

RESOLUTION NO. 18-30

Resolution Of The City Council Of The City Of Emeryville Approving The Amended And Restated Sport Fishing Concessions Agreement Between The City Of Emeryville And Andrew Guilano And Authorizing The City Manager To Execute The Agreement

WHEREAS, the City of Emeryville owns a marina, which consists of certain real property and improvements, commonly referred to as the "Marina"; and

WHEREAS, in 2008, the City entered into a Second Amended and Restated Agreement of Ground Lease with Emeryville Marina, LLC, which has been subsequently amended, and assigned to Safe Harbor Marinas Emeryville, LLC; and

WHEREAS, since 1988, the City has had a third party operate a sport fishing concession at the Marina in which a third party scheduled fishing trips for the sport fishing operators at the Marina and remitted business tax from the sport fishing boat operators to the City along with other services; and

WHEREAS, on September 6, 2016, the City Council adopted Resolution No. 16-123, approving the assignment of the sport fishing concession to the current Concessionaire; and

WHEREAS, the City desires to continue to have a third party operate a sport fishing concession at the Marina, subject to the Ground Lease at the Marina; and

WHEREAS, the Parties desire to amend and restate their existing agreement; and therefore be it

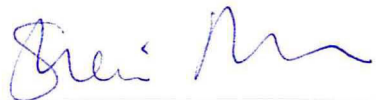
RESOLVED, the City Council of the City of Emeryville approves the Amended and Restated Sport Fishing Concessions Agreement with Andrew Guiliano and authorizes the City Manager to execute the agreement, attached hereto as Attachment A, on behalf of the City.

ADOPTED, by the City Council of the City of Emeryville at a regular meeting held Tuesday, March 20, 2018, by the following vote:

AYES:	<u>5</u>	Mayor Bauters, Vice Mayor Medina and Council Members Donahue, Martinez and Patz
NOES:	<u>0</u>	
ABSTAIN:	<u>0</u>	
ABSENT:	<u>0</u>	


MAYOR

ATTEST:


CITY CLERK

APPROVED AS TO FORM:


CITY ATTORNEY

AMENDED AND RESTATED SPORT FISHING CONCESSIONS AGREEMENT

THIS AMENDED AND RESTATED SPORT FISHING CONCESSIONS AGREEMENT ("Agreement") is effective as of this ____ day of _____, 2017, by and between **THE CITY OF EMERYVILLE**, a municipal corporation, ("**City**") and **ANDREW GUILIANO** ("**Concessionaire**"), collectively referred to as the "**Parties**."

RECITALS

WHEREAS, the City owns a marina, which consist of certain real property and improvements, commonly referred to as the "**Marina**"; and

WHEREAS, in 2008, the City entered into a Second Amended and Restated Agreement of Ground Lease ("**Ground Lease**") with Emeryville Marina, LLC, which has been subsequently amended, and assigned to Safe Harbor Marinas Emeryville, LLC ("**Marina Operator**"); and

WHEREAS, numerous sport fishing boat operators currently offer fishing trips to the public from the Marina; and

WHEREAS, since 1988, the City has had a third party operate a sport fishing concession at the Marina in which the third party scheduled fishing trips for the sport fishing boat operators at the Marina and remitted business tax from the sport fishing boat operators to the City along with other services; and

WHEREAS, on September 6, 2016, the City Council adopted Resolution No. 16-123, approving the assignment of the sports fishing concession to the current Concessionaire; and

WHEREAS, the City desires to continue to have a third party operate a sport fishing concession at the Marina, subject to the Ground Lease at the Marina; and

WHEREAS, the Parties desire to amend and restate their existing agreement, as set forth herein.

NOW, THEREFORE, the parties hereto agree to the terms and conditions set forth below:

I. SPORT FISHING CONCESSION

Subject to the terms and conditions contained herein, City hereby grants to Concessionaire, an independent contractor, the exclusive right and privilege to operate a sport fishing concession at the Marina ("**Sport Fishing Concession**").

II. REQUIREMENT REGARDING COMMERCIAL LEASE AGREEMENT WITH MARINA OPERATOR

Prior to the City granting the Sport Fishing Concession to Concessionaire, Concessionaire must enter into a commercial lease or other substantially similar document with the Marina Operator or its successor as the Marina Operator, and provide an executed copy of said lease to the City upon demand by the City. Failure to maintain said lease with Marina Operator at all times as required in this paragraph shall constitute a Default, and the City may terminate this Agreement as provided for in paragraph VI.

III. TERM

- A. Initial Term. Unless sooner terminated under other provisions of this Agreement, the Initial Term of this Agreement shall begin on the date the City executes this Agreement, and continue to December 31, 2023.
- B. Extension of Term. If Concessionaire complies with all of the terms and conditions of this Agreement for the entire Initial Term, and if the City desires to extend the term of this Agreement for an additional five (5) years, the City Manager is authorized to extend the term of this Agreement for an additional five (5) years, and shall notify the Concessionaire at least thirty (30) calendar days in advance of its intent to extend the term of the Agreement.

IV. OBLIGATIONS OF CONCESSIONAIRE

Concessionaire will operate the Sport Fishing Concession. As part of the Sport Fishing Concession, the Concessionaire shall do the following:

- A. Book Sport Fishing Passengers. The Concessionaire shall have the right to book passengers for any business operating a sport fishing operation berthed at the Marina ("Boat Operator"). The Concessionaire shall determine whether a passenger has a preference for a specific Boat Operator. If a passenger does not state a preference for a particular Boat Operator or Boat Operators, then the Concessionaire shall direct that passenger to the various Boat Operator's boats pursuant to the Rotation System described below. The Concessionaire shall be responsible for collecting fees from all passengers booking through the Concessionaire. On a weekly basis, the Concessionaire shall remit to the Boat Operators their share of such fees, less the Percentage Fee (described in paragraph IV.B) and City Tax (described in paragraph IV.C), together with documentation of the calculations of their respective gross revenues, Percentage of Fee and City Tax.
- B. Collect Percentage Fee. As compensation for services in booking passengers for the Boat Operators, Concessionaire will be entitled to receive a Percentage Fee based upon gross revenues generated by all sales of tickets, food and

beverage and rentals of Equipment, either by Concessionaire or by the individual Boat Operators ("**Gross Revenue**"). The Percentage Fee will be equal to 7.5% of such Gross Revenue and may be increased only with the approval of the City Council, in its sole discretion, after public notice and an opportunity for public hearing. Any such increase (and the giving of public notice and the opportunity for a public hearing relating thereto) will be conditioned upon a showing by the Concessionaire to the City Council that the expenses of operating the Concession have increased to the point where the Concessionaire can no longer make a reasonable profit without an increase in the Percentage Fee. As part of this showing, the Concessionaire must demonstrate that these expenses have not been adequately offset by increases in revenues generated by increases in ticket prices charged by the Boat Operators to passengers. In the event that the Percentage Fee is increased, then Concessionaire may not request an additional increase until at least three years have elapsed since the effective date of the preceding increase.

- C. Collect City Tax. The Concessionaire shall be responsible for collecting and remitting to the City a City Tax equal to 2.5% of the Gross Revenue generated by sales of tickets either by the Concessionaire or by the Boat Operators to passengers of the Boat Operators. This 2.5% City Tax shall be in addition to the 7.5% Percentage Fee paid to the Concessionaire. The City Tax is charged in lieu of a business tax paid by the Boat Operators as required by Chapter 1 of Title 3 of the Emeryville Municipal Code. Within five days of the end of each calendar month, the Concessionaire shall remit to the City the entire City Tax due for such calendar month. The City Tax shall be made payable to the City of Emeryville and delivered in person or by first class mail to City of Emeryville, Finance Department, 1333 Park Avenue, Emeryville, CA 94608 or may be remitted in such other manner as may be agreed upon by the City and the Concessionaire.
- D. Enforce Rotation System.

1. If a passenger or potential passenger requests to be booked on the boat of a particular Boat Operator, the Concessionaire shall honor that request if space is available. If the prospective passenger does not initiate a request for a particular Boat Operator or cannot be booked on the requested Boat Operator's boat for some reason (e.g, the boat is not running or is full), the Concessionaire shall assign the passenger to a particular Boat Operator in accordance with the rotation system ("**Rotation System**") agreed upon annually by the Boat Operators who have their ticket sales booked through the Concessionaire. The Rotation System will include a set of written criteria to be drafted and agreed upon by a majority of the Boat Operators who book through the Concessionaire on an annual basis or at such intervals as a majority of said Boat Operators shall determine. Each such Boat Operator shall have one vote, regardless of how many boats the Boat Operator has berthed. The Concessionaire

shall not have a vote unless s/he operates a boat or boats out of the Marina, in which case, s/he will only have one vote. Notwithstanding the foregoing, the Boat Operators who book through the Concessionaire need not develop criteria or Rotation System for bass or albacore fishing, but in the event that such Boat Operators elect to develop a Rotation System, it shall fall within the provisions of this Agreement.

2. The Concessionaire will be responsible for distributing passengers in accordance with the criteria and the Rotation System in effect at the time. Whether or not a Rotation System is in place or written criteria for referrals have been adopted, neither the Concessionaire nor any Boat Operator may discriminate against any Boat Operator by steering a disproportionate share of "walk-ins" to a particular Boat Operator, or by pirating passengers from one Boat Operator to another. Repeated violations of this anti-discrimination provision by the Concessionaire, or the repeated failure of the Concessionaire to enforce the Rotation System, shall constitute a Default and the City may terminate the Agreement as provided herein. In the event of any complaint regarding implementation of the Rotation system by the Concessionaire or any Boat Operator, or in the event of any other complaint regarding the Concession by the Concessionaire or any Boat Operator, then the City, Boat Operator, or the Concessionaire may initiate administrative proceedings with the City Manager to investigate and enjoin such behavior by submitting a written declaration under the penalty of perjury from a witness or any other party who has personal knowledge of the alleged objectionable behavior. Within 14 days after the notice, the affected parties will attempt to resolve their disputes informally in a meeting presided over by the City Manager. If the parties are not able to resolve their dispute informally, then the City Manager shall issue a written decision on the merits of the complaint, and the City Manager's written decision shall be the City's final decision on the matter.

- E. Rent Equipment. The Concessionaire will have the exclusive right to rent and sell fishing equipment, including rods and reel (collectively, the "**Equipment**") to Boat Operators' passengers who do not bring their own Equipment, subject to exceptions set forth below. The Concessionaire will maintain all Equipment in good and usable condition. The Concessionaire at all times will maintain sufficient Equipment to service all passengers for the Boat Operators. The Concessionaire may offer to sell and rent tackle and other fishing supplies (e.g. hooks, line, sinkers, and bait), but this right is not exclusive in that the Boat Operators may sell such items to their own customer, provided that the Boat Operators may not make any off-vessel rentals or sales of tackle or supplies. The Concessionaire will not discriminate against the Boat Operators by charging them or their customers higher prices than the Concessionaire charges for comparable quantities to non-Boat Operators, although nothing herein shall preclude the Concessionaire from giving volume discounts so long as such discounts are made available on a non-discriminatory basis.

- F. Sell Fishing Licenses, Foods and Beverages. The Concessionaire will have the exclusive right to sell fishing licenses to passengers of the Boat Operators who are required to purchase licenses in order to fish with the Boat Operators. The Concessionaire will also have the exclusive right to sell food and beverages to passengers of the Boat Operators, subject to the exceptions set forth below; however, the passengers will have every right to bring licenses, food and beverages with them from outside. Notwithstanding the above, all Boat Operators will be allowed to sell and provide catered food and beverage service to passengers (such as a meal serviced to virtually every passenger) without having to purchase such food and beverages from the Concessionaire. Further, the Boat Operators will be free to purchase bait and gasoline from any vendor of their choosing.
- G. Provide Promotion and Advertising. The Concessionaire will apply a portion of the proceeds of the Percentage Fee collected from the Boat Operators who book ticket sales through the Concessionaire to promote and advertise the Sport Fishing Center, the Marina, and the services of said Boat Operators generally, all in the manner and at a penetration level consistent with the marketing in place at the time of execution of this Agreement. In addition to the above, the Concessionaire will use its best efforts to have the Boat Operators who book through the Concessionaire enter into and agree upon a cooperative advertising program to be administered and implemented by the Concessionaire. The cost of this cooperative advertising program will be allocated among said Boat Operators pro-rata to the number of boats involved and the relative cost of each component of the advertising material relating to a particular Boat Operator. Notwithstanding the above, no Boat Operator will be required to contribute any amount to such cooperative advertising program beyond the Percentage Fee except when an additional contribution is being paid by all Boat Operators who book through Concessionaire, pro rata to the boats involved, following approval by the majority vote of all such Boat Operators.

IV. COVENANTS OF CONCESSIONAIRE

A. Assignment of Agreement. The Concessionaire shall not be entitled to assign any of its rights or obligations under this Agreement to any person or entity by operation of law or otherwise; and any assignment or transfer in violation of this prohibition will, at the City's option, terminate this Agreement immediately. City may, in its sole discretions, authorize an assignment of Concessionaire's rights and obligations under this Agreement. Such an assignment must be authorized in writing by the City provided that (it) the Concessionaire provides the City with ninety (90) days prior written notice of its intention to assign together with a complete description of the proposed assignment and assignee; (b) the Concessionaire demonstrates to the satisfaction of the City that the proposed assignee will be capable of operating the Concession and performing its duties under this Agreement in a satisfactory manner at a quality level at least as good as has been provided by the concessionaire to the date of the proposed assignment; (c) the Concessionaire is not in breach of any obligation under this Agreement; and (d) there are not objections raised to the proposed assignment-or assignee by any Boat Operator, any creditor of the Concessionaire, or any person attending any public hearing held in connection with the assignment, which objection is considered material by the City Council. Materiality under subparagraph (d) above shall be determined by the City Council in its sole discretion with reference to (a) fitness and ability of the intended assignee to perform its obligations under this Agreement, and (b) financial condition.

B. Responsibility of Concessionaire and Indemnification of City. To the fullest extent permitted by law, Concessionaire shall indemnify, defend, and hold harmless City and City's members, officers, agents, employees and volunteers, from and against any and all claims, losses, liabilities of every kind, nature and description, damages, injury (including without limitation injury to or death of an employee of Concessionaire or sub-contractors as well as any claim by any employee, agent, Concessionaire or independent contractor hired or employed by Concessionaire that such persons or individuals are entitled to any benefit otherwise provided to employees of the City, including coverage under the California Public Employee Retirement System), costs and expenses of any kind, whether actual, alleged or threatened, including, without limitation, incidental and consequential damages, court costs, reasonable attorneys' fees, litigation expenses, and fees of expert Concessionaires or expert witnesses incurred in connection therewith and the costs of investigation, to the extent arising out of, pertaining to, or relating to, directly or indirectly, in whole or in part, the negligence, recklessness, or willful misconduct of Concessionaire, any sub-contractors, anyone directly or indirectly employed by them or anyone that they control, whether or not there is alleged to be concurrent negligence on the part of the City, but, to the extent required by law, excluding liability caused by the conduct of the City. This indemnification obligation is not limited in any way by any limitation on the amount or type of damages or compensation payable to or for Concessionaire. This obligation to indemnify and defend the City, its members, officers, agents, employees and volunteers shall survive termination of this Agreement.

C. Independent Contractor. The Concessionaire hereby covenants and declares that it is engaged in an independent business and agrees to perform the services as an independent contractor and not as the agent or employee of the City. The Concessionaire agrees to be solely responsible for its own matters relating to the time and place the services are performed; the instrumentalities, tools, supplies and/or materials necessary to complete the services; hiring of Concessionaires, agents or employees to complete the services; and the payment of employees, including compliance with Social Security, withholding and all other regulations governing such matters. The Concessionaire agrees to be solely responsible for its own acts and those of its subordinates and employees during the life of this Agreement.

D. Insurance

1. Requirements: The Concessionaire shall have and maintain in full force and effect for the duration of this Agreement, insurance insuring against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work by the Concessionaire, its agents, representatives, employees or subcontractors. If requested, Concessionaire shall provide the City with copies of all insurance policies. These requirements are subject to amendment or waiver if so approved in writing by the City Manager.

2. Minimum Limits of Insurance: Concessionaire shall maintain limits no less than:

- a. Commercial General Liability providing coverage at least as broad as ISO CGL Form 00 01 on an occurrence basis for bodily injury, including death, of one or more persons, property damage and personal injury with limits of not less than One Million Dollars (\$1,000,000) per occurrence. The policy shall provide contractual liability and, if required by City, products and completed operations coverage for the term of the policy.
- b. Comprehensive Automobile Liability (owned, non-owned, hired) providing coverage at least as broad as ISO Form CA 00 01 on an occurrence basis for bodily injury, including death, of one or more persons, property damage and personal injury, with limits of not less than One Million Dollars (\$1,000,000).
- c. [Intentionally Omitted]
- d. Workers' Compensation limits as required by the laws of the State of California and Employers Liability limits of not less than \$1,000,000 per accident.

No Workers' Compensation insurance shall be required if Concessionaire completes the following certification:

I certify that my business has no employees and that I do not employ anyone. I am exempt from the legal requirement to provide Workers' Compensation Insurance.

_____ (Concessionaire's initials)

3. Deductibles and Self-Insured Retentions: Any deductibles or self-insured retentions must be declared to and are subject to approval by the City.

4. Other Insurance Provisions: The policy is to contain, or be endorsed to contain, the following provisions:

a. General Liability and Automobile Liability Coverage.

- i. Concessionaire shall name the City of Emeryville, its officials, employees, agents and volunteers as additional insureds in its Commercial General Liability and Automobile Liability policies. If Concessionaire submits the ACORD Insurance Certificate, the additional insured endorsement must be set forth on a CG 20 10 11 85 form (or more recent) and/or CA 20 48 – Designated Insured Form (for business auto insurance); The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents or volunteers, except where limited by State laws.

When a certificate says, "certificate issued to" this does not mean the same as *additional insured* and is not acceptable.

- ii. Concessionaire's insurance coverage shall be primary noncontributing insurance as respects to any other insurance or self-insurance available to the City, its officials, employees, agents or volunteers. Any insurance or self-insurance maintained by the City, its officials, employees or volunteers shall be excess of the Concessionaire's insurance and shall not contribute with it.
- iii. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents or volunteers.
- iv. Coverage shall state that the Concessionaire's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- v. Coverage shall be provided on a "pay on behalf" basis, with defense costs payable in addition to policy limits. There shall be no cross liability exclusion.
- vi. The insurer agrees to waive all rights of subrogation against the City, its officials, employees, agents and volunteers for losses arising from work performed by the Concessionaire for the City.

- vii. All endorsements to policies shall be executed by an authorized representative of the insurer.
- b. Workers' Compensation Coverage: The insurer will agree to waive all rights of subrogation against the City, its officials, employees, agents and volunteers for losses arising from work performed by the Concessionaire for the City.
 - c. All Coverages: Each insurance policy required by this clause shall be endorsed to state that City will be provided thirty (30) days written notice of cancellation or material change in the policy language or terms.
- 5. Acceptability of Insurers: Insurance is to be placed with insurers with an A.M. Best's rating of no less than A:VII.
- 6. Verification of Coverage: Concessionaire shall furnish the City with certificates of insurance and endorsements to the policies evidencing coverage required by this Agreement prior to the start of work. The certificates of insurance and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificate of insurance and endorsements shall be on a form utilized by Concessionaire's insurer in its normal course of business and shall be received and approved by the City prior to execution of this Agreement by the City. The City reserves the right to require complete, certified copies of all required insurance policies, at any time. The Concessionaire shall provide proof that any expiring coverage has been renewed or replaced at least two (2) weeks prior to the expiration of the coverage.
- 7. Subcontractors: Concessionaire shall either include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor demonstrating that subcontractors maintain insurance coverage that meets the minimum scope and limits of insurance coverage required by this Agreement, including but not limited to naming the City, its officials, employees, agents and volunteers as additional insureds.
- 8. Claims-Made Policies. Concessionaire shall extend any claims-made insurance policy for at least 5 years after termination or final payment under the Agreement, whichever is later.

E. Records, Reports and Audits

1. Records. The Concessionaire will keep and maintain for three (3) years after the close of each year accurate books and records regarding (a) all Gross Revenues generated by the Concessionaire, (b) operating expenses incurred by the Concessionaire, (c) the Percentage Fee, (d) the City Tax and (e) other matters covered by this Agreement. All such books and records shall be available for inspection, audit and copying by any agent or representative of the City upon reasonable notice. Furthermore, records that are the subject of audit findings shall be retained for three years or until such audit findings have been resolved, whichever is later.

- a. All costs shall be supported by properly executed payrolls, time records, invoices, contracts, or vouchers, or other official documentation evidencing in proper detail the nature and propriety of the charges. All checks, payrolls, invoices, contracts, vouchers, orders or other accounting documents pertaining in whole or in part to this Agreement shall be clearly identified and readily accessible.

2. Reports and Information: Upon request, the Concessionaire shall furnish to the City any and all statements, records, reports, data and information related to matters covered by this Agreement in the form requested by the City.

3. Audits and Inspections: At any time during normal business hours and as often as the City may deem necessary, there shall be made available to the City for examination all records with respect to all matters covered by this Agreement. The Concessionaire will permit the City to audit, examine, and make excerpts or transcripts from such records, and to audit all contracts, invoices, materials, payrolls, records of personnel, conditions of employment and or data relating to all matters covered by this Agreement.

- F. Conflicts of Interest. The Concessionaire covenants and declares that, other than this Agreement, it has no holdings or interests within the City of Emeryville, nor business holdings or agreements with any official, employee or other representative of the City. For the duration of this Agreement, in the event the Concessionaire or its principals, agents or employees acquire such a holding, interest or agreement within the City of Emeryville or with any official, employee or representative of the City in the future, the Concessionaire will immediately notify the City of such holding, interest or agreement in writing.

- G. Confidentiality. The Concessionaire agrees that such reports, information, opinions or conclusions shall not be made available to or discussed with any individual or organization, including the news media, without prior written approval of the City. The Concessionaire shall exercise reasonable precautions to prevent the unauthorized disclosure and use of City information whether deemed confidential or not.
- H. Discrimination Prohibited. The Concessionaire covenants and agrees that in performing the services required under this Agreement, the Concessionaire shall not discriminate against any person on the basis of race, color, religion, sex, sexual orientation, gender identity, marital status, national origin or ancestry, age or disability.
- I. Licenses, Certifications and Permits. The Concessionaire covenants and declares that it has obtained all diplomas, certificates, licenses, permits or the like required of the Concessionaire by any and all national, state, regional, county, city or local boards, agencies, commissions, committees or other regulatory bodies in order to perform the services contracted for under this Agreement. All work performed by Concessionaire under this Agreement shall be in accordance with applicable legal requirements and shall meet the standard of quality ordinarily expected of competent professionals.
- J. Key Personnel. Andrew Guiliano is necessary for the successful prosecution of the work due to his unique expertise and depth and breadth of experience. Concessionaire recognizes that Andrew Guiliano was instrumental in the City's decision to award this Agreement to Concessionaire and that compelling reasons for substituting these individuals must be demonstrated for the City's consent to be granted. Any substitutes shall be persons of comparable or superior expertise and experience. Failure to comply with the provisions of this section shall constitute a Default of Concessionaire's obligations under this Agreement and shall be grounds for termination.
- K. Authority to Contract. The Concessionaire covenants and declares that it has obtained all necessary approvals of its board of directors, stockholders, general partners, limited partners or similar authorities to simultaneously execute and bind Concessionaire to the terms of this Agreement, if applicable.
- M. Living Wage. If Concessionaire employs twenty-five or more employees and has three hundred, fifty thousand dollars or more in annual gross receipts, then Concessionaire shall comply with the requirements of the City's Living Wage Ordinance set forth in Chapter 31 of Title 5 of the Emeryville Municipal Code, unless (i) Concessionaire is a governmental entity, (ii) this Agreement is subject to a higher prevailing wage rate as defined in the California Labor Code, or (iii) this Agreement is subject to federal or state laws or regulations that would preclude the application of the City's laws.

Compliance with the Living Wage Ordinance, if applicable, shall be required during the term of the Agreement for all employees of Concessionaire who perform at least twenty-five percent (25%) of the work arising from this Agreement, unless said employees are otherwise exempt from the application of the Living Wage Ordinance pursuant to Section 5-31.08. Concessionaire shall promptly provide to the City documents and information verifying compliance with the requirements of the Living Wage Ordinance within ten (10) working days following a written request for such documentation and information from the City.

Failure to comply with the Living Wage Ordinance provides that a person claiming a violation thereof may bring an action against Concessionaire for back pay, reinstatement and compensatory damages, as well as a penalty up to three times the amount of damages for a willful violation, plus reasonable attorney's fees and costs. In addition, the City may terminate the Agreement and pursue any other remedies available to the City, including debarment, for violations of the Living Wage Ordinance.

Concessionaire shall notify each of its affected employees regarding wages that are required to be paid pursuant to this Agreement. "Living Wage" means no less than \$15.27 per hour (as of July 1, 2017, subject to increase annually on July 1st to reflect the twelve month average increase to the Consumer Price Index for all urban consumers in the San Francisco-Oakland-San Jose Metropolitan Statistical Area for the preceding year from March to February, not to exceed three percent (3%) in any one year) including wages and health benefits. If employer contributions for health benefits are not paid on an hourly basis, the employer must demonstrate to the City the hourly value of such benefits in order to receive credit for such payments to covered employees.

V. DEFAULT

The occurrence of any one or more of the following events shall constitute a material default of this Agreement by Concessionaire.

- A. The failure to maintain a commercial lease agreement with Marina Operator, or its successor.
- B. The failure of Concessionaire to make any payment of City Tax, license fees, or any other payment required to be made by Concessionaire hereunder, upon 10 days' written notice from the City of non-payment.

C. The failure to Concessionaire to observe or perform all the covenants, conditions or provisions of this Agreement to be observed or performed by Concessionaire where such failure continues for a period of ten days after written notice thereof from City to Concessionaire. If the nature of Concessionaire's default is such that more than ten days are reasonably required for cure thereof, then Concessionaire shall not be in default if Concessionaire commences such cure within the ten-day period and thereafter diligently prosecutes such cure to completion.

D. The assignment of this Agreement without the City's prior written permission.

VI. REMEDIES

In the event of Default by Concessionaire the City may terminate this Agreement, and in addition to termination of this Agreement, exercise any rights and remedies provided under this Agreement or at law or in equity

VII. NO PERSONAL LIABILITY

No member, official or employee of the City shall be personally liable to the Concessionaire or any successor in interest in the event of any default or breach by the City or for any amount which may become due to the Concessionaire or successor or on any obligation under the terms of this Agreement.

VIII. ENTIRE AGREEMENT

This Agreement constitutes the complete agreement between the parties and supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject matter of this Agreement. No other agreement, statement or promise relating to the subject matter of this Agreement not contained in this Agreement shall be valid or binding. This Agreement may be modified or amended only by a written document signed by representatives of both parties with appropriate authorization.

IX. SUCCESSORS AND ASSIGNS

Subject to the provision of this Agreement regarding assignment, this Agreement shall be binding on the heirs, executors, administrators, successors and assigns of the respective parties.

X. APPLICABLE LAW AND ATTORNEY'S FEES; VENUE

If any action at law or in equity is brought to enforce or interpret the provisions of this Agreement, the rules, regulations, statutes and laws of the State of California will control. The prevailing party shall be entitled to reasonable attorney's fees in addition to any other relief to which said party may be entitled. The exclusive venue for any legal action taken pursuant to this Agreement shall be the State of California Superior Court for the County of Alameda or the United States District Court for the Northern District of California.

XI. SEVERABILITY

The caption or headnote on articles or sections of this Agreement are intended for convenience and reference purposes only and in no way, define, limit or describe the scope or intent thereof, or of this Agreement nor in any way affect this Agreement. Should any article(s) or section(s), or any part thereof, later be deemed unenforceable by a court of competent jurisdiction, the remainder of this Agreement shall remain in full force and effect to the extent possible.

XII. NOTICES

A. Communications Relating to Daily Activities

All communications relating to the day-to-day activities of the work shall be exchanged between Andrew Clough for the City and Andrew Guiliano for the Concessionaire.

B. Official Notices

All other notices, writings or correspondence as required by this Agreement shall be directed to the City and the Concessionaire, respectively, as follows:

CITY

**Andrew Clough
1333 Park Avenue
Emeryville, California 94608
Phone No. (510) 596-4341
E-Mail aclough@emeryville.org**

CONCESSIONAIRE

Andrew Guiliano

XIII. WAIVER OF AGREEMENT

The City's failure to enforce any provision of this Agreement or the waiver in a particular instance shall not be construed as a general waiver of any future breach or default.

IN WITNESS WHEREOF the City and the Concessionaire have executed this Agreement, which shall become effective as of the date the City Manager executes this Agreement on behalf of the City.

Approved as to form:



Michael A. Guina, City Attorney

CITY OF EMERYVILLE

Dated: _____, 20__

Carolyn Lehr, City Manager

CONCESSIONAIRE

Dated: JANUARY 31, 2018

By: _____

Andrew Guiliano

Its: _____

OWNER / OPERATOR