to approve the Second Amendment; the item was only restored to the agenda months later after the Tenant initiated legal proceedings against the Mayor of CCSF and his director of economic development;
- 36) CCSF has interfered with the Contractual Relations between the Tenant and DBAW by publishing false and defamatory information regarding the Tenant and the leasehold, outside of any legally authorized process, and without regard to the Tenant's due process rights;
- 37) CCSF has interfered with the Contractual Relations between the Tenant and BCDC by publishing false and defamatory information regarding the Tenant and the leasehold, outside of any legally authorized process, and without regard to the Tenant's due process rights;
- 38) CCSF has interfered with the Contractual Relations between the Tenant and Tenant's "invitees" (as defined in the Agreement at Paragraph 2.19) by publishing false and defamatory information regarding the Tenant and the leasehold, outside of any legally authorized process, and without regard to the Tenant's due process rights;
- 39) CCSF has interfered with the Contractual Relations between Tenant and the United States Department of the Interior's grant of money in the sum of \$1.5 million to the Tenant for improvements to the leasehold;

- 40) CCSF has interfered with the Prospective Economic Contractual Relations between Tenant and the United States Department of the Interior's further grant of money in the additional sum of \$1.5 million to the Tenant for improvements to the leasehold.
- 41) CCSF has interfered with the Prospective Economic Advantage of potential relations between the Tenant and members of the public who would have become Tenant's "invitees" (as defined in the Agreement at Paragraph 2.19) by publishing false and defamatory information regarding the Tenant and the leasehold, outside of any legally authorized process, and without regard to the Tenant's due process rights;
- 42) CCSF has portrayed the Tenant and the leasehold in a false light by publishing false and defamatory information regarding the Tenant and the leasehold, outside of any legally authorized process, and without regard to the Tenant's due process rights;
- 43) CCSF has abused lawful process by commencing multiple eviction proceedings against the Tenant without substantial factual or legal merit and CCSF has not prevailed;
- 44) CCSF has maliciously prosecuted the Tenant by engaging in multiple eviction proceedings against the Tenant without substantial factual or legal merit and CCSF has not prevailed;
- 45) CCSF has arbitrarily and capriciously utilized administrative processes in its attempts of eviction of the Tenant without substantial factual or legal merit;
- 46) CCSF has issued Administrative Orders requiring acts of abatement by the Tenant on grounds which do not have substantial factual or legal merit, outside of any legally authorized process, and without regard to the Tenant's due process or contractual rights;
- 47) CCSF has wrongfully abused the legal process in that it has deliberately refused to receive or otherwise act on building permit applications prepared by the Tenant;
- 48) CCSF has failed to fulfill its duties under the California Permit Streamlining Act (California Government Code §65920, et. seq) by failing to act as the "lead agency" in obtaining approvals from other agencies for building permits requested by the Tenant in relationship to the development permits the Tenant had already obtained for the leasehold;
- 49) CCSF has and continues to violate the Public Trust Doctrine by preventing effective commerce at Pier 38 through the acts described herein;
- 50) CCSF has also converted money belonging to the Tenant to its own devices by accepting permit application fees for permits which it has never processed or reviewed;
- 51) CCSF, by committing the torts and breaches of contract previously mentioned, has inflicted emotional distress upon the Tenant which has required medical treatment and hospitalization;

52) CCSF, by committing the torts and breaches of contract previously mentioned, has committed "Elder Abuse" as defined in the California Elder Abuse and Dependent Adult Civil Protection Act (California Welfare and Institutions Code §15600, et. seq), through financial abuses, mental suffering and emotional distress;

**OTHER TORTS -- UNFAIR BUSINESS PRACTICES**

In addition to those torts, the CCSF has ongoing breaches of the following public policies:

- 53) CCSF, by and through its redevelopment agency, is and has been violating the California Business and Professions Code §17200 et. seq by unfair competition resulting from its operation of the "South Beach Harbor" marina and Pier 40 at full capacity, with a long waiting list, and substantially below market rates enjoyed in comparable markets in California and along the West Coast of the United States;
- 54) CCSF is and has been violating the California Business and Professions Code §17200 et. seq by unfair competition resulting from its operation of its Fisherman's Wharf, Pier 39, San Francisco Yacht Harbor, and Treasure Island Marina at full capacity, with a long waiting list, and substantially below market rates enjoyed in comparable markets in California and along the West Coast of the United States;

**VIOLATIONS OF THE PUBLIC TRUST DOCTRINE**

- 55) the CCSF has violated the public trust doctrine and the terms of the Burton Act through its proprietary operation of the South Beach harbor, causing the loss of direct operating revenues for the Port Commission of San Francisco, in an amount approximately the difference between fair market rate of \$20.00 per foot and the CCSF current rate of \$12.24 per foot, times 700 slips times an average of 32 feet per slip, for a total of \$173,824 per month, times a duration of nearly 20 years, for a total of nearly \$42 million of estimated total operating losses to the Port of San Francisco and its beneficiaries, including tenants of the Port and the Tenant;
- 56) the CCSF has violated the public trust doctrine and the terms of the Burton Act through its proprietary operation of the South Beach harbor, causing the diversion of direct operating revenues from the Port Commission of San Francisco into the CCSF general fund, in an amount approximately the CCSF current rate of \$12.24 per foot, times 700 slips times an average of 32 feet per slip, for a total of \$274,176 per month, times a duration of nearly 20 years, for a total of nearly \$66 million of estimated total operating losses to the Port of San Francisco and its beneficiaries, including tenants of the Port and the Tenant;

57) the various breaches of the Agreement and associated Torts by the CCSF have resulted in the diversion of approximately \$150 million per year in direct spending by MegaYacht owners who would otherwise be located in the CCSF. Such MegaYacht owners annually spend approximately 15% of the value of their boats in the local economy in which their yacht is berthed. With anticipated bookings of \$1.0 billion of yacht value, the Tenant and his invitees would be spending \$150 million per year in the local economy, and would have been doing so for the next 20 years of the lease and the past 7 years, for a total of 27 years, resulting in over \$4 billion infusion of revenues into the economy of the CCSF and directly into the operating budget of the Port Commission of the CCSF;

**PUNITIVE AND EXEMPLARY DAMAGES AGAINST EMPLOYEES OF THE CCSF**

Each of the above described Torts is subject to an award of punitive and exemplary damages from individual employees of the CCSF who acted in a manner such that:

- 58) In those Torts, the natural and proximate effect of those acts by employees of the CCSF was to cause the Tenant to suffer extreme emotional and mental anxiety or distress;
- 59) Tenant is informed and believes and on that basis alleges that various employees of the CCSF, were malicious and guilty of fraud and oppression as these terms are defined in California Civil Code §3294, as follows:
- a. Tenant is informed and believes and thereon alleges that employees of the CCSF conduct in each of those Torts described above was intended by those employees of the CCSF to cause injury to the Tenant;
  - b. Tenant is informed and believes and thereon alleges that employees of the CCSF used despicable conduct in each of those Torts described above and such conduct was carried on by employees of the CCSF with a willful and conscious disregard of the rights or safety of the Tenant;
  - c. Tenant is informed and believes and thereon alleges that the employees of the CCSF used despicable conduct in each of those Torts described above and thereby caused cruel and unjust hardship to the Tenant in conscious disregard of the Tenant's rights under both contract and law;
  - d. Tenant is informed and believes and thereon alleges that employees of the CCSF used intentional misrepresentation, deceit, and/or concealment of material fact known to those employees of the CCSF with the intention on the part of those employees of the CCSF of depriving the Tenant of property rights, legal rights, contractual rights, and otherwise causing injury to the Tenant;

**CONTRACT INTERPRETATION AND  
FRAUD IN THE INDUCEMENT**

The Tenant was not represented by counsel in the negotiations of the lease with the CCSF and the City Deputy attorney who negotiated and prepared the lease. As such, it is likely that the finders of fact and law can and will set aside various provisions of the lease and/or construe them strictly against the CCSF.

Additionally, the CCSF has received all of the benefits of the bargain reached in the Agreement, while evading its duties and obligations therein, and the Tenant is informed and believes that the CCSF never intended to fulfill the duties and obligations the CCSF had assumed, constituting fraud in the inducement for which the Tenant seeks appropriate remedies, including damages resulting from Tenant's detrimental reliance, according to proof.

**DAMAGES AND LOSSES**

The best measure of damages directly caused by CCSF to the Tenant is comparison of the highest and best use of the leasehold proposed by the Tenant to the situation which the CCSF created by depriving the Tenant of his various rights under contract and law. The highest and best use proposed is that of a "MegaYacht/SuperYacht Marina". In comparison with other MegaYacht/SuperYacht Marinas located in California and elsewhere, the leasehold should be realizing the following rates for its "invitees":

\$1.50/sqft	per month, for the water area of the leasehold
\$1.00/sqft	per month, for storage located within the leasehold "shed" building
\$3.00/sqft	per month, for office space related to marine activities

The revenues associated with those uses, absent the interference and unfair business practices of the CCSF, should be approximately \$650,000 per month. In an attempt to mitigate his damages from the conduct of the CCSF, the Tenant has elected alternative interim uses consistent with the "Waterfront Development Plan" published by CCSF which enable him to receive only approximately \$60,000 per month, for a difference of \$590,000 per month at the current time.

Over the term of the lease thus far, those damages amount to approximately \$90 million. Over the remaining anticipated term of the lease if the conduct of CCSF continues to interfere with the Tenant's rights, there are additional damages of approximately \$160 million from loss of revenues.

Based on the past conduct of the CCSF, its employees, and the Torts described above, there are additional damages which a jury can award for emotional distress, elder abuse, loss of investment. Those are estimated at a total of \$7.5 million for the purposes of this claim to the CCSF.

CARL ERNST JR  
CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO

Page 8 of 9

**PUNITIVE AND EXEMPLARY DAMAGES**

The employees of the CCSF will be subject to determination by jury for punitive and exemplary damages with respect to each of the Torts outlined above, which could reach over \$500 million in total.

**ADDITIONAL DAMAGES / RESTITUTION**

- A. Tenant is also seeking restitution of monies paid for building permit applications for the leasehold which remain unprocessed.
- B. Tenant is also seeking restitution of rents paid during time periods where the Tenant has been partially evicted from the leasehold in the sum of approximately \$4.6 million, or according to proof.
- C. Tenant is also seeking damages from CCSF to allow Tenant to perform the obligations of the CCSF for maintenance and repair of the facilities in the sum of \$49.5 million it has admitted in its 10 year capital plan, or according to proof.

**STATEMENT OF DAMAGES**

Tenant has claimed damages of the following amounts:	
Lost revenues from 1/1996 to 12/2009:	~ \$ 87.5 million
Predicted lost revenues 1/2010 to 5/2032	~ \$161.0 million
<u>Investment loss and tort related damages</u>	<u>~ \$ 7.5 million</u>
Subtotal:	~ \$256.0 million
Potential punitive and exemplary damages:	~ \$512.0 million
Restitution due from wrongful partial eviction	~ \$ 4.6 million
Costs to perform CCSF leasehold obligations	~ \$ 49.5 million
<u>Total damages to Tenant:</u>	<u>~ \$822.1 million</u>

**CONCLUSION**

Tenant is claiming total damages of \$822.1 million, including restitution, punitive and exemplary damages.

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EX - INST COMPLAINT - 000022

# EXHIBIT D

Exhibit for Complaint for Carl Ernst Jr.



## CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO

Before completing this form please read the instructions on the back. Untrue claims will be returned. Please submit this form and supporting documentation to the Controller's Office, Claims Division, 1390 Market Street, 7th Floor, San Francisco, CA 94102-8402 in person or by mail.

* = REQUIRED ** = REQUIRED IF KNOWN			
<b>1. Claimant's Name and Home Address (Please Print Clearly)</b> * Carl Ernst, Jr. 38 Pier, Buila 100 City San Francisco Zip 94107 Telephone (415) 678-3828	<b>2. Send Office Notices and Correspondence to:</b> * David Ned, Esq., Chapman, Poole & White 650 California Street, 19th Floor City San Francisco Zip 94108 Telephone (415) 362-3000		
<b>3. Date of Birth</b> N/A	<b>4. Social Security Number</b> N/A	<b>5. Date of Incident</b> * see attached	<b>6. Time of Incident (a.m./p.m.)</b> ** see attached
<b>7. Location of Incident or Accident</b> ** Pier 38 - San Francisco		<b>8. Claimant Vehicle License Plate #, Type, Mileage, and Year</b> ** N/A	
<b>9. Basis of Claim.</b> State in detail all facts and circumstances of the incident. Identify all persons, entities, property and City departments involved. State why you believe the City is responsible for the alleged injury, property damage or loss. * see attached for detail			
Name, LG Number and City Department of City Employee who allegedly caused injury or loss The Port of San Francisco	Type of City Vehicle	Vehicle License Number and Bus or Train Number	
<b>10. Description of Claimant's injury, property damage or loss</b> * (see attachment for explanation) lost business revenues, emotional distress, investment loss, loss of use of real property, medical expenses, punitive damages.		<b>11. Amount of Claimant's property damage or loss and method of computation. Attach supporting documentation. (See instructions)</b>  ITEMS _____ \$ _____ _____ \$ _____ _____ \$ _____ _____ \$ _____ _____ \$ _____ <b>TOTAL AMOUNT</b> _____ \$ _____ Court Jurisdiction: Limited (up to \$25,000) <input type="checkbox"/> Unlimited (over \$25,000) <input checked="" type="checkbox"/>	
<b>12. Witnesses (if any) Name</b> 1. subject to discovery 2.	Address employees, current and former of the Port of San Francisco		Telephone
1. <i>David Ned</i> Signature of Claimant or Representative David Ned, Esq. Print Name	7/21/2010 Date Attorney Relationship to Claimant	Do Not Write In This Space  <div style="text-align: center; border: 1px solid black; padding: 5px;">                     RECEIVED                      10 JUL 22 PM 2:27                 </div>	
CRIMINAL PENALTY FOR PRESENTING A FALSE OR FRAUDULENT CLAIM IS IMPRISONMENT OR FINE OR BOTH. (PENAL CODE § 72)			

Appendix for Claim Against the City and County of San Francisco

On or about January 13, 1996, Carl Ernst, Jr. (hereinafter, "Ernst") and the City and County of San Francisco (hereinafter "CCSF") entered into a lease agreement for Pier 38 with surrounding waters, a property managed in trust by the Port Commission of the City and County of San Francisco for the People of the State of California pursuant to the "Burton Act."

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PRIOR CLAIMS

Ernst has filed three prior claims against the CCSF, all of which are still pending adjudication. Those complaints were filed on approximately: May 10, 2007; September 17, 2007; and February 2, 2010.

The subject matter of those prior claims is continuing and ongoing. Accordingly, the claims and allegations of those 3 prior claims are incorporated herein by reference.

SUPPLEMENTAL FACTS

Since the time of the filing of the claim dated February 2, 2010, the CCSF has continued to cause damages to Ernst. Namely, additional damages arise from the following:

- 1) each of the prior claims and causes of action is ongoing, and damages continue to accrue;
- 2) Ernst is informed and believes that from February 3, 2010 to the present, the Mayor of San Francisco, the Director of the Port (Monique Moyer), and other officers and staff of the Port have met with or communicated with agents and representatives of the current America's Cup defender syndicate, BMW Oracle Racing, including Larry Ellison, and the Golden Gate Yacht Club;

- 3) These meetings and communications concerned the defense of the America's Cup in San Francisco and the availability of Port facilities, including Pier 38, for this purpose;
- 4) The CCSF has excluded Ernst from all such meetings and communications even though Ernst has previously communicated with the America's Cup defenders for the same purpose;
- 5) Ernst is informed and believes that these meetings and communications included arrangements whereby the America's Cup defenders would lease Pier 38 directly from the Port to the exclusion of Ernst;
- 6) Ernst is informed and believes that these same CCSF officials have met with or communicated with potential America's Cup challengers for the same purpose;
- 7) Ernst is informed and believes that these same CCSF officials, in their meetings and communications, have disparaged Ernst and his ability to cooperate with the America's Cup defenders or challengers and to prepare Pier 38 to support the defense or challenge of the America's Cup while at the same time extolling their own abilities to do the same with Pier 38;
- 8) On or about June 30, 2010, CCSF agents or representatives notified Ernst that they would be conducting a "walk-through" at Pier 38, and Ernst subsequently learned that the purpose of the walk-through was to "show off one of the properties" available for use in connection with the defense of the America's Cup.

#### SUPPLEMENTAL DAMAGES

In addition to the damages arising from the previous claims of Ernst, Ernst is informed and believes that additional damages have arisen and are arising from the continuing conduct of the CCSF with regard to the defense of the America's Cup.

Based on the improvements and capital expenditures of the participants of the prior America's Cup races in upgrading facilities, Ernst is informed and believes that the Pier 38 facility is a keystone property near "ground zero" of the sailing village which needs to be established over the next 3 years. Based on the infrastructure budgets of the prior America's Cup defense teams, Ernst is informed and believes that the Pier 38 facility would be the pro-rata beneficiary of over \$50 million in capital improvements funded by third parties.

Additionally, based on the market rents established for facilities such as Pier 38 in prior defenses of the America's Cup, Ernst is informed and believes that additional rents of \$500,000 per month over the next 3 years would be achievable and sustainable thereafter at comparable rates due to improvements of the facility.

#### PUNITIVE AND EXEMPLARY DAMAGES

Ernst intends to seek punitive damages against the employees of the CCSF with respect to the supplemental claims outlined above.



# EXHIBIT E

Exhibit for Complaint for Carl Ernst Jr.

ORIGINAL

CITY AND COUNTY OF SAN FRANCISCO  
WILLIE L. BROWN, JR., MAYOR

LEASE NO. L-12120

BY AND BETWEEN

THE CITY AND COUNTY OF SAN FRANCISCO  
THROUGH THE SAN FRANCISCO PORT COMMISSION

AND

CARL ERNST, JR. AND  
PIER 38 MARITIME RECREATION CENTER, INC.  
a California corporation, jointly and severally

Dennis Bouley  
Executive Director

SAN FRANCISCO PORT COMMISSION

Michael Handaman, President  
Frankie G. Lee, Vice-President  
Anne Halstad, Commissioner  
Francis J. O'Neill, Commissioner  
Preston Cook, Commissioner

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**EXHIBITS**

Exhibit A The Premises

LEASE

This Lease ("Lease"), dated for reference purposes only as of January 13, 1996, is by and between the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation ("City"), operating by and through the SAN FRANCISCO PORT COMMISSION ("Port"), as landlord, and Carl Ernst, Jr. and Pier 39 Maritime Recreation Center, Inc., a California corporation, jointly and severally ("Tenant").

Port and Tenant hereby agree as follows:

BASIC LEASE INFORMATION

The following terms are a summary of basic lease information (the "Basic Lease Information"). Each item below shall be deemed to incorporate all of the terms set forth in this Lease pertaining to such item. In the event of any conflict between the information in this Section, and any more specific provision of this Lease, the more specific provision shall control.

1.1 Premises: The entirety of the Pier, Apron and Bulkhead Office consisting of approximately 68,000 square feet of Shed Space, 28,000 square feet of Apron Space, 7,800 square feet of Pier Bulkhead Office Space and 180,000 square feet of water surface area located at Pier 39, in the City and County of San Francisco, State of California, as shown on Exhibit A dated August 1, 1995 attached hereto and made a part hereof, together with any and all improvements and Alterations thereto. Tenant shall have the right to exclusive possession of the Shed Space, Apron Space and Pier Bulkhead Office Space and the right to the non-exclusive possession of the water surface area. (Section 3)

1.2 Term: The Term shall be for Twenty (20) years and Nine (9) months as follows:

1.2(a) Preliminary Term: The Preliminary Term shall be for nine (9) calendar months commencing on August 1, 1996 (the "Preliminary Term Commencement Date") and terminating on April 30, 1997.

1.2(b) Term: The Term shall be for twenty (20) years commencing on May 1, 1997 (the "Commencement Date") and terminating twenty (20) years thereafter (the "Termination Date"), unless earlier terminated in accordance with the provisions of this Lease. (Section 4) (Section 10) (Section 36) (Section 37)

INITIALS: Port

Tenant

**1.3 Base Rent:**

**1.3(a) Base Rent During the Preliminary Term:** One Thousand Dollars (\$1,000.00) per calendar month.

**1.3(b) Base Rent During the Term:**

For the First Lease Year: Five Thousand Five Hundred Dollars (\$5,500.00) per calendar month;

For the Second Lease Year: Eleven Thousand Dollars (\$11,000.00) per calendar month;

For the Third Lease Year: Sixteen Thousand Five Hundred Dollars (\$16,500.00) per calendar month;

For the Fourth Lease Year: Twenty One Thousand Five Hundred Dollars (\$21,500.00) per calendar month;

For the Fifth Lease Year: Twenty Seven Thousand Dollars (\$27,000.00) per calendar month;

For the Sixth Lease Year: Thirty Two Thousand Dollars (\$32,000.00) per calendar month;

For the Seventh Lease Year: Thirty Seven Thousand Five Hundred Dollars (\$37,500.00) per calendar month;

For the Eight, Ninth and Tenth Lease Years: Forty Eight Thousand Dollars (\$48,000.00) per calendar month;

For the Eleventh through the Twentieth Lease Year: Twenty Two Thousand Dollars (\$22,000.00) adjusted pursuant to Section 5.2 of this Lease, plus an amount determined pursuant to Section 45 herebelow per calendar month.

**1.3(c) Opportunity Rent:**

In addition to the foregoing, on the Tenth Anniversary Date of this Lease, Tenant shall make a one time payment to Port as additional Base Rent hereunder, an Opportunity Rent equal to the difference (provided such difference is a positive number) arrived at by taking the then net present value (the accrued Future Value) of a hypothetical base rent of \$27,500.00 per calendar month, as if payable monthly, from the Commencement Date and as if adjusted on each Anniversary Date pursuant to Section 5.2 of this Lease and adding to that number the then net present value (the accrued Future Value) of the hypothetical percentage rent for the same period which would have been payable based on Tenant's actual reported sales for the same period given

the hypothetical base rent. This total shall be the Hypothetical Total Rent.

From the Hypothetical Total Rent shall be subtracted the then net present value (the accrued Future Value) of the total Base Rent and Percentage Rent paid for the same period (before adjustments for any Rent Credits issued to Tenant pursuant to the other terms of this Lease as set forth in Section 1.3 and Section 1.6); this number (being positive) shall be the Opportunity Rent. The discount rate used to determine the above described net present values (the accrued Future Value) shall be five and seventy-five hundredths percent (5.75%).

Said Opportunity Rent shall be payable to Port regardless of whether or not Tenant exercises its right to terminate this Lease as contained in Section 3B hereafter. (Section 5.1)

1.4 Rent Commencement Date: August 1, 1998.

1.5 Base Index: The calendar month next preceding the 1st calendar month of the Term as above defined  
(Section 5.2)

1.6 Percentage Rent: (Section 5.3)  
Applicable XXX (See Addendum)  
Not Applicable \_\_\_\_\_

If Applicable, Percentage of Gross Receipts Due For:

Types of Sales:	Percentage:
Used Boat Sales Brokerage Fees (whether or not received)	7%
Casual Dining (as defined in Section 44)	11%
Full Service Dining (as defined in Section 44)	7%
All Other Sales and Rental Receipts	7%

No Percentage Rent shall be due for Gross Receipts directly related to the sale of new or used boats.

\* As may be adjusted periodically pursuant to Section 5.3 and/or Section 45)

1.7 Security Deposit: Equal to two (2) months' Base Rent as may be periodically adjusted but in no event less than \$15,000  
Initial Deposit: \$15,000.00  
(Section 7)

1.8 Permitted Use: (Section 8.1)

Promises shall be used as a maritime recreation center, and limited to visiting boat docks and moorings (including perimeter floats providing transient berthing for not more than 72 hours per visit; recreational boat rentals, boat rental facilities; boat launches, dry boat storage facilities; a maritime chandlery operation occupying not more than 2,500 square feet; a new and used boat sales operation occupying not more than

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INITIALS: Port

Tenant

7,500 square feet; maritime recreational equipment rental; related maritime recreation facilities which may include up to two (2) whirlpool baths and up to two (2) saunas; not more than 5,000 total square feet dedicated to Casual Dining and Full Service Dining as defined in Section 44 including therein the sale of alcoholic beverages for on site consumption (No sales of alcoholic beverages for off-site consumption shall be permitted); and offices for general and administrative functions directly related to the administration of the permitted uses herein enumerated; public access; public restrooms and other public facilities; boat trailer storage; storage of vehicles related to the operation of the maritime recreation center and up to 100 spaces for free parking for customers and invitees.

**1.9 Maintenance and Repairs**  
(Section 11.1)

Tenant shall at all times during the Preliminary Term and Term of this Lease, and at its sole cost and expense, maintain and repair in good and working order, condition and repair the Premises and all Improvements and Alterations thereon including all windows, roll-up and/or man doors, pier floors and pier apron and stringer surfaces and such fender systems as may be retained and/or required by Tenant's use of the Premises.

Subject to the further provisions of Section 40, Port shall maintain in good working order and repair, the Facility roof (including the roof substructure) and exterior walls in a watertight condition, the pier and pier apron pilings and pier and pier apron substructures but not the Pier fender systems. All other repair and maintenance obligations of any kind whatsoever are the sole responsibility of Tenant.

**1.10 Utilities and Services:**

(Section 12)

Tenant shall be responsible for all utilities and services including without limitation, water, sewer, garbage disposal, natural gas and electricity service as may be provided by the Port (including the Port's standard administrative surcharge and/or fees related to such service) and/or public utility company.

**1.11 Mineral Reservation:** Zone 3, beginning at a point where X equals 1,455,100 and Y equals 472,700, extending 500 feet south, thence 500 feet east, thence 500 feet north, and thence 500 feet west, ending at said point of beginning. (Section 28)

**1.12 Notices:** (Section 30)

Address for Port: Commercial Property Manager  
Port of San Francisco

3a

INITIALS: Port

Tenant

Room 3100, Ferry Building  
San Francisco, CA 94111  
FAX No: (415) 274-0578  
Telephone No: (415) 274-0510

Address for Tenant: Pier 39  
San Francisco, CA 94107

FAX No: (415) 285-1042  
Telephone No: (415) 285-1492

Name/Address of Agent for Service of Process, If Tenant is a Corporation:

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

1.13 Addendum: The following section(s) set forth in the Addendum, attached hereto, are incorporated herein by reference:

- §4.2 (Termination by Port) - Deleted
- §5.2 (Base Rent Adjustment) - Amended
- §5.3 (Percentage Rent) - Amended
- §6.2 (Possessory Interest Tax) - Amended
- §8.2 (Prohibited Uses) - Amended
- §10 (Regulatory Approvals) - Amended
- §18.2 (Tenant Responsibility) - Amended
- §18.3 (Requirement to Remove) - Amended
  
- §20.3 (Hazardous Materials Indemnification) - Amended
- §21.4c (Port's Consent/Refusal to Consent) - Amended
- §33.8 (Real Estate Commission) - Amended
- §34 (Tenant's Right to Rent Credits for Capital Improvements Investment) - Added
- §35 (Tenant's Right to Rent Credits for Repairs and Maintenance Otherwise the Obligation of Port) - Added
- §36 (Pile Removal and Pile Driving) - Added
- §37 (Minimum Capital Investment Obligations of Tenant) - Added
- §38 (Tenant's Right to Terminate) - Added
- §39 (Option to Extend Term) - Added
- §40 (Tenant's Sole and Exclusive Remedy for Port's Failure to Maintain or Repair) - Added
- §41 (No Guarantee of Useful Life) - Added
- §42 (No Responsibility for Dredging) - Added
- §43 (Oil Spill Response Plan) - Added

3b

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Tenant

§44 (Casual Dining; Full Service Dining Defined) - Added  
§45 (Casual Dining; Full Service Dining Base Rent Adjustment) - Added  
§46 (Affirmative Action) - Added  
§47 (Tobacco Products Advertising Ban) - Added  
§48 (Opportunity Rent Example) - Added  
§23.1 (Default by Tenant) - Amended

In the event of any conflict between the provisions of the Addendum and provisions of this Lease, the provisions of the Addendum shall control.

3c

INITIALS: Par

Tenant

2. Definitions

For purposes of this Lease, the following initially capitalized terms shall have the meanings ascribed to them in this Section:

2.1 "Additional Rent" means all taxes, assessments, insurance premiums, operating and maintenance charges, fees, costs, expenses, liabilities and obligations of every description which Tenant assumes or is obligated to pay or discharge pursuant to this Lease, together with every fine, penalty, interest or other charge which may be added for non-payment or late payment, whether payable to Port or to other persons, parties or entities designated herein.

2.2 "Agents" means, when used with reference to either party hereto, the officers, directors, employees, agents and contractors of such party, and their respective heirs, legal representatives, successors and assigns.

2.3 "Alterations" means any alterations, installations or additions to any improvements or to the Premises.

2.4 "Anniversary Date" means the first anniversary of the Commencement Date and each anniversary of such date thereafter; provided, however, that if the Commencement Date is other than the first day of a month, then the first Anniversary Date shall be the first day of the thirteenth (13th) month thereafter.

2.5 "Base Rent" means the monthly Base Rent specified in Section 1.3 hereof and described in Section 5.1 hereof.

2.6 "Base Index" means the Cost of Living Index for the calendar month set forth in Section 1.5 hereof.

2.7 "Basic Lease Information" means the information with respect to this Lease summarized in Section 1 hereof.

2.8 "City" means the City and County of San Francisco, a municipal corporation.

2.9 "Commencement Date" means the date on which the Term of this Lease commences as specified in Section 1.2 hereof.

2.10 "Commission" means the San Francisco Port Commission.

2.11 "Cost of Living Index" means the United States Department of Labor's Bureau of Labor Statistics Consumer Price Index for All Urban Consumers (All Items: 1982-84=100), San Francisco-Oakland-San Jose, California. If the aforesaid Cost of Living Index ceases to be published, any similar index published by any other branch or department of the U.S. Government shall be used as the index herein, and if none is published, another index generally recognized as authoritative shall be substituted therefor by Port. The base period used by any new index shall be reconciled to the 1982-84 = 100 Base Index. If the Cost of Living Index is not published for the particular calendar month in question, the immediately preceding last calendar month for which the index is published shall be used.

2.12 "Current Index" means the Cost of Living Index for the calendar month immediately preceding the Anniversary Date upon which the Base Rent is adjusted.



2.13 "Environmental Laws" means any present or future federal, state or local laws, ordinances, regulations or policies relating to Hazardous Material (including, without limitation, their use, handling, transportation, production, disposal, discharge or storage) or to health and safety, industrial hygiene or environmental conditions in, on, under or about the Premises, including, without limitation, soil, air, bay water and groundwater conditions.

2.14 "Facility" means the pier, building or other structure in or on which the Premises are located.

2.15 "Handle" or "Handling" means to use, generate, process, produce, package, treat, store, emit, discharge or dispose.

2.16 "Hazardous Material" means any substance, waste or material which now or in the future is determined by any state, federal, or local governmental authority to be capable of posing a present or potential risk of injury to health, safety, the environment or property, including, but not limited to, all of those materials, wastes and substances designated as hazardous or toxic by the United States Environmental Protection Agency, the City and County of San Francisco, the United States Department of Labor, the United States Department of Transportation, the California Department of Environmental Protection or any other governmental agency now or hereafter authorized to regulate materials and substances in the environment.

2.17 "Improvements" means any and all buildings, structures, fixtures or other improvements constructed or installed on the Premises, including those constructed by or on behalf of Tenant pursuant to this Lease (including, without limitation, any trailers, signs, roads, trails, driveways, parking areas, curbs, walks, fences, walls, stakes, poles, plantings and landscaping).

2.18 "INC" means IntraBuilding Network Cable and is defined as the telephone wiring which begins at the terminal block nearest the point where the telephone company wiring enters the Facility and ends at the terminal nearest the Premises.

2.19 "Invitees" when used with respect to Tenant means the clients, customers, invitees, guests, members, licensees, assignees and subtenants of Tenant.

2.20 "Late Charge" means a fee equivalent to one and one-half percent (1-1/2%) of all Rent, or any portion thereof, which is due and unpaid for more than thirty (30) days.

2.21 "Laws" means all laws, statutes, ordinances, resolutions, regulations, judicial decisions, proclamations, orders or decrees of any municipal, county, state or federal government or the departments, courts, commissions, boards and officers thereof, or other governmental or regulatory authority with jurisdiction over the Premises or any portion thereof.

2.22 "Leasehold Mortgage" means one or more mortgage, deed of trust or other security agreement encumbering the leasehold estate, or Tenant's interest, if any, in any improvements or Tenant's interest in its personal property or trade fixtures, as security for a loan or loans to benefit Tenant's use of the Premises.

2.23 "Official Records" means the official records of the City and County of San Francisco.

2.24 "Percentage Rent" means a sum equal to a percentage of Tenant's Gross Receipts made from or upon the Premises during each calendar month of the Term in the percentage amounts and for the terms set forth in Section 1.6, if applicable.

2.25 "Port" means the San Francisco Port Commission.

2.26 "Premises" means the real property described in Section 1.1 hereof.

2.27 "Regulatory Approval" means any authorization, approval or a permit required by any governmental agency having jurisdiction over the Premises, including but not limited to the Bay Conservation and Development Commission ("BCDC").

2.28 "Rent" means the Base Rent, as adjusted pursuant to the provisions of Section 5.2 hereof, together with Percentage Rent, if applicable, and any and all Additional Rent.

2.29 "Security Instrument" means a certificate of deposit; surety bond; undertaking; unconditional, irrevocable letter of credit or other similar instrument or security.

2.30 "Tenant" means the party identified as Tenant at the beginning of this Lease.

3. Premises. Port hereby leases to Tenant, and Tenant hereby hires from Port, the Premises described in Section 1.1 hereof on the terms and conditions of this Lease.

#### 4. Term of Lease.

4.1 Term. The Premises are leased by Tenant from Port for the Term specified in section 1.2 hereof.

4.2 Termination by Port. Tenant's period of occupancy of the Premises is subject to Port's right to terminate this Lease as provided herein when the Premises is needed in connection with a Port program or project. As used herein, "Port program or project" shall mean any development or renovation, by public and/or private parties, of the building, pier or seawall for in or on which the Premises is located. In the event of any such development or renovation, Port shall have the right to terminate this Lease without liability or expense except as specifically set forth in this Section 4.2 upon delivery to Tenant of six (6) months prior written notice of such termination. Tenant agrees and shall be required to surrender possession of the Premises by the end of such six (6) month period.

Within sixty (60) days after Tenant's surrender, Port agrees to pay Tenant a portion of those expenses which are documented by Tenant as having been incurred by Tenant prior to the delivery of Port's termination notice in making alterations, additions and improvements to the Premises which were approved in advance and in writing by Port and which were not previously reimbursed to Tenant through rent credits, rent abatement or other form of compensation ("Improvement Costs"). Such Improvement Costs shall be determined by the value attributable to any alterations, additions and improvements in any Port building permits for such work obtained by Tenant and which are approved in advance in writing by a Port Property Manager to the extent supported by reasonable evidence of such expenditures provided by Tenant. If no building permits are required for such work, value shall only be attributed to such alterations, additions or improvements if the value is approved in writing by a Port Property Manager prior to the commencement of the work and if the cost is supported by reasonable evidence of such expenditures provided by Tenant. The portion of the Improvement Costs paid by Port shall be a fraction. The numerator of said fraction shall be the number of months remaining in the initial term of the Lease after Tenant surrenders the Premises, and the denominator shall be the number of months in the initial term of this Lease, or for work undertaken following the commencement of the Lease, the number of months beginning at the second month following the Port's approval of the improvements and ending at the termination date of the initial term of the Lease.

In addition to Port's share of the Improvement Costs, within sixty (60) days of Tenant's surrender, Port shall also pay Tenant a termination fee equal to one month's Base Rent for each full

year remaining on the initial term after Tenant's surrender of the Premises; provided, however, in no event shall said termination fee exceed three (3) months Base Rent. In no event shall Port be responsible for paying any moving or relocation expense or other expense incurred by Tenant due to any termination hereunder. Tenant hereby waives any and all rights, benefits or privileges of the California Relocation Assistance Law, California Government Code § 7260 et seq., and the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 et seq. or under any similar law, statute or ordinance now or hereafter in effect. Nothing in this Section 4.2 shall be deemed or construed as altering in any way the provisions of Section 18 (Damage and Destruction) or Section 19 (Eminent Domain).

5. **Rent.** Tenant shall pay to Port, in the manner herein described, the following Rent:

5.1 **Base Rent.** Tenant shall pay to Port Base Rent, as set forth in section 1.3 hereof, subject to adjustment in accordance with Section 5.2. Except as otherwise provided in Section 1.3, Tenant shall make the first payment of Base Rent on or before the Commencement Date and thereafter shall pay the Base Rent, in advance, on or before the first day of each calendar month throughout the Term. If the Commencement Date is other than the first day of the month, or the Termination Date is other than the last day of the month, the Base Rent for those months shall be apportioned as the number of days of occupancy bears to those months.

5.2 **Base Rent Adjustment.** Commencing on the first Anniversary Date of this Lease and on each Anniversary Date thereafter, the Base Rent shall be adjusted for the succeeding year in direct proportion to the percentage increase in the Current Index over the Base Index. In no case shall the Base Rent, as adjusted, be less than the Base Rent in effect immediately prior to the Anniversary Date. If the Current Index has increased over the Base Index, the adjusted Base Rent shall be determined by multiplying the Base Rent set forth in Section 1.3 by a fraction, the numerator of which is the Current Index and the denominator of which is the Base Index, as follows:

$$\frac{\text{Current Index}}{\text{Base Index}} \times \text{Base Rent} = \text{Adjusted Base Rent}$$

5.3 **Percentage Rent.** If applicable, as set forth in Section 1.6 hereof, Tenant agrees to pay Percentage Rent to Port on the terms and conditions set forth in the Addendum attached hereto.

5.4 **Late Charges.** Tenant acknowledges that late payment by Tenant to Port of Rent will cause Port increased costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges. Accordingly, a Late Charge will be paid by Tenant for each month that such Rent, or any portion thereof, remains due and unpaid, plus reasonable attorneys' fees incurred by Port by reason of Tenant's failure to pay Rent when due under this Lease. Late Charges shall be computed from the date on which such Rent first became due. The parties agree that such Late Charges represent a fair and reasonable estimate of the cost which Port will incur by reason of any late payment by Tenant.

5.5 **Additional Rent.** Tenant shall pay or cause to be paid, and discharge or cause to be discharged, when the same shall become due, any and all amounts of Additional Rent, as defined in Section 2.1; If Tenant fails to pay or discharge any amount, liability or obligation of Additional Rent Port shall have all rights, powers and remedies provided herein or by Law in the case of non-payment of the Base Rent.

5.6 **Manner of Payment.** All payments due from Tenant to Port under this Lease shall be made to Port without any abatement, deduction, set-off, prior notice or demand, except as otherwise expressly provided in this Lease, in lawful money of the United States of America at Port's address set forth in

Section 1.12 or to such other person or at such other place as Port may from time to time designate by written notice to Tenant.

#### 6. Taxes and Assessments.

6.1 Payment of Taxes. During the Term of this Lease, Tenant agrees to pay, when due, to the proper authority any and all real property and personal taxes, general and special assessments, license fees, permit fees and all other governmental charges of any kind or nature whatsoever, including without limitation all penalties and interest thereon, levied or assessed on the Premises, on Tenant's personal property, the leasehold or subleasehold estate or Tenant's use of the Premises, whether in effect at the time this Lease is entered into or which become effective thereafter, and all taxes levied or assessed on the possession, use or occupancy, as distinguished from the ownership, of the Premises. Tenant shall not permit any such taxes, assessments or other charges to become a defaulted lien on the Premises or the improvements thereon; provided, however, that in the event any such tax, assessment or similar charge is payable in installments, Tenant may make, or cause to be made, payment in installments; and provided, further, that Tenant may, through such proceeding as Tenant considers necessary or appropriate, contest the legal validity or the amount of any tax, assessment or similar charge so long as such assessment or charge does not become a defaulted lien. In the event of any such dispute, Tenant shall indemnify and hold Port, City, and their Agents harmless from and against all losses, damages, costs, or expenses, including attorneys' fees, resulting therefrom.

6.2 Possessory Interest Tax. Tenant acknowledges and understands that a possessory interest subject to property taxation may be created by this Lease and that Tenant may be subject to the payment of property taxes levied on such possessory interest. Tenant further acknowledges that Tenant is familiar with San Francisco Administrative Code Sections 23.6-1 and 23.6-2, which require that Port submit a report, which includes specified information relating to the creation, renewal, sublease, or assignment of any such possessory interest, to the County Assessor within 80 days after any such transaction. Tenant agrees to provide to Port the information required by Section 23.6-2 within 30 days of a request in writing by Port to do so.

#### 7. Security Deposit.

7.1 Amount of Deposit. Tenant shall pay to Port on or before the Commencement Date, in addition to the advance payment of the first month's Base Rent, a security deposit, either in cash or by Security Instrument, in the sum specified as the Initial Deposit in Section 1.7, as security for the faithful performance by Tenant of all terms, covenants and conditions of this Lease. If the Base Rent is increased pursuant to any of the provisions of this Lease, Tenant shall increase the amount of the security deposit to maintain the same ratio of security deposit to Base Rent as existed at the Commencement Date. Any increase in the security deposit shall be delivered to Port on the same date that such increase in the Base Rent is first due. Tenant agrees that Port may (but shall not be required to) apply the security deposit in whole or in part to (a) pay any sum due to Port under this Lease; (b) compensate Port for any damage to the Premises caused by Tenant; or (c) cure any default by Tenant. If Port uses any portion of the security deposit to cure any default by Tenant hereunder, Tenant shall immediately replenish the security deposit to the original amount. Port's obligation with respect to the security deposit is solely that of debtor and not trustee. Except as provided in Section 7.2, Tenant shall not be entitled to any interest on such deposit. If Tenant is not in default at the termination of this Lease, Port shall return the unused balance of the security deposit to Tenant after Tenant vacates the Premises. The amount of the security deposit shall in no way limit Tenant's obligations under this Lease, and nothing contained in this Section 7 shall in any way diminish or be construed as waiving any of Port's other remedies set forth in this Lease or provided by Law or equity.

**7.2 Security Instrument.** In lieu of depositing the security deposit to Port in cash as provided in Section 7.1 above, Tenant may deliver to Port a Security Instrument; provided however, that said Security Instrument shall be (a) in a form and issued by a surety company or financial institution acceptable to Port in Port's sole discretion, (b) funds payable only to Port and able to be liquidated without any action required by Tenant, and (c) in a sum equal to the amount specified in Section 7.1 plus ten percent or such additional amount (as Port shall determine in its sole discretion) which will adequately cover penalty charges and/or administrative fees imposed for early liquidation of the Security Instrument. The form of Security Instrument may be changed from time to time by mutual consent of Port and Tenant.

If Tenant elects to deposit certificates of deposit or other interest-bearing instruments as a security deposit, Tenant shall be entitled to all interest payable on such certificates or instruments as the same becomes due if Tenant has made arrangements for such interest payments to be made directly to Tenant by the financial institution issuing such certificates or instruments. Port shall have no responsibility to pay, nor to make arrangements for payment, to Tenant of interest accruing on such certificates or instruments. If Tenant deposits certificates of deposit or other interest-bearing instruments as a security deposit, Tenant shall renew or replace such instrument no later than ten days prior to expiration thereof, and; if Tenant fails to do so, Port shall be entitled to cash such instrument and to hold the funds so obtained as the security deposit required pursuant to this Section 7.

If Tenant elects to use a bond or letter of credit as a security deposit, Tenant shall keep the same, at its expense, in full force and effect throughout the Term and until the sixtieth (60th) day after the Termination Date or other termination hereof. Such bond or letter of credit shall provide for sixty (60) days' prior written notice to Port by the issuing institution in the event of non-extension, cancellation or material change thereof. In such event, Tenant shall replace the bond or letter of credit at least ten days prior to expiration thereof, and, if Tenant fails to do so, Port shall be entitled to present its written demand for payment of the entire face amount of said bond or letter of credit and to hold the funds so obtained as the security deposit required pursuant to this Section 7.

**8. Use of the Premises.**

**8.1 Permitted Use.** The Premises shall be used and occupied only for the Permitted Use specified in Section 1.8 hereof and for no other purpose.

**8.2 Prohibited Activities.** Tenant agrees that the following activities, by way of example only and without limitation, are inconsistent with this Lease and are strictly prohibited: (a) any activity, or the maintaining of any object, which is not within the Permitted Use; (b) any activity, or the maintaining of any object, which will in any way increase the existing risk of, affect or cause a cancellation of, any fire or other insurance policy covering the Premises, any part thereof or any of its contents; (c) any activity or object which will overload or cause damage to the Premises; (d) any activity which constitutes waste or nuisance to owners or occupants of adjacent properties, including, but not limited to, the preparation, manufacture or mixing of anything that might emit any objectionable odors, noises or lights onto adjacent properties, or the use of loudspeakers or sound or light apparatus which can be heard or seen outside the Premises; (e) any activity which will in any way injure, obstruct or interfere with the rights of other tenants or of owners or occupants of adjacent properties, including rights of ingress and egress; (f) use of the Premises for sleeping or personal living quarters; (g) any auction, divorce, fire, bankruptcy or going-out-of-business sale on the Premises without the prior written consent of Port.

**8.3 Premises Must Be Used.** Tenant shall use the Premises continuously for the Permitted Use specified in Section 1.8 and shall not allow the Premises to remain unoccupied or unused without the prior written consent of Port, which consent may be withheld in Port's sole discretion.

9. Compliance with Laws and Regulations. Tenant, at Tenant's sole cost and expense, promptly shall comply with all Laws relating to or affecting the condition, use or occupancy of the Premises in effect either at the time of execution of this Lease or which may hereafter be in effect at any time during the Term, whether or not the same are now contemplated by the parties. Tenant further understands and agrees that it is Tenant's obligation, at Tenant's sole cost and expense, to cause the Premises and Tenant's activities and operations conducted thereon, to be in compliance with the Americans with Disabilities Act, 42 USCS sections 12101, et seq.

Tenant understands and agrees that Port is entering into this Lease in its capacity as a landlord with a proprietary interest in the Premises and not as a regulatory agency of the City with certain police powers. Port's legal status as an agency of City shall in no way limit the obligation of Tenant to obtain any required approvals from City departments, boards or commissions which have jurisdiction over the Premises, including Port. By entering into this Lease, Port is in no way modifying or limiting the obligation of Tenant to cause the Premises to be used and occupied in accordance with all Laws.

10. Regulatory Approvals. Tenant understands that Tenant's operations on the Premises, changes in use, or Improvements or Alterations to the Premises may require a Regulatory Approval. Tenant shall be solely responsible for obtaining any such Regulatory Approval, and Tenant shall not seek any Regulatory Approval without first obtaining the approval of Port. All costs associated with applying for and obtaining any necessary Regulatory Approval shall be borne by Tenant. Tenant shall be solely responsible for complying with any and all conditions imposed by regulatory agencies as part of a Regulatory Approval. Any fines or penalties imposed as a result of the failure of Tenant to comply with the terms and conditions of any Regulatory Approval shall be paid and discharged by Tenant, and Port shall have no liability, monetary or otherwise, for said fines and penalties. To the fullest extent permitted by Law, Tenant agrees to indemnify and hold City, Port and their Agents harmless from and against any loss, expense, cost, damage, attorneys' fees, penalties, claims or liabilities which City or Port may incur as a result of Tenant's failure to obtain or comply with the terms and conditions of any Regulatory Approval.

11. Maintenance and Repairs.

11.1 Maintenance and Repair Obligations. Except as otherwise provided in Section 1.9, Tenant shall at all times during the Term of this Lease, and at its sole cost and expense, maintain and repair in good and working order, condition and repair the Premises and all Improvements and Alterations thereon. Except as otherwise provided in Section 1.9, Port shall not be obligated to make any repairs, replacement or renewals of any kind, nature or description whatsoever to the Premises nor to any Improvements or Alterations now or hereafter located thereon. Notwithstanding any maintenance obligations of Port set forth in Section 1.9, in the event that Tenant, its Agents or Invitees cause any damage (excepting ordinary wear and tear) to the Premises, Port may repair the same at Tenant's expense and Tenant shall immediately reimburse Port therefor.

11.2 Port's Right to Inspect. In the event that damage or deterioration to the Premises or any portion thereof which is Tenant's obligation to maintain results in the same not meeting the standard of maintenance required by Port for such uses as Tenant is making of the Premises, then Tenant shall have the independent responsibility for, and shall promptly undertake, maintenance or repair of the Premises and complete the same with due diligence. Without limiting Section 25 hereof, Port may make periodic inspections of the Premises and may advise Tenant when maintenance or repair of the Premises is required, but such right of inspection shall not relieve Tenant of its independent responsibility to maintain such Premises and Improvements in a condition as good as, or better than, their condition at the Commencement Date, excepting ordinary wear and tear. If, after reasonable notice in writing from Port, Tenant fails to undertake such maintenance or repairs and complete the

same with due diligence, then in addition to any other remedy available to Port, Port may make such maintenance or repairs at Tenant's expense and Tenant shall immediately upon invoice reimburse Port therefor.

11.3 Acts of God. Nothing contained herein shall require either Tenant or Port to repair or replace the Premises or the improvements thereon as a result of damage caused by acts of war, earthquake, tidal wave or other acts of God, except that this provision shall not affect any obligation to make repairs to the Premises pursuant to Section 18 in the event of any damage or destruction of the Premises.

## 12. Utilities and Services.

12.1 Utilities. Tenant shall make arrangements and shall pay all charges for all utilities to be furnished on, in or to the Premises or to be used by Tenant, including, without limitation, gas, electrical, water, sewer and telecommunications services. Except as otherwise provided in Section 1.10, Tenant shall pay all charges for said utilities, including charges for the connection and installation of the utilities specified in section 1.10 from the location points specified therein.

Tenant shall be obligated, at its sole cost and expense, to repair and maintain in good operating condition all utilities located within the Premises and all utilities installed by Tenant (whether within or outside the Premises). If Tenant requests Port to perform such maintenance or repair, whether emergency or routine, Port shall charge Tenant for the cost of the work performed at the then prevailing standard rates, and Tenant agrees to pay said charges to Port promptly upon billing. Tenant shall pay for repair of utilities located outside the Premises (regardless of who installed the same) which are damaged by or adversely affected by Tenant's use of such utility and shall be responsible for all damages, liabilities and claims arising therefrom.

The parties agree that any and all utility improvements shall become part of the realty and are not trade fixtures. Port makes no representation or warranty that utility services, including telecommunications services, will not be interrupted. Port shall not be liable in damages or otherwise for any failure or interruption of any utility services, including telecommunications services, furnished to the Premises. No such failure or interruption shall constitute a basis for constructive eviction, nor entitle Tenant to terminate this Lease or abate the Rent.

12.2 Services. Tenant shall make arrangements and shall pay all charges for all services to be furnished on, in or to the Premises or to be used by Tenant, including, without limitation, garbage and trash collection, janitorial service and extermination service.

## 13. Improvements and Alterations.

13.1 Consent Required. Tenant shall not make, nor cause or suffer to be made, any Alterations or Improvements to the Premises until Tenant shall have procured and paid for all Regulatory Approvals required to be obtained for such Alterations and Improvements, including, but not limited to, any building or similar permits required by Port or its Chief Harbor Engineer in the exercise of its jurisdiction with respect to the Premises.

13.2 Construction Requirements. All Alterations or Improvements to the Premises made by or on behalf of Tenant shall be subject to the following conditions, which Tenant covenants faithfully to perform:

(a) All Alterations and Improvements shall be constructed in a good and workmanlike manner and in compliance with all applicable building, zoning and other applicable Laws, and compliance with the terms of and the conditions imposed in any Regulatory Approval.

(b) All Alterations and Improvements shall be performed with reasonable dispatch, delays beyond the reasonable control of Tenant excepted; and

(c) At the completion of the construction of the Alterations or Improvements, Tenant shall furnish one (1) set of "as-built" drawings of the same made on or to the Premises. Unless otherwise stated as a condition of the Regulatory Approval, this requirement may be fulfilled by the submittal after completion of the Alterations or Improvements of a hand-corrected copy of the approved permit drawing(s).

**13.3 Improvements Part of Realty.** All Alterations or Improvements to the Premises made by or on behalf of Tenant which may not be removed without substantial injury to the Premises shall become part of the realty, shall be owned by Port and shall, at the end of the Term hereof, remain on the Premises without compensation to Tenant, unless Port first waives its right to the Alterations or Improvements in writing.

**13.4 Removal of Improvements.** At Port's election made in accordance with Section 13.5 hereof, Tenant shall be obligated at its own expense to remove and relocate or demolish and remove (as Tenant may choose) any or all Alterations or Improvements which Tenant has made to the Premises, including without limitation all telephone wiring and equipment installed by Tenant. Tenant shall repair, at its own expense, in good workmanlike fashion any damage occasioned thereby.

**13.5 Notice of Removal.** Prior to the effective termination date of this Lease, Port shall give written notice to Tenant (herein "Notice of Removal") specifying the Alterations or Improvements or portions thereof which Tenant shall be required to remove and relocate or demolish and remove from the Premises, in accordance with Section 13.4. If termination is the result of loss or destruction of the Premises or any Improvements thereon, Port shall deliver said Notice of Removal to Tenant within a reasonable time after the loss or destruction, if Tenant fails to complete such demolition or removal on or before the termination of this Lease, Port may perform such removal or demolition at Tenant's expense, and Tenant shall reimburse Port upon demand therefor.

**13.6 Removal of Non-Permitted Improvements.** If Tenant constructs any Alterations or Improvements to the Premises without Port's prior written consent or without complying with section 13.2 hereof, then, in addition to any other remedy available to Port, Port may require Tenant to remove, at Tenant's expense, any or all such Alterations or Improvements and to repair, at Tenant's expense and in good workmanlike fashion, any damage occasioned thereby. Tenant shall pay to Port all special inspection fees as set forth in the San Francisco Building Code for inspection of work performed without required permits.

**14. Suitability: Acceptance.** Tenant acknowledges that Port has made no representations or warranties concerning the Premises, including without limitation, the seismological condition thereof. By taking possession of the Premises, Tenant shall be deemed to have inspected the Premises and accepted the Premises in an "As-Is" condition and as being suitable for the conduct of Tenant's business.

**15. Liens.** Tenant shall keep the Premises free from any liens arising out of any work performed, materials furnished or obligations incurred by Tenant or its Agents. In the event that Tenant shall not, within twenty (20) days following the imposition of any such lien, cause the same to be released of record, Port shall have, in addition to all other remedies provided by this Lease or by Law, the right but not the obligation to cause the same to be released by such means as it shall deem proper, including without limitation, payment of the claim giving rise to such lien. All sums paid by Port for such purpose and all reasonable expenses incurred by Port in connection therewith shall be payable to Port by Tenant within thirty (30) days following written demand by Port.



16. Hazardous Materials.

16.1 Requirements for Handling. Neither Tenant nor its Agents or Invitees, shall Handle in, on or about the Premises any Hazardous Material without the prior, written consent of Port, which consent shall not be unreasonably withheld so long as Tenant demonstrates to Port's reasonable satisfaction that such Hazardous Material is necessary to Tenant's business, will be Handled in a manner which strictly complies with all Environmental Laws and will not materially increase the risk of fire or other casualty to the Premises. Notwithstanding the foregoing, Tenant may Handle on the Premises janitorial or office supplies or materials in such limited amounts as are customarily used for general office purposes so long as such Handling is at all times in full compliance with all Environmental Laws.

16.2 Tenant Responsibility. Subject to the restrictions set forth in Section 16.1 hereof, Tenant shall Handle all Hazardous Materials discovered on the Premises during the Term of this Lease or introduced on the Premises by Tenant, its Agents or Invitees, in compliance with all Environmental Laws. Tenant shall not be responsible for the safe Handling of Hazardous Materials introduced on the Premises during the Term of this Lease by City, Port or their Agents. Tenant shall protect its employees and the general public in accordance with all Environmental Laws. Port may from time to time request, and Tenant shall be obligated to provide, information reasonably adequate for Port to determine that any and all Hazardous Materials are being Handled in a manner which complies with all Environmental Laws. Port shall have the right to inspect the Premises for Hazardous Materials at reasonable times, pursuant to Section 25.1 hereof.

16.3 Requirement to Remove. Prior to termination of this Lease, Tenant, at its sole cost and expense, shall remove any and all Hazardous Materials introduced in, on, under or about the Premises by Tenant, its Agents or Invitees. Further, Tenant, at its sole cost and expense, shall remove any Hazardous Material discovered on the Premises during the Term of this Lease which is required to be removed by any governmental agency, including Port; provided however, that Tenant shall not be obligated to remove any Hazardous Material introduced onto the Premises during the Term of this Lease by the City, Port or their Agents. Prior to the termination of this Lease, Port and Tenant shall conduct a joint inspection of the Premises for the purpose of identifying Hazardous Materials existing on the Premises which Tenant is required to remove.

17. Insurance.

17.1 Required Insurance Coverage. Tenant, at its sole cost and expense, shall maintain, or cause to be maintained, throughout the Term of this Lease, the following insurance:

(a) General Liability Insurance. Comprehensive or commercial general liability insurance, with limits not less than One Million Dollars (\$1,000,000.00) each occurrence combined single limit for bodily injury and property damage, including coverages for contractual liability, independent contractors, broadform property damage, personal injury, products and completed operations, and fire damage and legal liability with limits not less than Two Hundred Fifty Thousand Dollars (\$250,000.00).

(b) Automobile Liability Insurance. Comprehensive or business automobile liability insurance with limits not less than One Million Dollars (\$1,000,000.00) each occurrence combined single limit for bodily injury and property damage, including coverages for owned and hired vehicles and for employer's non-ownership liability, which insurance shall be required if any automobiles are operated on the Premises.

(c) Worker's Compensation: Jones Act; U.S. Longshore and Harborworker's Act Insurance. Worker's Compensation Insurance, U.S. Longshore and Harborworker's Act Insurance and Jones Act Insurance with employer's liability limit not less than One Million Dollars (\$1,000,000.00) for each accident, on employees eligible, for each. In the event Tenant is self-insured for the insurance required

pursuant to this Section 17.1(c), it shall furnish to Port a current Certificate of Permission to Self-Insure aligned by the Department of Industrial Relations, Administration of Self-Insurance, Sacramento, California:

(d) Personal Property Insurance. Tenant, at its sole cost and expense, shall procure and maintain on all of its personal property and Alterations, in, on, or about the Premises, property insurance on an all-risk form, excluding earthquake and flood, to the extent of full replacement value. The proceeds from any such policy shall be used by Tenant for the replacement of Tenant's personal property.

(e) Business Interruption Insurance. Tenant, at its sole cost and expense, shall maintain business interruption insurance insuring that the Base Rent shall be paid to Port for a period of up to one year if Tenant is unable to operate its business at the Premises due to a risk insured against by the personal property insurance referred to in Section 17.1(d) above. Said insurance also shall cover business interruptions due to riots or civil commotion.

(f) Required by Law. Such other insurance as required by Law.

(g) See Addendum. Such other insurance as specified in the Addendum attached to this Lease, if any.

17.2 Claims-Made Policies. If any of the insurance required in Section 17.1 is provided under a claims-made form of policy, Tenant shall maintain such coverage continuously throughout the Term and without lapse for a period of three years beyond the termination of this Lease, to the effect that should occurrences during the Term give rise to claims made after termination of this Lease, such claims shall be covered by such claims-made policies.

17.3 Annual Aggregate Limits. If any of the insurance required in Section 17.1 is provided under a form of coverage which includes an annual aggregate limit or provides that claims investigation or legal defense costs be included in such annual aggregate limit, such annual aggregate limit shall be double the occurrence limits specified herein.

17.4 Payment of Premiums. Tenant shall pay the premiums for maintaining all required insurance.

17.5 Waiver of Subrogation Rights. The parties release each other, and their respective authorized representatives, from any claims for damage to the Premises or, to the fixtures, personal property, improvements or Alterations of either Port or Tenant in or on the Premises which are caused by or result from risks insured against under any property insurance policies carried by the parties and in force at the time of any such damage, to the extent such claims for damage are paid by such policies. Each party shall cause each property insurance policy obtained by it to provide that the insurance company waives all right of recovery by way of subrogation against the other party in connection with any damage covered by any policy.

17.6 General Insurance Matters.

(a) All liability insurance policies required to be maintained by Tenant hereunder shall contain a cross-liability clause, shall name as additional insureds "the City and County of San Francisco and the San Francisco Port Commission and their officers, directors, employees and agents," shall be primary to any other insurance available to the additional insureds with respect to claims arising under this Lease, and shall provide that such insurance applies separately to each insured against whom complaint is made or suit is brought except with respect to the limits of the company's liability.

(b) All insurance policies required to be maintained by Tenant hereunder shall be issued by an insurance company or companies reasonably acceptable to Port. Tenant's compliance with this Section shall in no way relieve or decrease Tenant's liability under this Lease.

(c) All insurance policies required to be maintained by Tenant hereunder shall provide for thirty (30) days prior written notice of cancellation or intended non-renewal or reduction in coverage to

Tenant and Port. Such notice shall be given in accordance with the notice provisions of Section 30 of this Lease.

(d) Tenant shall deliver to Port certificates of insurance in a form satisfactory to Port evidencing the coverages required herein, together with evidence of payment of premiums, on or before the Commencement Date, and upon renewal of each policy not less than thirty (30) days before expiration of the term of the policy. Tenant shall, upon Port's request, promptly furnish Port with a complete copy of any insurance policy required hereunder.

(e) Not more often than every year and upon not less than sixty (60) days prior written notice, Port may require Tenant to increase the insurance limits set forth in Section 17.1 above if Port finds in its reasonable judgment that it is the general commercial practice in San Francisco to carry insurance in amounts substantially greater than those amounts carried by Tenant with respect to risks comparable to those associated with the use of the Premises.

#### 18. Damage and Destruction

18.1 Damage and Destruction. If the Premises or the Facility are damaged by fire or other casualty, then Port shall repair the same provided that funds for such repairs are appropriated by Port, in its sole discretion, for such purpose and provided that such repairs can be made within two hundred ten (210) days after the date of such damage (the "Repair Period"). In the event such conditions are satisfied, this Lease shall remain in full force and effect except that Tenant shall be entitled to a proportionate reduction of Base Rent during the Repair Period based upon the extent to which such damage and the making of such repairs materially interferes with Tenant's use or occupancy of the Premises.

Port shall use its best efforts to notify Tenant within ninety (90) days after the date of such damage whether or not such repairs can be made within the Repair Period, and Port's determination thereof shall be binding on Tenant. If such repairs cannot be made within the Repair Period, Port shall have the option to notify Tenant of: (a) Port's intention to repair such damage and diligently prosecute such repairs to completion within a reasonable period after the Repair Period, subject to appropriation of funds, in which event this Lease shall continue in full force and effect and the Base Rent shall be reduced as provided above; or (b) Port's election to terminate this Lease as of a date specified in such notice, which date shall be not less than thirty (30) nor more than sixty (60) days after notice is given by Port. In case of termination, the Base Rent shall be reduced as provided above, and Tenant shall pay such reduced Base Rent up to the date of termination.

If at any time during the last twelve (12) months of the Term, the Premises or the Facility is damaged or destroyed, then either Port or Tenant may terminate this Lease by giving written notice to the other party of its election to do so within thirty (30) days after the date of the occurrence of such damage; provided, however, Tenant may terminate only if such damage or destruction substantially impairs its use or occupancy of the Premises. The effective date of termination shall be specified in the notice of termination, which date shall not be more than thirty (30) days from the date of the notice.

Notwithstanding anything to the contrary in this Lease, Port shall have no obligation to repair the Premises or the Facility in the event the damage or destruction is attributable to any act or omission of Tenant, its Agents or invitees. In no event shall Port be required to repair any damage to Tenant's personal property or any paneling, decorations, railings, floor coverings, or any improvements or Alterations installed or made on the Premises by or at the expense of Tenant. In the event the Premises or the Facility is substantially damaged or destroyed and Port intends to rebuild for public purposes inconsistent with this Lease, Port may terminate this Lease upon written notice to Tenant.

18.2 Waiver. Port and Tenant intend that the provisions of this Section govern fully in the event of any damage or destruction and accordingly, Port and Tenant each hereby waives the provisions of

19.2 Partial Takings. If (a) a part of the Premises shall be taken by any public or quasi-public authority under the power of eminent domain or conveyance in favor thereof, and (b) Tenant is reasonably able to continue the operation of Tenant's business in that portion of the Premises remaining; and (c) Port elects to restore the Premises to an architectural whole, then this Lease shall remain in effect as to said portion of the Premises remaining, and the Base Rent payable from the Date of Taking shall be reduced by an amount that is in the same ratio to the Base Rent as the value of the area so taken bears to the total value of the Premises immediately before the Date of Taking. If, after a partial taking, Tenant is not reasonably able to continue the operation of its business in the Premises or Port elects not to restore the Premises to an architectural whole, this Lease may be terminated by either Port or Tenant by giving written notice to the other party no earlier than thirty (30) days prior to the Date of Taking and no later than thirty (30) days after the Date of Taking. Such notice shall specify the date of termination which shall be not less than thirty (30) nor more than sixty (60) days after the date of said notice.

19.3 Taking of the Facility. If any substantial portion of the Facility is taken under the power of eminent domain or conveyance in favor thereof, whether any portion of the Premises is taken or not, Port shall have the right to terminate this Lease by written notice to Tenant within thirty (30) days of the Date of Taking.

19.4 Temporary Takings. Notwithstanding anything to the contrary contained in this Section, if a taking occurs with respect to all or any part of the Premises for a limited period of time, this Lease shall remain unaffected thereby and Tenant shall continue to pay Rent and to perform all of the terms, conditions and covenants of this Lease. Tenant shall be entitled to receive that portion of any award representing compensation for the use or occupancy of the Premises during the Term up to the total Rent owing by Tenant for the period of the taking, and Port shall be entitled to receive the balance of any award.

19.5 Award Waiver. Port shall be entitled to any and all payment, income, rent, award, or any interest therein whatsoever which may be paid or made in connection with any taking or conveyance hereunder, and Tenant shall have no claim against Port or otherwise for the value of any unexpired term of this Lease. Notwithstanding the foregoing, to the extent that the same shall not diminish Port's recovery for such taking, Tenant shall have the right to make a claim, and to receive any award specifically made to Tenant, for moving expenses and for loss or damage to Tenant's trade fixtures, equipment and movable furniture. Port and Tenant intend that the provisions of this Section govern fully in the event of condemnation and accordingly, Port and Tenant each hereby waive any right to terminate this Lease in whole or in part under Sections 1295.120 and 1253.130 of the California Code of Civil Procedure or under any similar law now or hereafter in effect.

## 20. Indemnity and Exculpation.

20.1 Indemnity. Tenant shall indemnify and hold Port, City, and their agents, officers, directors, contractors and employees (collectively, "Agents") harmless from, and, if requested, shall defend them against any and all claims, direct or vicarious liability, damage, injury or loss arising directly or indirectly out of: (a) any injury to or death of any person, including employees of Tenant, or damage to or destruction of any property occurring in, on or about the Premises, or any part thereof, from any cause whatsoever, or (b) any default by Tenant in the observance or performance of any of the terms, covenants or conditions of this Lease, or (c) the use, occupancy or condition of the Premises or the activities therein by Tenant, its Agents, or clients, customers, invitees, guests, members, licensees, assignees and subtenants (collectively, "invitees"). This indemnity shall be enforceable regardless of the negligence of Port or City, and regardless of whether liability without fault is imposed or sought to be imposed on Port or City. This indemnity shall be enforceable except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on, or validly retroactive

to, the date of this Lease. This indemnity includes all such loss, damage, injury, liability or claims as described above, loss predicated in whole or in part, upon active or passive negligence of Port, City or their Agents. This indemnity shall exclude claims, liability, damage or loss resulting solely and exclusively from the willful misconduct of Port or City which is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on, Tenant, its Agents, or invitees.

In addition to Tenant's obligation to indemnify Port and City, Tenant specifically acknowledges and agrees that it has an immediate and independent obligation to defend Port and City from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent. Tenant's obligation to defend shall arise at the time such claim is tendered to Tenant by Port and/or City and shall continue at all times thereafter.

The foregoing indemnity obligation of Tenant shall include without limitation, indemnification from all loss and liability, including attorney's fees, court costs and all other litigation expenses. This indemnification by Tenant shall begin from the first notice that any claim or demand is or may be made. The provisions of this section shall survive the termination of this Lease with respect to any damage, destruction, injury or death occurring prior to such termination.

**20.2 Exculpation.** Tenant, as a material part of the consideration to be rendered to Port, hereby waives any and all claims against Port, City and their Agents, and agrees to hold Port, City and their Agents harmless from any claims for damages to goods, wares, goodwill, merchandise, equipment or business opportunities and by persons in, upon or about said Premises for any cause arising at any time, including without limitation all claims arising from the joint or concurrent negligence of Port or City or their Agents, but excluding any intentionally harmful acts committed solely by Port or City.

**20.3 Hazardous Materials Indemnification.** Tenant shall indemnify, defend and hold Port, City and their Agents harmless from any and all claims, judgments, damages, penalties, fines, costs, liabilities or losses which arise during or after the Term of this Lease as a result of the Handling of Hazardous Materials on the Premises by Tenant, its Agents or invitees, including without limitation, all costs of investigating and remediating the same, damages for diminution in the value of the Premises, damages for the loss or restriction on use of rentable or usable space or of any amenity of the Premises, damages arising from any adverse impact on marketing of any such space and sums paid in settlement of claims, attorneys' fees, consultant fees and expert fees.

This indemnification of Port and City by Tenant includes, but is not limited to, costs incurred in connection with any investigation of site conditions or any clean-up, remediation, removal or restoration work requested by Port or required by any federal, state or local governmental agency or political subdivision because of Hazardous Material present in the soil or groundwater in, on or under the Premises or in any improvements. Without limiting the foregoing, if the presence of any Hazardous Material in, on, under or about the Premises caused or permitted by Tenant results in any contamination of the Premises, Tenant, at its sole expense, promptly shall take all action that is necessary to return the Premises to the condition existing prior to the introduction of such Hazardous Material in, on, under or about the Premises; provided that Port approval of such actions shall first be obtained, which approval shall not be unreasonably withheld so long as such actions could not potentially have any material adverse effect upon the Premises. Tenant's obligations hereunder shall survive the termination of this Lease.

## **21. Assignment and Subletting.**

**21.1 Definition of Transfer.** The occurrence of any of the following (whether voluntarily, involuntarily or by operation of Law) shall constitute a "Transfer" of this Lease:

- (a) any direct or indirect assignment, conveyance, alienation, sublease, or other transfer of Tenant's interest in this Lease or in the Premises, or any part thereof or interest therein; or
- (b) the use of all or part of the Premises by any person or entity other than Tenant, except Tenant's authorized Agents or invitees; or

(c) If Tenant is a privately-held corporation, the dissolution, merger, consolidation or other reorganization of Tenant, or any cumulative or aggregate sale, transfer, assignment or hypothecation of fifty percent (50%) or more of the total capital stock of Tenant or any sale or cumulative sales of fifty percent (50%) or more of the value of the assets of Tenant; or

(d) If Tenant is a partnership or an unincorporated association, (i) the withdrawal or substitution (whether voluntarily, involuntarily or by operation of Law and whether occurring at one time or over a period of time) of any partner(s) owning fifty percent (50%) or more of said partnership or association, or (ii) the cumulative or aggregate sale, transfer, assignment or hypothecation of fifty percent (50%) or more of any interest in the capital or profits of such partnership or association, or (iii) the dissolution of the partnership or association.

As used herein, the term "Transfer" includes a transfer of any interest in this Lease held by any subtenant, assignee, or transferee, but does not include any hypothecation, encumbrance or mortgage of this Lease made in accordance with Section 22.

**21.2 Port's Consent Required.** Tenant shall not make or permit any Transfer of this Lease except with the prior written consent of Port in each instance as evidenced by Port Commission resolution and in full compliance with all of the terms and provisions of this Section 21. Any Transfer of this Lease occurring without full compliance with all of the terms and conditions hereof shall constitute an incurable breach by Tenant and shall be voidable at the option of Port.

**21.3 Request for Transfer.** Tenant shall give Port at least forty-five (45) days prior written notice of any desired Transfer (herein "Notice of Request to Transfer") and shall provide Port with the following information in writing: (1) the name, address, legal composition and ownership of the proposed transferee, (2) the current balance sheet and profit and loss statements (herein "financial statements") for the proposed transferee and for any other entity or person who is to be liable for Tenant's obligations under this Lease, such financial statements to be certified in writing to be true and correct and to be prepared in accordance with generally accepted accounting principles and to cover a period of three years prior to the proposed effective date of the Transfer (or for such shorter period as the proposed transferee or other person may have been in existence), (3) a full description of the terms and conditions of the proposed Transfer, including copies of any and all proposed sublease or assignment agreements or other documents and instruments concerning the proposed Transfer, (4) a description of the proposed use of the Premises by the proposed transferee, including any required or desired Alterations or Improvements to the Premises that may be undertaken by such transferee in order to facilitate its proposed use, (5) complete information regarding all payments to be made or other consideration to be given in connection with the Transfer; (6) a list of personal, business and credit references of the proposed transferee, (7) a current financial statement of Tenant, and (8) any other information, documentation or evidence as may be requested by Port, all in sufficient detail to enable Port to evaluate the proposed Transfer and the prospective transferee. Tenant's Notice of Request to Transfer shall not be deemed to have been served or given until such time as Tenant has provided Port with all information set forth hereinabove. Tenant shall immediately notify Port of any modifications to the proposed terms of the Transfer.

**21.4 Port's Consent/Refusal to Consent.** Upon receiving a Notice of Request to Transfer, Port shall have the right to do any of the following:

(a) Port may consent to the proposed Transfer, subject to any reasonable conditions upon such Transfer, which conditions may include, without limitation: (i) that the proposed transferee expressly assume all obligations of Tenant under this Lease without, however, Port releasing Tenant therefrom; (ii) that in the event this Lease is terminated prior to the expiration of any sublease, at the election of Port, such termination shall operate to terminate all existing subleases entered into by Tenant without further notice from Port; and (iii) that the sublease or other Transfer agreement contain: (A) an indemnification clause and waiver of claims provisions in favor of Port and City identical to those contained in Section 20 of this Lease; (B) a clause requiring the proposed transferee to name City, Port

The effective date of such termination shall be not earlier than one hundred eighty (180) days following delivery of the termination notice to Port.

Tenant hereby waives any right to claims for damages of any kind whatsoever which claims arise from Port's failure to extend the useful life of the Premises or the Facility in which the Premises (including, but not limited to damages alleged to be the result of Port's gross negligence or gross mismanagement of the Facility in which the Premises are situated) are situated, Tenant's sole and exclusive remedy being Tenant's right to terminate as set forth hereabove."

20. Section 42 is hereby added to the Lease to read as follows:

"42. No Responsibility for Dredging. Port shall have no obligation to dredge the waterways of submerged lands adjacent and contiguous to the Premises. Port does not warrant or guarantee any water depth in the vicinity of the Premises nor does Port warrant or guarantee that the water depth in the vicinity of the Premises is now or ever will be adequate to Tenant's needs."

21. Section 43 is hereby added to the Lease to read as follows:

"43. Oil Spill Response Plan. Prior to Tenant's occupancy of the Premises, Tenant shall deliver to Port an Oil Spill Response Plan acceptable to Port which Oil Spill Response Plan will set forth with specificity and particularity the abatement and remediation responses Tenant intends to make in the event of the intentional, inadvertent or accidental discharge into the Bay or anywhere on or in the Premises of any Hazardous Materials including gasoline, fuel oils, lubrication oils or other petroleum distillates and/or byproducts. Unless and until Port approves Tenant's Oil Spill Response Plan in writing, Tenant shall not permit the storage of any petroleum, petroleum distillates or petroleum byproducts anywhere on or in the Premises."

22. Section 44 is hereby added to the Lease to read as follows:

"44. Casual Dining; Full Service Dining Defined. For purposes of Percentage Rent calculation (Section 5.3), "Casual Dining" and "Full Service Dining" are defined as follows.

- a. Casual Dining: "Casual Dining" shall include any restaurant uses that do not constitute Full Service Dining uses as defined herebelow.
- b. Full Service Dining: "Full Service Dining" is defined as restaurant uses where food is cooked to customers' orders and all food and beverages are ordered by and served to customers at their table for consumption on the restaurant premises."

23. Section 45 is hereby added to the Lease to read as follows:

"45. Casual Dining and Full Service Dining Base Rent Adjustment. The Base Rent for that portion of the Premises occupied by Tenant (or Tenant's invitees) and used for Casual Dining and Full Service Dining, shall be adjusted effective as of the Tenth Anniversary Date and as of the Commencement Date of any Option Term utilizing the following procedure:

By not earlier than two hundred forty (240) days or later than one hundred eighty (180) days prior to the expiration of the tenth Lease Year of the Term, the Term or any Option Term, Port shall deliver to Tenant written notice of the proposed "Base Rent for Casual and Full Service Dining. The proposed Base Rent for Casual and Full Service Dining shall reflect Port's reasonable determination of the then applicable prevailing market rate rent for similarly sized, improved and situated Casual Dining and Full Service Dining establishments in the City and County of San Francisco. However, there shall be given no consideration for the in-place value of Tenant's trade fixtures and equipment.

Additionally, said written notice shall also set forth Port's proposed percentage amounts for use in calculating the Percentage Rent for Casual Dining and Full Service Dining, which percentage amounts shall reflect Port's reasonable determination of the then market rate for percentage amounts for similarly sized, improved and situated Casual Dining and Full Service Dining establishments in the City and County of San Francisco. Said written notice of the Base Rent for Casual Dining and Full Service Dining and percentage amount adjustments is hereinafter referred to as "Port's Notice of Adjustment".

Within thirty (30) days following Tenant's receipt of Port's Notice of Adjustment, Tenant shall deliver to Port Tenant's written notice of acceptance or rejection of Port's proposal. In the event of Tenant's acceptance, the Base Rent for that portion of the Premises occupied by Tenant (or Tenant's invitees) and used for Casual Dining and Full Service Dining and the Percentage Rent percentage for the balance of the Term or for the Option Term next succeeding the expiration of the Term or Option Term then in effect shall be as set forth in Port's Notice of Adjustment.

In the event that Tenant delivers a rejection (hereinafter "Tenant's Rejection Notice") of Port's Notice of Adjustment, Port and Tenant shall submit the issue to binding arbitration as set forth herebelow.

Should Tenant fail to deliver written notice of Tenant's acceptance or rejection of Port's Notice of Adjustment within thirty (30) days of Tenant's receipt of Port's Notice of Adjustment, the Base Rent and percentage amounts contained in Port's Notice of Adjustment shall be deemed conclusively as having been accepted by Tenant.

Tenant may reject either or both the proposed Base Rent for Casual and Full Service Dining or the proposed percentage amounts contained in Port's Notice of Adjustment. Only the item rejected will be subject to the arbitration procedures outlined below.

**45.1 Arbitration.** Within thirty (30) days of Port's receipt of Tenant's Rejection Notice, Port and Tenant at each party's own cost, and by giving notice to the other party, shall appoint an MAI (Member, Appraisal Institute) real estate appraiser with not less than five (5) years' full time commercial appraisal experience in the City and County of San Francisco, to appraise and determine the prevailing fair market value of that portion of the Premises utilized by Tenant (or Tenant's invitees) for Casual Dining and Full Service Dining and/or to determine the prevailing fair market percentage amounts to be utilized in calculating the percentage rent for Casual Dining and Full Service Dining. If one party shall not appoint an appraiser and notify the other party of such appointment within said thirty (30) days, the single appointed appraiser shall be the sole appraiser and shall determine the prevailing fair market rental and/or percentage amounts.

If the two parties each timely appoint an appraiser meeting the qualifications as set forth above, the two Appointed Appraisers (the "Appointed Appraisers") shall meet promptly and shall elect a third appraiser (the "Elected Appraiser") meeting the qualifications stated in this Section. The Elected Appraiser shall be a person who has not previously acted in any capacity for either Port or Tenant. If the Appointed Appraisers fail to select the Elected Appraiser within said thirty (30) day period, on application of either Port or Tenant, the Elected Appraiser shall be promptly appointed by the then presiding Judge of the Superior Court of the State of California in and for the City and County of San Francisco, acting in his individual capacity. The party making such application shall give the other party written notice of such application.

Within thirty (30) days of the appointment of the second of the "Appointed Appraisers", each appointed appraiser shall submit to the Elected Appraiser his or her respective appraisal of the prevailing fair market rent and/or percentage amounts with a copy to be forwarded to both Port and Tenant.

Within thirty (30) days following the receipt by the Elected Appraiser of the appraisals from the Appointed Appraisers, the Elected Appraiser shall deliver to Port and Tenant the Elected Appraiser's



determination of the prevailing fair market rent and/or the percentage amount being appraised. In no event shall the Elected Appraiser's appraisal of either value be less than the lower of the two Appointed Appraisers' appraisal of either value, nor greater than the higher of the Appointed Appraisers' appraisal of either value.

Should either of the Appointed Appraisers fail to timely deliver an appraisal to the Elected Appraiser, the appraisal delivered by the complying appointed appraiser shall be deemed by the Elected Appraiser to be conclusive as to the prevailing fair market rental and/or percentage amounts appraised.

If both the Appointed Appraisers fail to timely deliver an appraisal to the Elected Appraiser, the Elected Appraiser shall make an independent appraisal of the prevailing fair market rent and/or percentage amounts to be appraised.

The cost of the Elected Appraiser shall be shared equally by Port and Tenant except, however, if one appointed appraiser shall fail to timely deliver an appraisal to the Elected Appraiser, the costs of the Elected Appraiser shall be borne by the party appointing that appointed appraiser that failed to timely deliver his or her appraisal.

The Elected Appraiser's appraisal shall be conclusive as to the prevailing fair market rental and/or percentage rents therein contained for the remainder of the Term or for the applicable Option Term.

The Base Rent for Casual Dining and Full Service Dining as established by this Section shall be adjusted on the Eleventh Anniversary Date and each succeeding Anniversary Date and on the Anniversary Date of any Option Term Commencement Date (but not on any Option Term Commencement Date) pursuant to Section 5.2

This Section acknowledges that this scenario would permit a situation whereby the prevailing fair market rent may be greater in the Port's Appointed Appraisers' appraisal, while at the same time, the percentage amount may be higher in the Tenant's Appointed Appraisers' appraisal.

24. Section 45 is hereby added to the Lease to read as follows:

"45. Affirmative Action. Tenant hereby agrees that not less than thirty percent (30%) of the construction costs expended by Tenant for tenant improvements or repair costs for repairs otherwise the obligation of Port will inure to the benefit of bona fide Minority Owned Business Enterprises ("MBE"), Women Owned Business Enterprises ("WBE") or Business Owned by Disadvantaged Persons ("DBE") as an MBE, WBE and DBE enterprises may be from time to time defined and certified as bona fide MBE, WBE and DBE enterprises by the Human Rights Commission of the City and County of San Francisco. Tenant further agrees that Tenant's goals for hiring of employees employed on the Premises for that of Tenant's invitees) shall be in conformance with the Affirmative Action Plan attached hereto as Exhibit B, and incorporated herein by its reference."

25. Section 47 is hereby added to the Lease to read as follows:

"47. Tobacco Products Advertising Ban. Tenant acknowledges and agrees that no advertising of cigarettes or tobacco products is allowed on any real property owned by or under the control of the City, including the property which is the subject to this New Lease. This prohibition includes the placement of the name of a company producing, selling or distributing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. This prohibition does not apply to any advertisement sponsored by a state, local or nonprofit entity designed to communicate the health hazards of cigarettes and tobacco products or to encourage people not to smoke or to stop smoking.

26. Section 48 is hereby added to the Lease to read as follows:

"48. Opportunity Rent Example. In order to illustrate the intent of the parties as to the application of Section 1.3c (Opportunity Rent) Port and Tenant agree that the following example is correct;

The following example assumes:

A. The Annual Cost of Living Index will result in an annual seven percent (7%) increase in the Cost of Living Index;

B. Tenant's total monthly Percentage Rents for Lease Years one (1) through ten (10) will be:

Lease Year	Monthly Average Percentage Rent
1	335
2	0
3	450
4	1,500
5	4,000
6	5,200
7	12,000
8	2,985
9	4,514
10	6,090

Given these assumptions, the monthly hypothetical Assumed Base Rent and Assumed Percentage Rent for Lease Years one (1) through ten (10) would be:

Lease Year	Monthly Hypothetical Base Rent	Monthly Hypothetical Percentage Rent	Monthly Hypothetical Total Rent	Future Value At End of Year 10
1-12 mos. @	27,000	0	27,000	47,225
2-12 mos. @	28,820	0	28,820	47,867
3-12 mos. @	30,912	0	30,912	48,347
4-12 mos. @	33,076	0	35,391	52,343
5-12 mos. @	35,391	0	35,391	49,497
6-12 mos. @	37,808	0	37,868	50,081
7-12 mos. @	40,520	8,980	49,500	61,905
8-12 mos. @	43,356	7,629	50,985	60,295
9-12 mos. @	46,391	6,123	52,614	58,726
10-12 mos. @	49,538	4,452	54,090	57,200
Total				\$533,286

\* value at year 10 @ 5.75%  
Accrued Future Value

Given these same assumptions and utilizing a 5.75% discount rate, the then net present value of the hypothetical Base Rent and hypothetical Percentage Rent (the Total Hypothetical Rent) would be \$533,286. For purpose of this illustration only this amount is the Assumed Hypothetical Total Rent.

Utilizing the same monthly Gross Receipts as set forth in B, above Tenant's monthly Base Rent and

Percentage Rent obligations for Lease Year one (1) through ten (10) would be:

Lease Year	Monthly Hypothetical Base Rent	Monthly Hypothetical Percentage Rent	Monthly Hypothetical Total Rent	Future Value At End of Year 10
1	5,000	335	5,335	9,331
2	11,000	0	11,000	18,193
3	18,500	450	18,950	26,510
4	21,500	1,600	27,000	39,932
5	27,000	4,000	32,000	44,754
6	32,000	5,200	37,200	49,198
7	37,500	12,000	49,500	61,905
8	48,000	2,985	50,985	60,295
9	48,000	4,514	52,514	58,727
10	48,000	6,090	54,090	57,200
Total				\$428,045

\*value at year 10 @ 5.75%

Given these same assumptions and utilizing a 5.75 discount rate the then net present value of the Total Base Rent and Percentage Rent, paid to Port at the end of the tenth Lease Year would be \$428,045. Subtracting this amount from the then net present value of the assumed Hypothetical Total Rent will result in an amount equal to the Opportunity Rent of the difference or \$107,241.00.

26. Section 23.1 is hereby amended in its entirety to read as follows:

"23.1 Default by Tenant The occurrence of any one or more of the following events shall constitute a default by Tenant:

- (a) Failure by Tenant to pay when due any Rent;
- (b) Abandonment or vacation of the Premises by Tenant;
- (c) Failure to perform according to Section 37.1 or Section 37.2

(d) Failure to perform any other provision of this Lease if the failure to perform is not cured within thirty (30) days after notice has been given by Port to Tenant. If the default cannot reasonably be cured within 30 days, Tenant shall not be in default of this Lease if Tenant commences to cure the default within such thirty (30) day period and diligently and in good faith continues to cure the default

(e) Either (i) the failure of Tenant to pay its debts as they become due, the written admission of Tenant of its inability to pay its debts, or a general assignment by Tenant for the benefit of creditors; or (ii) the filing by or against Tenant of any action seeking reorganization, arrangement, liquidation, or other relief under any Law relating to bankruptcy, insolvency, or reorganization (unless such action is involuntary and is discharged within sixty (60) days) or seeking the appointment of a trustee, receiver or liquidator of Tenant's or any substantial part of Tenant's assets; or (iii) the attachment, execution or other judicial seizure of substantially all of Tenant's interest in this Lease, unless such seizure is discharged within ten (10) days.

Notice given under this section shall demand that Tenant perform the provisions of this Lease or pay the Rent that is in arrears, as the case may be, within the applicable period of time, or quit the Premises. No such notice shall be deemed a forfeiture or a termination of this Lease unless Port so elects in the notice.

8:11 PM RELEASE UNDER E.O. 14176

SITE PLAN

EXHIBIT A

-44-

INITIALS: Port IN Tenant AKR

INITIALS: For: *Case*  
 EXHIBIT A  
 Pier 38 Proposed Facilities

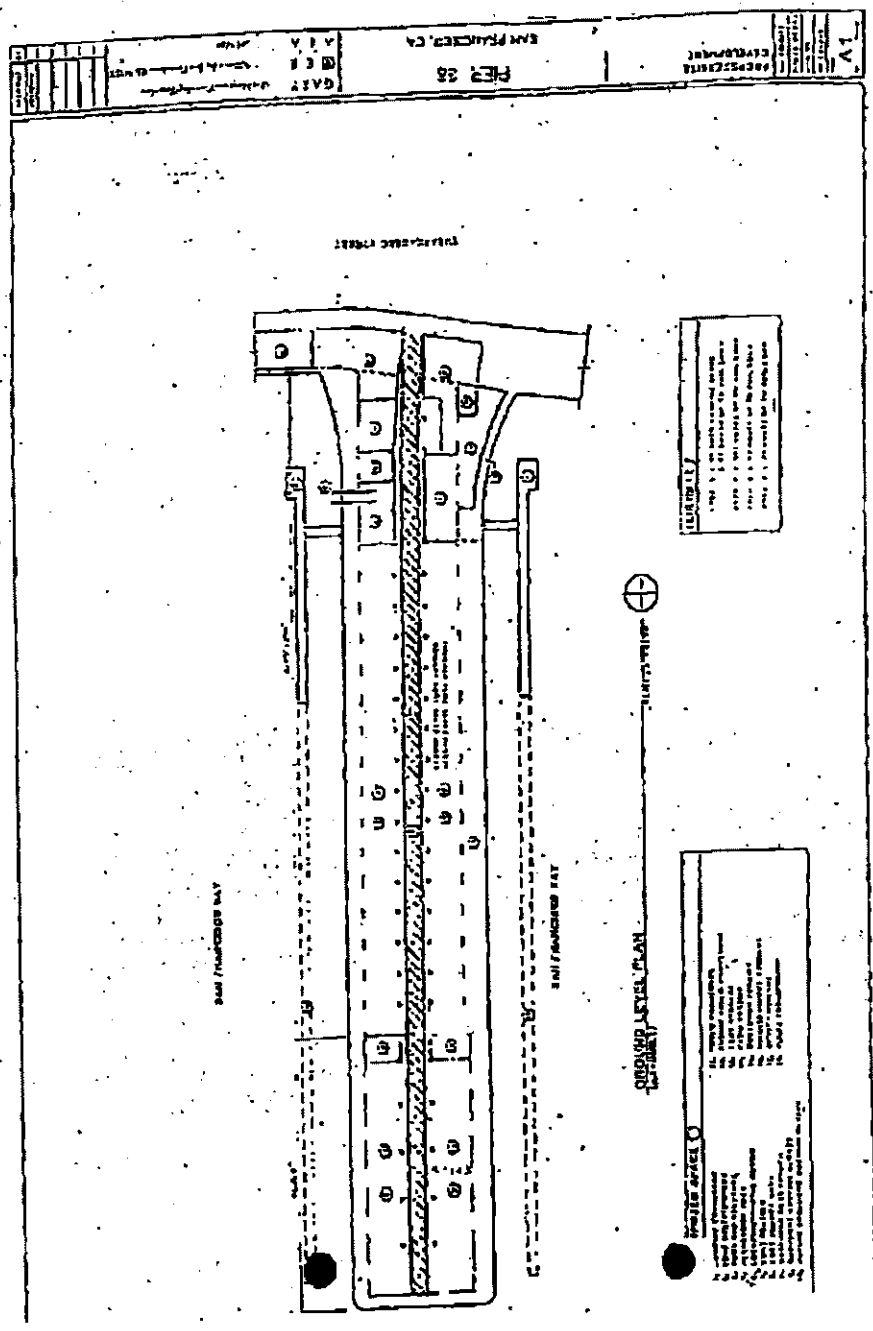


EXHIBIT A  
PAGE 2 OF 2

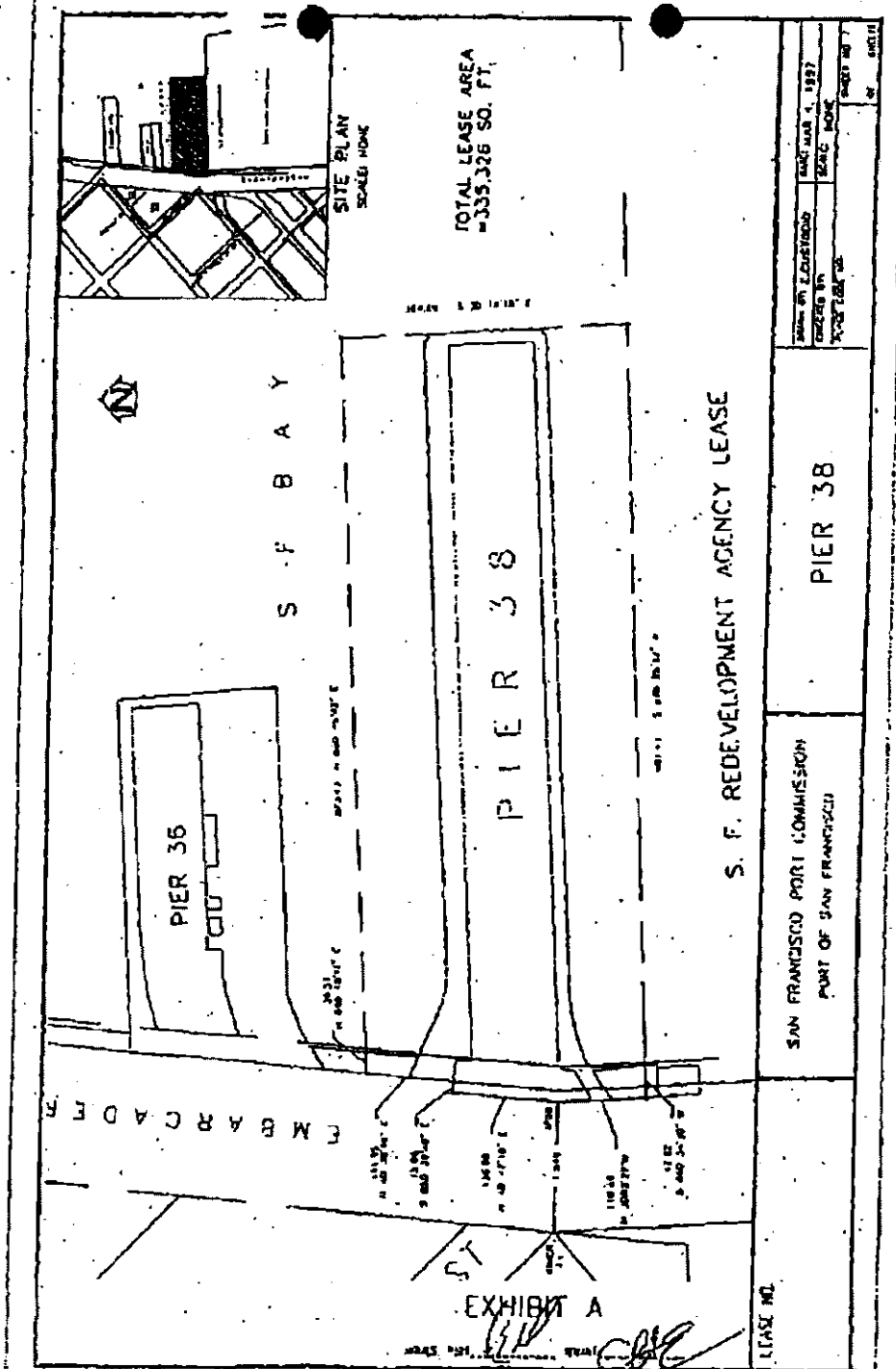
Being Pier 38 of the San Francisco Port Commission, situated at the Easterly side of the Embarcadero at the intersection of Delancey Street and Townsend Street, City and County of San Francisco, described as follows:

Commencing at the point of intersection of the most Southwesterly line of Delancey Street with the Northwesterly line of Townsend Street as it previously existed, said point of intersection being INNER 14 of the Inner Waterfront Line, with records on file at the Office of the Engineers of the San Francisco Port Commission; running thence South 89deg 07'32" East, a distance of 154.95 feet to the true point of beginning; thence North 4deg 47'40" East, a distance of 136.00 feet; thence South 85deg 39'48" East a distance of 15.08 feet to the existing bulkhead line; thence North 4deg 38'16" East, along the existing bulkhead line, a distance of 111.95 feet; thence North 86deg 45'42" East a distance of 26.51 feet, to the edge of the existing deck; continuing thence North 86deg 45'42" East a distance of 873.43 feet, to a point on the Northerly extension of the Easterly line of the existing Pier 38 deck; thence South 3deg 14'18" East a distance of 384.88 feet, to a point on the Northerly line of Parcel N-2 of the San Francisco Redevelopment Agency Lease with the San Francisco Port Commission (Lease No. L-10882) dated April 30, 1987; running thence South 87 deg 25'32" West along the aforementioned Northerly line of Parcel N-2 of the San Francisco Redevelopment Agency Lease, a distance of 907.43 feet, to the edge of the existing deck; thence South 86deg 54'30" West a distance of 42.22 feet; thence North 3deg 02'27" West a distance of 110.69 feet, to the true point of beginning, containing an area of 335,326 square feet of deck and water space, more or less.

INITIALS: Port

Tennant

EX - ERNST COMPLAINT - 000090



ORIGINAL

FIRST AMENDMENT TO LEASE No. 12120  
BETWEEN THE CITY AND COUNTY OF SAN FRANCISCO, THROUGH THE  
SAN FRANCISCO PORT COMMISSION, LANDLORD,

and

CARL ERNST, JR. AND  
PIER 38 MARITIME RECREATION CENTER, INC.  
A CALIFORNIA CORPORATION, JOINTLY AND SEVERALLY, TENANT

This First Amendment to Lease No. L-12120, dated for reference purposes only is entered into as of March 26, 1997, by and between the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation ("City"), and operating through the SAN FRANCISCO PORT COMMISSION ("Port"), as landlord and CARL ERNST, JR. and PIER 38 MARITIME RECREATION CENTER, INC., a California corporation, jointly and severally ("Tenant").

RECITALS

WHEREAS, by Lease No. 12120, executed January 13, 1996 ("Lease"), Port and Tenant entered into a lease for certain real property ("Premises") more particularly described in the Lease; and

WHEREAS, a subsequent survey undertaken by Port indicates that the description of the Premises set forth in the Lease is not accurate; and

WHEREAS, Port and Tenant desire to correct this administrative error in the Lease to provide for the correct description of the Premises; and

WHEREAS, such administrative correction is consistent with the approval of this Lease by the Port Commission and Board of Supervisors, is for the sole purpose of correction of a clerical error, and therefore does not require additional Port Commission or Board approval.

NOW THEREFORE, in consideration of the mutual covenants contained herein and for other good and valuable consideration, Port and Tenant do hereby modify the Lease as follows:

TERMS

1. Section 1.1 ("Premises") of the Lease is hereby amended to read as follows:

1.1 Premises. The entirety of the Pier, Apron, Bulkhead Building, Marginal Wharf and Water Surface located at Pier 38, in the City and County of San Francisco, State of California comprising approximately 336,326 square feet of deck and water space as shown on Page 1 of Exhibit A dated March 4, 1997 attached hereto and made a part hereof and as more particularly described on Page 2 of said Exhibit A, together with any improvements and Alterations thereto. Tenant shall have the right to the exclusive possession of the Pier, Apron and Bulkhead Building and the right to the non-exclusive possession and use of the Marginal Wharf and Water Surface areas. (Section 3)

INITIALS: Port [Signature] Tenant [Signature]

Case: 07-31444 Doc #: 48 Filed: 12/21/2007 EXHIBIT B



2. Exhibit A attached hereto and by its reference incorporated herein, is hereby substituted for the Exhibit A attached to the Lease.
3. Except as herein modified all of the other terms and conditions of the Lease shall remain in full force and effect.


G:\WP51\LEASES.DWG\1896UP\B\MORED.120IND\March 28, 1997

INITIALS: Part

Tenant



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**PROOF OF SERVICE**

*Ernst vs Moyer, et al.*

San Francisco County Superior Court Case No.: CGC-10-501887

I am a resident of the United States and employed in the City of Walnut Creek, County of Contra Costa. I am over the age of 18 years and not a party to the within action. My business address is 1220 Oakland Boulevard, Suite 200, Walnut Creek, California 94596.

On November 10, 2011, I served the following document(s), described as:

**SECOND AMENDED COMPLAINT**

on all interested parties to said action, through their attorneys of record by placing a true and correct copy thereof, addressed as shown below, by the means designated below:

X  **BY MAIL**

\_\_\_\_\_ I placed the document(s) in a sealed envelope(s) and deposited such envelope(s) in the mail at Walnut Creek, California, with postage thereon fully paid.

X  I am "readily familiar" with the firm's practice of collection and processing documents for mailing. The document(s) are placed in a sealed envelope(s) and deposited with the U.S. Postal service, with postage thereon fully prepaid on that same day in the ordinary course of business.

\_\_\_\_\_ **BY FACSIMILE TRANSMISSION** On \_\_\_\_\_, from facsimile machine telephone number (925) 274-2910; that transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

\_\_\_\_\_ **VIA OVERNIGHT DELIVERY** I caused all of the above-entitled document(s) to be deposited with an express service carrier in an envelope designated by the carrier as an express mail envelope, with fees and/or postage pre-paid.

\_\_\_\_\_ **BY PERSONAL SERVICE** I caused all of the above-entitled document(s) to be served by hand to the offices of the addressee(s).

W.G. Wailes Carr, McClellan, Ingersoll, Thompson & Horn, APC 216 Park Road P.O. Box 513 Burlingame, CA 94010	
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I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on November 10, 2011 at Walnut Creek, California.

  
\_\_\_\_\_  
DONNA GRIFFITH