



Mastering the Art of Leasing for Public Entities

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Janna Aldrete, Property Manager, City of Monterey
Nancy A. Park, Best Best & Krieger

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Mastering the Art of Leasing for Public Entities

<p>Nancy A. Park Partner Best Best & Krieger LLP 500 Capitol Mall, Suite 1700 Sacramento, CA 95814 Telephone: (916) 325-4000 Email: nancy.park@bbklaw.com</p>	<p>Janna Aldrete Leasing Manager City of Monterey 580 Pacific Street Monterey, CA 93940 Telephone: (831) 646-1743 Email: aldrete@monterey.org</p>
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MASTERING THE ART OF LEASING FOR PUBLIC ENTITIES

It is often necessary for public entities to lease land or building space to conduct public business or to utilize real estate investments to their highest potential. The purpose of this paper is to address common issues that arise when leasing properties, with special notes on issues faced by public entities, either from the tenant or landlord perspective.

I. What is the context?

Context in a deal is understanding the relative position and leverage to the market and the other party. Often, the landlord is the one with the greatest leverage, though this is not always the case. The context will give guidance in balancing the client's interests against the market and in resolving issues with common compromises. Understanding whether there is any bargaining power will also determine how much time, energy and legal fees are spent on issues which are a waste of time. A small tenant needs to focus on expenses and deal breakers, not rights and terms which only a large tenant will be able to achieve.

When acting as tenant, ask what the public entity client needs from the deal. What will the building/land be used for? Communicate or meet with key staff to understand completely what the use will be on that site. Will members of the public be allowed on site? Are there other feasible alternatives for location of the intended use?

A letter of intent is often used by parties to agree on initial business terms. Review the letter of intent carefully with the client. The best case scenario is to be involved with the client in drafting the letter of intent to ensure that it includes all critical business terms.

As tenant, it is most advantageous to push property responsibilities and costs to the landlord. Landlord's goal is to find a tenant that will take care of the property and pay rent on time. Conversely to tenant's position, a landlord will prefer the tenant to cover as many maintenance costs as possible to maximize revenue. The parties are free to decide how to split costs and responsibilities—there is no one right way, but the critical point is that the parties have decided and the rent reflects the inclusion or not of such costs.

II. Communicate, communicate, communicate

While parties may be tempted to conduct reviews and communications over e-mail, an in-person meeting can help the parties understand the issues, concerns and real business needs. Whatever the format, a lease requires much input and careful review to ensure it is as flexible and accurate as possible. A letter of intent, staff reports, and background on the property will ensure key terms are included for the party who is reviewing or drafting the lease.

Timing of lease commencement depends on many factors. Move-out deadlines, lease expirations, construction requirements and funding requirements all add or influence start dates in leases. Work backwards in time to come to an estimated framework that the clients agree is realistic, and build extra time into the timeline for contingencies, if possible. Ironically (for this audience), uncertainty regarding permitting for construction of tenant improvements causes delays in start time. With the City acting as landlord, it can be challenging for tenants to distinguish between the City as landlord and the City acting in its role as a local agency

regulator. City leasing staff should work closely with the tenant and other City departments to assist tenant with permit processing, if necessary.

III. Control the Drafting Process; Use Tools

Controlling the lease draft creates a position of strength because the lease will be negotiated from the beginning position, and, depending on relative budgets, negotiation position and time, may not move very far from this initial draft. It is useful to have at least two lease templates for use: one drafted to use when the entity is tenant, and the other drafted to be more friendly when acting as landlord. Having these templates will save time and money in lease drafting and in familiarity with the form. A template used by the City of Monterey for its Fisherman's Wharf retail premises is included at the end of this paper. Use of a template always requires careful review to extract property or deal specific terms. In this case, references to piling repair and closure of the wharf are two examples of property specific provisions, but there are others. The template is offered as a good example of a master retail lease for a particular property, and not as a general retail form to use everywhere.

Also provided at this paper's end is a checklist for landlords to use when drafting or reviewing leases. The landlord checklist is an excellent tool to use for most types of leases, as it contains discussion of most lease terms and what to look for, as well as a summary of public entity issues at the end. It is extremely useful for those not familiar with lease terms or who review leases infrequently as it contains reminders of issues to consider. It was developed over time in conjunction with a client who acquired multiple properties and needed extensive lease reviews completed, but it has served as a useful training tool for new lawyers learning the art of leasing. The Practical Real Estate Lawyer, a legal publication, also publishes useful checklists for leases, in particular, a series called the Tenant's Silent Lease Issues, which is extremely useful as well, however the articles have a private focus so public entity issues are not addressed. Nonetheless, tools like these can be helpful for staff and lawyers to consistently address and review their documents to ensure they consider the critical issues.

Sometimes form leases are proposed, such as AIREA or California Association of Realtors (CAR) forms. These are not recommended, except in certain circumstances. The AIREA form can be expedient, but must be carefully read to ensure all terms are applicable, or modified when not. Addenda can be added to cover special terms. Because both forms are drafted by brokers/realtors, be sure to watch for broker favorable terms such as mandatory mediation, arbitration, third party beneficiary language benefiting brokers and collection remedies for the broker fees.

Broker terms should generally be covered in a listing agreement or other contract dealing with the payment of any fee. There is no harm in omitting or deleting these terms from the lease, since if the public entity has the relationship with the broker, it has likely dealt with these terms in a consultant contract, and if the broker represents the other party, that party should have their own agreement. Brokers serve a valuable purpose in many transactions, proving market date, bringing parties together, and negotiating terms. They work for free until a deal is consummated, and they should not be asked to forgo their fee or be shut out of a transaction where they found the property or the tenant. However they do not need to be a party to the lease or be a third party beneficiary of the lease when their fee can be handled in a short term listing or commission agreement.

Property uses will often dictate the form:

- Residential: It may make sense to use a CAR form. Generally, these are updated regularly for compliance with laws. However, they are drafted by realtors and not for public entities. Careful review is necessary when using a standard printed form.
- Office: Consider creation of a master lease agreement that is standardized for the property (for landlord). Multiple leases on the same form for the same property makes administration and property management more efficient.
- Retail: The most common arrangement is that tenant be responsible for: most expenses such as: real estate taxes, building insurance, and maintenance (aka “triple net”).
- Industrial: Consider any environmental concerns for site and how these should be handled (warnings, disclosures, indemnity by landlord for pre-existing haz mats, and indemnity by tenant for any exacerbation) in the lease. There should be stronger environmental clauses for tenants who are “dirty” users. Industrial users usually follow a triple net expense arrangement. Landlord might want to consider a baseline soils study for any existing hazardous materials before another user takes occupancy, or on a clean property with a user who might have potential to be a possible polluter.

Also consider whether to use a shorter, less complex lease form; this might work for a short term lease, or a tenant with a previous relationship. A longer, more detailed lease agreement could be used if the tenant is long term, has uses which require restrictions, or special terms or if there is complicated financing.

Some counterparties may have a policy of refusing to negotiate contract terms; this is especially true with certain governmental entities and utilities. If possible, ask in advance for a copy of any key lease terms or mandatory lease form and make sure the client is willing to agree to those terms. Also, ask if any exceptions have been made in the past to “required” boilerplate language. A landlord or tenant who is inflexible at lease negotiation will not make a long-term leasing relationship very pleasant, so rigid inflexibility could be a good reason to advise pursuing other alternatives if reasonably available. If a public entity has certain “sacred cow” type provisions which are truly critical to their community or positions which are non-negotiable, these should always be disclosed in the letter of intent stage to the other party, so that the parties can know up front about issues that might be a deal breaker or just infeasible for the other party. Also, if there is additional flexibility that can be offered as a mitigating factor, it is good to show these cards early on as goodwill, to help the party take the good with the bad. Again, deal breaker terms should be disclosed in the letter of intent or summary of terms stage to avoid wasting time on parties that just won’t work with the required terms.

IV. Premises

The lease must include a full, accurate, and specific description of the premises. This description should include the street address, suite or floor number, floor plan (as an exhibit), space plan (as an exhibit), and exact or approximate figures depicting the rentable and usable square footage of the premises (as applicable). A legal description is not generally necessary,

unless no other description is available. Because public entities are exempt from the Subdivision Map Act for creating parcels (Government Code 66428(a)(2) less than an entire parcel can be leased in a ground lease.

A floor plan is the location of premises in a building. A space plan shows walls, cabinetry, doors, electrical and more, and specifications for these items. A space plan is critical for spaces that are to be built out, but it is not necessary if there is not any construction or tenant improvements.

The premises paragraph should address whether the premises includes any specifically described areas; whether the tenant may access and use areas other than the premises (e.g., common areas, parking, loading, storage, easements); whether tenant accepts the premises in their “as-is” condition; and establish an agreed-upon standard for calculating rentable and usable area. Rentable area is a calculation which includes an allocation for common hallways and lobbies. Usable area is the actual measurement of the space.

V. Term

The lease must identify a term. Typically, the term is described as a specific number of full calendar months or years (e.g., 12 months from January 1, 2019 through December 31, 2019) during which the tenant may occupy the premises. All leases must identify a commencement and termination date. Sometimes, parties define the commencement date as a date certain. Other times, parties define the commencement date as the date on which a specified event occurs (e.g., the tenant opens for business on the premises or landlord substantially completes tenant improvements). In the alternative, parties may define the commencement date as the earlier of a particular calendar date or a specified event (e.g., “the lease will commence upon the earlier of January 1, 2019 or substantial completion of tenant improvements”). Terms should not begin until the lease has been approved by City Council.

The lease should address whether the tenant may occupy the premises prior to the commencement date. Landlord should not permit the tenant to possess the premises prior to the commencement date without insurance and a security deposit. Commencement dates are often triggered by the completion of construction by the landlord, which sometimes takes longer than anticipated. The parties often will agree to a grace period, such as 30 or 60 days, to complete the construction, after which the landlord might grant a rent concession such as 2 for 1 rent credit, or after which the tenant might insist on a cancellation right. Landlords will strongly resist the cancellation right, as the worst position a landlord can be in is to fully improve premises and then the tenant cancels. If a tenant is granted early occupancy rights, the parties should agree upon what terms that is (with payment of expenses, delay of rent, or other agreements). If the occupancy begins prior to the commencement date, the lease should provide that all other terms apply except for rent and that the lease is otherwise in full force and effect from the first date of occupancy or from execution, whichever is more applicable given the circumstances.

If the parties agree to abate rent for a certain period of time at the beginning of the lease term, the lease must also identify a rent commencement date. Under these circumstances, the lease commencement date will differ from the rent commencement date. Rent abatement often triggers prevailing wage issues for tenants, as it may be considered a subsidy, even if it is otherwise a market term. Unfortunately for tenants, even though the market might indicate that free rent or free tenant improvements are the norm for similar space, these terms trigger

prevailing wages for public entities, creating a non-market term for the public entity landlord and thus a disadvantageous situation for the public entity when competing for tenants with other properties who do not pay prevailing wage. There is no way around this requirement for prevailing wage other than the tenant paying for the improvements, again which may not be market.

In addition, the landlord may grant tenant an option to extend the lease term. If so, the option to extend should establish the number of times that tenant may extend the lease and the duration of each subsequent extension. Before exercising any option to extend, tenant should be required to give the landlord written notice within a set period of time. Tenant should not be permitted to extend the lease term when in default of any provision. An option typically benefits the tenant more than the landlord because tenant then controls what happens to the property. Some public entity landlords allow a tenant to exercise an option but then require the public entity to approve also. Many public entities include a 90 or 180 day termination clause in the event of a loss in funding, on the tenant side, or if the property is to be re-purposed, on the landlord side. Lease term including all options should not exceed the maximum legal term (51 years for ag leases (CCC 718); 55 years for city properties (CCC 718), but if the rent is reviewed periodically, among other requirements, the term can be up to 99 years; (CCC 719); tidelands can't exceed 66 years(CC 718)).

VI. Rent

Rent is the landlord's primary benefit and the tenant's primary burden under the lease. For that reason, clear and precise terms are important for base rent and additional rent for operating expenses and taxes. Failure to define base rent clearly can lead to significant loss for either party.

The base rent clause should specify a specific dollar value to be charged as rent, establish when the obligation to pay rent commences, and state when rent is due during the lease term (e.g., due in twelve equal monthly installments, each in advance of the first day of each calendar month). It should also specify whether any rent must be prepaid in the form of a security deposit and whether there will be a free rent period (i.e., an abated rent period). First month's rent should be paid at lease execution, even if a period is abated. The security deposit should never be offered as credit for last month's rent, but the amount of the deposit is often set at that level. Security deposits are to be used for potential defaults, so a deposit that is earmarked for rent, will not be available if the tenant leaves the property damaged on move out or who fails to pay direct expenses.

Typically, landlords increase base rent over the term of a lease to account for rising market conditions, sometimes with periodic fixed price increases, or alternatively, annual increases pursuant to the Consumer Price Index. Public entities tend to use the CPI, even though the CPI does not bear a direct relationship to the real estate market. However, it is convenient and understandable. There isn't a more appropriate index, but knowledgeable real estate parties will use a periodic reset to fair market value on renewal to ensure that the rent keeps up with the market. As a landlord, this is smart business, but as a tenant, it means that the tenant may be priced out of a quickly appreciating market, while the landlord may set a floor to protect against a declining market. As tenant, avoiding the floor and asking for periodic resets while at least ensure that the CPI or percentage increases do not outpace the market. It is a guessing game, so hard to bet on one way versus another.

Sometimes, one public agency will lease space to another public agency in a mutually beneficial leasing relationship for a nominal amount like \$1 per year. When rent is set at such a low level, agencies must document which party is responsible for certain expenses that may arise during the lease relationship, especially capital improvements (e.g., roof repairs). Disputes can and do arise in these situations. Everyone benefits from a well-crafted lease that clearly delineates responsibilities and liabilities.

VII. Taxes

The lease should describe responsibility for all taxes associated with the premises. These may be included in the rent or paid separately. The lease should state whether and which taxes, if any, are included in the value of base rent. Similarly, the parties should clearly establish whether the tenant is responsible for paying any taxes that are not included in the value of base rent (i.e., if the tenant must pay certain taxes in addition to base rent). The tenant might not be held responsible for paying taxes unless that responsibility is stated in the lease.

California Revenue and Taxation Code Section 107.6 establishes requirements unique to public entities. Under that section, any lease between a private party tenant and a public entity landlord must include a statement that (i) the property may be subject to possessory interest tax and (ii) the tenant may be required to pay the property tax levied on the tenant's interest in the leased premises. When a public entity is tenant, the property tax is not abated except in certain specific statutory property tax exemptions (e.g. schools, community colleges, etc.).

VIII. Expenses & Capital Expenses

Tenants commonly agree to assume responsibility for additional expenses in the form of operating costs, repair and maintenance costs, or taxes. The lease should clearly state which expenses tenant is responsible for, whether tenant's responsibility for such expenses is capped at a certain dollar value, and when tenant should pay such expenses. Tenant is often responsible for expenses associated with maintenance and repair of the premises while landlord covers maintenance and repair of common areas and the building's structural elements (e.g., foundation, roof). The lease should specify whether tenant is responsible for repairs and/or replacements. Parties sometimes request the right to audit one another's expenses.

Landlords often seek to pass capital expenditures or compliance with laws expenses through to tenants and agree to amortize (i.e., spread out) such expenses over the useful life of the improvement. By amortizing such expenses, tenants can avoid unanticipated bills. Parties should discuss expenses that are likely to arise from deferred maintenance and agree upon an allocation of costs. Aging buildings can have costly upgrades to comply with ADA or to keep an aging roof or HVAC system in good condition. In the \$1 rent lease example mentioned earlier (See Section VI), neither entity thought that they should have to pay. Reviewing the status of these items before entering into a lease as tenant will trigger a discussion on who should warrant or cover these expenses during the term.

Under a triple net lease, tenant must pay rent and also reimburse the landlord (or pay directly) for all operating expenses and taxes. Alternatively, a tenant under a full service lease may not be required to reimburse the landlord for all operating expenses and tax costs (because these are included in the base rent), but may be required to pay increases in operating expenses and tax costs over the base year of the lease (i.e., the first full year of the lease term). In the latter case, the lease must clearly state the base year and the calculation of expenses.

IX. Utilities

The purpose of the utilities and services clause is to specify the types, quantities, and standards of delivery of the utilities and services that landlord shall provide to the premises. The utilities and services clause should identify who is responsible for paying the cost of utility services. It should also describe the scope of each party's remedies if the other party fails to provide the requisite utilities and services.

Typically, the lease will provide that landlord is not liable in damages or otherwise for any interruption in utility or other services to the premises and that such failure would not entitle tenant to terminate the lease or abate rent. Many public entities also provide certain services or utilities so an abatement might be more appropriate in such case.

When the tenant is responsible for paying for utility services, the landlord may bill the tenant (i) for tenant's pro rata share of the building's total utility bill or (ii) if separate metering is available, for tenant's individual use of utility services. If tenant is billed for its pro rata share of utility services, the lease should specify a method for determining that share.

X. Tenant Improvements & Surrender

Many tenants need to alter or improve the leased premises to meet their unique needs before assuming occupancy. These alterations and improvements are one of the first and largest up-front costs for landlords and tenants in the leasing process. For that reason, the terms governing alterations and improvements are very important. These terms influence various clauses, such as tenant improvements, condition of the premises, and alterations and improvements. Public entities often have special needs and improvements, which some landlords may require to be removed upon surrender, which can be expensive. Many public entity landlords have special properties which have special rules or needs (public halls, historic buildings, etc.).

Responsibility for the cost and implementation of initial tenant improvements varies by deal. Sometimes, the landlord agrees to cover the cost of initial tenant improvements up to a certain dollar value and is the one who implements the improvements (a "tenant allowance"). In such cases, tenants typically agree to reimburse the landlord for above-allowance work. This agreement is generally memorialized in a work letter attached to the lease as an exhibit. The parties should be aware that the tenant allowance can trigger prevailing wage issues. City staff find that negotiating a deal in which prevailing wage requirements apply to tenant improvements being completed by the tenant can hinder completion of the deal. Tenants can often complete the improvements for a cost less than prevailing wage. Competitive bidding, though a different legal standard than prevailing wages (different statutes, different case law, different definitions of what constitutes a "public works project"), may also be required. There are many different requirements for competitive bidding but the most important factor is if the public entity owns

the property. Other times, the tenant agrees to cover the costs and implementation of initial tenant improvements (subject to the landlord's approval).

As needs arise during the lease term, the tenant may need to make additional alterations and improvements to the premises. Any material tenant improvement requires a detailed plan and the landlord's prior approval, unless the parties agree that the tenant may make certain minor work without landlord's prior approval (e.g., work valued at less than a certain dollar threshold). In either case, the tenant must comply with all applicable laws and regulations when performing work on the premises. All work should be performed by a qualified and licensed contractor. Works considered public works will trigger prevailing wage.

Typically, ground leases provide that all improvements upon the premises made by either party revert to the landlord at the end of the term, unless otherwise specified. Sometimes, such leases provide that, at the end of the lease term, landlord may elect to keep the improvements or require tenant to remove them and repair any damage. Generally, a failure to state the ownership would result in the improvements reverting to the landlord. Other lease types often have special arrangements (e.g., cell tower leases) or restoration clauses.

XI. Assignment & Subletting

Unless the lease states otherwise, a tenant is free to transfer its leasehold interest to a third party. The term "transfer" can be defined to mean an assignment, sublease, mortgage, hypothecation, or change in ownership or organization of the tenant.

Landlords commonly restrict tenants' right to transfer. This is one of the most commonly negotiated terms. Most often, the lease will provide that tenant may not transfer its leasehold interest without landlord's prior written consent. The lease should grant landlord sufficient time to evaluate the request and grant or deny approval. Many public entities want to use a sole discretion standard or absolute prohibition on assignment. There may be unique reasons for doing this (e.g. sensitive premises, unique services, exclusivity), but by doing so, landlord should be made aware that it loses a default remedy under California Civil Code Section 1951.4. This remedy allows a landlord to keep the lease in place and sue for the rent as it becomes due. If the tenant is a commercially viable entity that has financial strength (i.e. a credit tenant or one which a good credit record) the continuing obligation for rent can be a burden on the tenant. Of course, the landlord must allow assignment or sublease to a qualified entity so that tenant may mitigate its rent obligation. However, under this remedy, landlord has no obligation or find a new tenant or mitigate damages. The responsibility is all on tenant. It allows landlord to get the benefit of the original lease income and not have the burden to lease the vacant space, which might be critical in a recessionary economy. In general, the lease should provide that landlord will act reasonably when deciding whether to grant or withhold consent to a transfer. Public entities should avoid "deemed" approval- where the assignment or sublease would be automatically approved if the entity fails to approve or deny an assignment within a period of time. Any timeframe for approval should include enough time to analyze the information presented and properly agendize any necessary decision to the City Council, say 30-45 days. This is not popular with tenants who wish to move their business sale or sublease forward, but it is a necessary time frame to properly review the issue and transaction. These minimum time periods should be set forth in any lease template used by public entity landlords. This time period for public hearings for any decisions should be included in any decision required by either landlord or tenant parties throughout the lease.

Tenants may charge the new subtenant a rent that exceeds the rent paid under the lease (i.e., tenant charges subtenant \$150/month under the sublease but landlord only charges tenant \$100/month under the lease). Leases often provide that, should this situation arise, the tenant must share with landlord a certain percentage of any excess rent collected from the subtenant. The usual private party compromise is a 50-50 split between landlord and tenant. However, landlords that are public entities typically collect more than 50 percent (often 90-100%) on the premise that private party tenants should not profit from public resources.

The assignment and subletting provision generally establish the conditions under which tenant may transfer its interest (e.g., the proposed transferee must be at least as creditworthy as tenant; the monthly rental may not be less than rental under the lease; any additional security deposit required by the new tenant must be qualified to run the business it is assuming or buying) and the legal implications of that transfer (e.g., tenant shall not be released from its obligations under the lease by transferring its interest to a third party). The more extensive these requirements, the less flexibility tenant will have to transfer its leasehold interest, but the greater control landlord has in keeping a quality property with well qualified tenants. Public entities don't often assign leases as tenants but they often sublease. Both situations should be covered carefully to preserve exit strategies (i.e. to mitigate expenses or damages) for the public entity.

XII. Indemnity

The indemnity clause shifts financial and legal risk from one party to the other. It is an essential element of any lease. Prudent landlords and tenants do not treat the indemnity clause as lawyers' boilerplate. Instead, they carefully review the clause to ensure that it is well-crafted and meets their individual needs.

The lease should always include a tenant indemnity of landlord. Typically, the indemnity clause will state that tenant agrees to indemnify, defend, protect, and hold harmless the landlord from claims related to (i) tenant's use of the premises, (ii) any breach or default by tenant, (iii) any hazardous materials on the premises caused by tenant, and (iv) any act or omission of tenant. The premise is that tenant controls the premises and landlord should not be liable for things caused by tenant's use or activities under the lease.

Tenant sometimes request landlord indemnify the tenant. Where landlord is a public entity, landlord should not agree to indemnify tenant for anything, unless there is a specific risk tenant is undertaking due to the lease that would not otherwise be their risk in operating their business. In addition, many public clients refuse to indemnify counterparties—or should. City staff are advised to check with their city attorney to confirm local policy on this point. At most, landlord should only indemnify for landlord's activities on site, not the exact reciprocal of tenant's indemnity.

XIII. Casualty / Insurance

Landlords should safeguard investments in leased property and insure against risks associated with leases by requiring tenants to meet certain insurance specifications and requirements. Typically, landlords require tenants to maintain general liability, automobile liability, employer's liability, all-risk property, and workers' compensation insurance policies with minimum coverage set at a value specified in the lease. Some large tenants may ask to self-insure. In such cases, it is advisable to include a net worth standard such as \$50 million and limit the option to the most well-qualified entities.

Except in ground leases, landlord generally obtains insurance on the building. Tenant generally pays for insurance on the leased premises and its furniture, fixtures, and equipment. Sometimes, tenant is required to reimburse landlord for tenant's pro rata share of insurance payments made by landlord (e.g., tenant's pro rata share of building insurance). Those payments may be considered additional rent. Public entity tenants need to ensure that any coverage provided by a risk pool or self-insurance is allowed by the insurance clause.

Landlords should ensure that any insurance requirements are specifically made applicable to contractors and subcontractors. In addition, both parties are always advised to have a risk manager review the casualty and insurance provision.

XIV. Late Fees, Interest, and Hold-Over Rent

The lease may establish late fees, interest, and holdover fees to be imposed when one party misses a payment deadline. Late fees are negotiated by the parties and typically range from five to ten percent. Unlike late fees, interest rates may not exceed certain legal limits. The lease should include a savings clause to avoid usury claims (e.g., "10% or the maximum legal rate").

When a tenant stays at the premises after the lease expires, whether due to lease termination or a default, the tenant is considered a "holdover tenant." The lease should include a provision stating how the landlord will assess rent upon a holdover tenant. Typically, landlords will charge holdover tenants more rent than regular tenants. Holdover rent often ranges from 125 percent to 200 percent of rent at the time of lease expiration.

XV. Events of Default / Termination by Landlord

Every lease should include a default and remedies clause. This clause governs the parties' rights and responsibilities if the lease breaks down—which can and does happen. A detailed clause can mitigate uncertainty and reduce the cost of litigation. Lease remedies in California are well settled and closely track the Civil Code (1951 et seq.).

Default may occur for various reasons: nonpayment of rent or other financial obligations; habitually late payments; violation of any lease term (e.g., a non-permitted assignment); bankruptcy; prohibited use of the premises; failure to continuously operate the premises (if the lease contains a continuous operation covenant); or another deal-specific reason. Public entities might want to include compliance with business license statutes and payments of any mandatory municipal fees as an event of default.

Defaults fall into a few categories: monetary and non-monetary, non-curable and other. Monetary defaults should have a short time frame until default (3-5 days) with or without notice; non-monetary defaults allow for longer notice and cure such as 10-30 days. Non-curable defaults include bankruptcy, assignment, or insolvency and may have different notice and cure periods, but are essentially non-curable.

XVI. Remedies

The lease should establish that certain remedies are available in the event of default by either party. In the event of a default, the non-defaulting party may pursue remedies established in the lease, as well as any other remedies available at law or in equity.

Leases typically provide that in the event of tenant's default, landlord may immediately terminate the lease and recover any unpaid rent (often after a notice and cure period). Tenant may reduce landlord's recovery of unpaid rent by proving that landlord failed to make a reasonable effort to mitigate damages after tenant's default. In California, this remedy is established by Civil Code section 1951.2. Lease drafters should refer to this statute to ensure that the remedies clause mirrors the statute.

Leases also commonly state that landlord shall have the remedy established by California Civil Code section 1951.4. This remedy is only available if specifically included in the lease using language substantially similar to the statute. The statute provides, in essence, that when a tenant has the right to sublet or assign (subject only to reasonable consent and limitations), landlord may continue the lease in effect after the tenant's breach and abandonment and recover rent as it becomes due.

Although some leases state that landlord has a right to retake possession of the premises upon tenant's default, landlord may only do so after first obtaining a judgment for possession. Without such a judgment, a landlord that takes possession may be liable for forcible entry under Code of Civil Procedure 1159. There are no legal self-help rights for landlords wishing to remove a tenant.

Generally, a mandatory arbitration provision for lease disputes is inappropriate in a lease because the remedies for default are already well settled under the law and expedited processes are available. Landlord-tenant law and leases themselves establish clear remedies for events of default. Arbitration is appropriate for settling disputes over renewal lease rates (appraisal arbitration, not legal arbitration) or to settle construction disputes (due to critical timing issues).

XVII. Hazardous Substances

Environmental remediation and damages can be extremely expensive. For this reason and others, landlords typically prohibit tenants from bringing hazardous materials onto and using hazardous materials upon the premises. The lease should establish a definition of and clarify expectations regarding hazardous materials. These provisions should be consistent with state and federal environmental laws. Typically, leases use strict language to prohibit any hazardous material uses upon the premises. In addition, the lease should include a comprehensive indemnity provision under which tenant indemnifies landlord for any occurrences relating to hazardous materials. Public entity landlords should ensure they understand the use to which their properties are being put and should limit the permitted use to that named use. . Nonetheless, the

parties may agree to permit the use of certain materials that would normally be considered hazardous (e.g., batteries, certain office cleaning supplies). Any such agreement should be codified in the lease or an amendment thereto. Since property owners are liable for hazardous materials which occur during their ownership, they will want to shift the liability to the actual party who contaminated the property during that time. Tenant should be legally responsible in the lease for any hazardous materials which result from Tenant's actions, and ideally, for any third party actions which may occur while tenant is in occupancy (i.e. an unrelated third party dumper). A sophisticated tenant will limit its liability only to its own actions, and carve out any haz mats caused by landlord or third parties. Landlord's argument is that Tenant is the one in control of the property and is the one most able to control any rogue third party dumpers; Tenant will argue that Tenant will only be responsible for its own actions, and can't control others. Any hazardous materials indemnity should survive the termination of the Lease to ensure later enforcement of these obligations.

XVIII. The Even Finer Print

In addition to the topics discussed above, a well-drafted lease should address the following topics:

- Attorney fees
- Broker/agent fees (Many public agencies do not use brokers, but the other party may.)
- CASp disclosure (Certified Access Specialist disclosure. Civ. Code 1938)
- Governing law and venue
- Confidentiality (but strike or modify for public agencies to expressly acknowledge obligations under public records disclosure and public meeting laws)
- Entire agreement
- Notices
- Authority/approval (City council approval should be contingency of lease)
- Mortgage subordination – Landlords should never subordinate their fee simple interest to a mortgage unless there is actual intent to risk losing the property, and there is significant economic benefit to doing so. Tenants should not subordinate unless they receive an assurance of non-disturbance from the lender so long as the tenant performs under the lease.
- Limitation on landlord's liability (no general fund liability as landlord; limit to interest in property)
- Signage
- Amendments
- Exhibits (be sure attached and complete)
- Tenant waiver of Civil Codes (CC 1932, 1933, 1941, 1942, 1943)

XIX. Silent Lease Issues

Omissions can be as deadly as included language. While leases typically focus on the amount of rent, the lease term, and maintenance, there are many other issues on which the lease may be silent. Here are some common "silent" lease issues:

- Alterations: does the landlord want a list of acceptable contractors? To what extent will tenant be allowed to alter inside or outside of the building? What about signage and use of tenant name on the building?
- Assignment/Subletting: Does it require landlord approval? What is the consent standard for assignment? Post 1980 leases which are silent on consent standards are presumed to be a “not to be unreasonably withheld” standard.
- Landlord default- what happens if landlord does not fulfil its responsibilities? What are tenant’s remedies- this is probably one of the most important clauses for tenant to ensure is included in the lease. Landlords will want to ensure proper notice and cure rights. A savvy tenant will insist on self-help rights if Landlord fails to maintain or perform other duties, and may require rent offsets in such case. Self help and rent offsets are common and allowed by statute in residential contexts, but commercial leases must include such a right in order for tenant to exercise such a remedy.
- Security: Does the tenant need building security or a manned lobby? Who will provide and how will costs be allocated?
- Defaults: Are there actions that trigger a default? Will there be any nonmonetary defaults? Does a bankruptcy filing trigger a default? Will the tenant be offered an opportunity to cure any defaults? Is tenant responsible for any fees should a default occur?
- Condemnation: What happens in the case of a condemnation?
- Estoppel Certificates: Who must provide? Landlord, tenant, or both? Should an acceptable form be attached to the lease?
- Surrender at End of Lease Term: Is there a duty to restore on the part of the tenant? In what condition must the premises be returned?
- Utilities/HVAC: What controls are spelled out for adequate billing? Does wattage need to be spelled out? Is there discussion of back-up generator? What is the level of HVAC service? What about after hours and weekends? Is there a charge and if so, how much?
- Other: Does force majeure provision apply? Does it protect the landlord or tenant or both? What is the scope of landlord’s access to the premises? Does the tenant anticipate entering into any other financing arrangements that might affect the landlord, the lease, or the premises? Is landlord responsible for ADA compliance? Who is responsible for cleaning and maintenance? What are cleaning and garbage disposal hours?

XX. Public Entity Issues

Unique local requirements or prohibitions

There are a number of issues that are unique to cities and other public entities. The letter of intent should spell out all approval and response times. Before entering into a letter of intent, the level of delegated authority to enter into lease contracts should be verified. Approvals by city council will have to be included into the timeline and authority section of the lease. Another key issue is the disclosure required by California Revenue and Taxation Code section 107.6: the disclosure of a possible possessory interest tax. Some cities have special policies that need to be included in the lease (no Styrofoam containers to be used in city limits, any anti-discrimination language, etc.).

Role Clarity

The lease should be clear on the roles in the lease between City as a police and permitting authority versus its role as a landlord. The City may not contract away its police and governing authority and if permitting of a tenant's improvements are included in a public entity landlord's lease, these roles should be clear and distinct so that landlord is not later accused of impermissibly waiving its proprietary rights as a consequence of its exercise of regulatory authority or, conversely, improperly contracting away its regulatory authority. Many private party tenants do not understand this distinction and will attempt to include these terms in leases. In drafting, try to use "Landlord" and "City" in articulating these roles, versus using "City" in reference to each role.

Nominal Rents/Friendly Parties

Many public entities use nominal rents for friendly tenants such as other public entities or non-profits. In any such lease, parties should ensure that responsibility for capital repairs is spelled out between the parties including roof repairs, HVAC replacement, parking replacement, and ADA improvements.

ADA Compliance

A tenant will always be responsible for compliance with ADA in its role as employer for making accommodations. Many landlords will require that any such special employee accommodation be tenant's expense, even if such accommodation requires improvements to the building or common area. However, tenants should carefully review whether a building or facility is compliant before move-in and require or negotiate that any common area or building improvements (other than employee accommodation) ADA improvements should be at landlord's expense, or at the most passed through on an amortized basis. Any inspection conducted by a Certified Access Specialist (CAsp- the California parlance for an ADA inspector) must be disclosed to tenant, and tenant may conduct its own inspection, at its own expense, but any deficiencies may be at tenant's expense (Civil Code 1938). An acknowledgement of the existence or non existence of such a report is often included in the lease. There is no statutory requirement that a property be in compliance with ADA when a tenant takes occupancy, but a savvy tenant can negotiate for a contractual requirement to bring a property up to date, or at least not to pay for the updates caused by a violations.

Prevailing Wages

The parties should review public works and prevailing wage issues under state and federal law, including the Department of Industrial Relations definition of public works and applicability of the Davis Bacon law, and depending on the deal terms, address the issues in the lease.

Indemnity of Public Officials

The parties should review the indemnities to ensure that City's public officials and volunteers are included in addition to employees, contractors and agent. Avoid, however, public entity indemnity of private parties. In fact, there may already be a stance of not allowing indemnification language in lease agreements. Again, communicate about what kinds of

indemnities the city is comfortable agreeing to, and discuss with key staff the difference between gross negligence, ordinary negligence, and willful misconduct.

Public Records Act

Some private counterparties will have lease forms containing confidentiality language (although if you are following the advice above, you will not use the counterparty's lease form!) Make sure to include language regarding the Public Records Act in lease agreements and eliminate or modify the confidentiality language.

Early Termination for Loss of Funding

Beware of multi-year obligations and debt limitations under the California Constitution and insert a lease termination clause for loss of funding if the tenant is a public entity.

Issues to Consider from Tenant's Perspective

- Double check all numbers in the lease: Rent, lease term, calculation of start dates and occupancy
- What expenses are covered in the rent? Push them back to the landlord as much as possible and try to limit definition of operating and maintenance expenses for triple net leases
- Know who pays for compliance issues (ADA, environmental, etc.?) Preferably landlord with no pass through or, at most, amortized over long term (not lease term unless 10+ years).
- Require a warranty by landlord of good working order for building systems and roof at commencement.
- Negotiate that landlord's failure to repair after notice and failure to cure may be performed by tenant and deducted from rent or promptly reimbursed.

Issues to Consider from Landlord's Perspective

- Double check all numbers in the lease: Rent, lease term, calculation of penalties.
- Make sure tenant is responsible for expenses that go beyond normal wear and tear.
- Don't allow delay in possession to lead to rent abatement.
- Request as much notice as possible of intent to vacate.
- Understand the rights and obligations of the security deposit.
- Include a broad definition of operating expenses.
- Narrow definition of landlord's representations of safety or warranty.

- Require approval of all contractors and ensure there is language that limits tenant's use to a use not prohibited by law.
- Require access to premises for inspection and maintenance.*

XXI. Conclusion

There are many issues to consider in drafting a lease. Time and money will determine many of the decisions made, but careful consideration of the facts and needs of the parties, along with helpful tools such as master lease forms, checklists of issues, and communication with key staff and stakeholders, will ensure that the final lease addresses the parties' concerns and is a practical and enforceable document.

****Note of Attribution:***

Sophie Wenzlau and Michelle K. Enchill, Associates with Best Best & Krieger LLP, contributed to this paper.

LANDLORD'S LEASE CHECKLIST

1. DATE AND PARTIES.

- _____ A. Is the lease dated for reference purposes (not necessarily commencement date)?
- _____ B. Are the parties accurately identified and defined as Landlord and Tenant?
- _____ C. If Landlord or Tenant is an agent, is evidence of authority indicated? If not, should evidence of authority be requested?
- _____ D. Is Tenant's performance guaranteed? Should it be?

2. TERM.

Initial Term.

- _____ (1) Is the initial term of lease identified with number of years, commencement and termination dates specified?
- _____ (2) Is the date when rent obligation commences specified?
- _____ (3) If there is a delay in possession, will there be rent abatement but no damages, cancellation or reimbursement of prepayments or security deposit? Does the lease provide that a delay in possession does not extend termination date? Is there any cap on delay of delivery of possession which would allow Tenant to terminate?
- _____ (4) Are there any conditions to the effectiveness of the lease (e.g., termination of another lease, court approval or land use approval such as zoning change, use permit or subdivision map)?

B. Options to Extend Term.

- _____ (1) Are the total number of all options to extend term specified?
- _____ (2) Is Tenant required to give written notice of exercise of option to extend to Landlord at least one hundred twenty (120) days before expiration of term?
- _____ (3) Is Tenant's exercise of option to extend ineffective if Tenant is in default on the date the notice of exercise is given or on the date that the renewal term is to commence?
- _____ (4) If option is not exercised or if exercise of option is ineffective, does the lease expire at the end of the term then in effect?

_____ (5) Is the increase in or specific method for computation of rent during each renewal term addressed (preferably in the section on rent)?

Holding Over.

_____ (1) Does the lease contain a holdover provision? Are the terms and conditions of the lease to be the same during any holdover period? Is the amount of the rent to also be the same, or is the rent to increase by a specified amount or percentage? Is Tenant obligated to indemnify and hold Landlord harmless if others have prior rights to possession of the premises at the end of the term?

3. PREMISES.

_____ A. Are the premises fully and accurately described by street address, legal description, and square footage (Landlord's preference is usually for square footage to be measured from outside walls)? Is a plot plan attached? (Should one be?) What standard is used to describe the square footage (e.g., BOMA rentable versus usable)? Is the square footage described exactly or approximately? Does Tenant accept the calculation, or would Tenant have a right to challenge the figure and demand a reduction in rent?

_____ B. Does Tenant take the premises "as is" or are the improvement obligations of Landlord identified with specificity (see Construction section)? Does Landlord make any representations or warranties regarding the condition of the premises (are there any toxic substances or hazardous materials on the premises)? [Landlord should avoid making representations or warranties if possible—see sections 16.A(2) and 16.B(3).]

_____ C. Does the definition of the premises exclude common areas and other specifically described areas?

_____ D. May Landlord change the size, shape, location, number and extent of the building, common areas and excluded areas without Tenant's consent? Can Landlord relocate Tenant (and on what terms)?

_____ E. Is Tenant denied access to roof areas (except for maintenance purposes if Tenant is obligated to maintain)? Does Tenant have an option (or a right of first refusal) to expand or to purchase the premises? When can (or must) the option (or right) be exercised? If Tenant has an option, what lease terms will be applicable to the new space?

_____ F. To the extent that the discussion of Tenant's rights in the common area (see section 5) is inapplicable or incomplete, are Tenant's appurtenant rights (e.g., parking, loading, storage, railroad spur, easements, etc.) clearly specified?

_____ G. If there are underground storage tanks on the property, whose responsibility are they?

4. RENT.

Minimum Annual Rent.

- _____ (1) Is a fixed dollar amount of minimum annual rent and when payable specified (e.g., monthly in advance without notice, demand or setoff)?
- _____ (2) Does the lease provide for proration of rent for any period of less than one (1) month?

Periodic Rent Adjustment.

- _____ (1) Does the lease provide fixed rent increases or is the minimum annual rent increased (never decreased) at the end of each twelve (12)-month period by the greater of a fixed percentage or the increase in an appropriate consumer price index over the same consumer price index for a specified base year?
- _____ (2) Have you checked the above formula for workability by running sample numbers?
- _____ (3) Is a method for replacing the consumer price index if discontinued specified?
- _____ (4) Is there a specified increase (never decrease) on commencement of any renewal/extension term (fixed dollar amount, percentage, or CPI adjustment)?

Prepaid Rent/Security Deposit.

- _____ (1) Is the amount of rent (if any) to be prepaid upon execution of lease specified?
- _____ (2) Is the security deposit amount specified as well as disposition on default or on normal termination?
- _____ (3) Is Tenant not entitled to any interest?
- _____ (4) May Landlord commingle the prepaid rent and security deposit with other funds?
- _____ (5) Have you checked with local counsel for any local restrictions on use of security deposit?
- _____ (6) Is the deposit payable to the last assignee of Tenant's interest.
- _____ (7) Are there provisions for further deposits (e.g., if the rent is increased or the premises are expanded or the deposit is applied to cure default)?
- _____ (8) How are deposits handled in the event of a transfer of the Landlord's interest?

Additional Rent.

_____ (1) [Shopping Centers Only] Gross Receipts.

_____ (a) In addition to minimum annual rent, as periodically adjusted, is Tenant to pay Landlord a specified percent of gross receipts?

_____ (b) Is the broadest possible definition of gross receipts used (including credit and in-kind transactions and all orders placed in or through the premises)? Is the definition realistic with regard to the type of Tenant's business? Are exclusions from gross receipts clearly specified?

_____ (c) Does the lease give audit rights and penalties?

_____ (d) Is there a radius clause?

_____ (e) Must Tenant keep the premises well-stocked and use due diligence to achieve a certain percentage rent?

_____ (f) Does the lease terminate for failure to achieve a minimum percentage rent? If so, can Tenant prevent termination, even though Tenant's sales are insufficient, by paying the required minimum?

(2) Expense Reimbursements.

_____ (a) Is the lease a net lease with Tenant required to reimburse Landlord for all operating and tax costs? Is Tenant required to pay all taxes on its personal property? If the lease requires Tenant only to pay increases in operating expenses, are the base year(s) and base expenses or assessments adequately defined?

_____ (b) Are allocations based on:

_____ (i) Ratio of area of premises to total area of building/shopping center currently leased; or

_____ (ii) Ratio of area of premises to total leasable area of building/shopping center with multiplier for estimated vacancy rate?

_____ (c) Is there a mixed use of building by different tenants?
[Special allocation problems arise.]

_____ (d) Is a procedure specified for reallocation periodically and on significant change (e.g., reassessment)?

_____ (e) Are the following expense items specifically included:

_____ (i) Taxes:

- _____ • on building/shopping center (include common areas);

increases attributable to a change in ownership?)

- on Tenant improvements;
- occupancy/use taxes;
- lease transaction taxes;
- gross receipts;
- all other fees and assessments?

(Is there any relief for Tenant from tax

(ii) Operating expenses:

- Is there a broad definition of management, operating and maintenance costs, including, but not limited to: all costs of Landlord's compliance with obligations under the lease or similar leases with other tenants; wages, salaries and benefits; cost of services provided by third parties; rental value of manager's office, janitorial space, etc.; utilities and services not separately metered and paid directly by tenants (see paragraph 9 infra); materials and supplies; snow removal; trash removal; landscaping and gardening; security; maintenance and repair performed by Landlord (see paragraph 10 infra); Landlord's insurance (see paragraph 11 infra); depreciation on equipment and other personal property; depreciation on buildings, common areas, fixtures and capital improvements*; debt service and increases in variable rate*; tenant improvement costs paid by Landlord*; leasing and marketing costs including brokers' commissions, management fees and attorneys' fees*; remedial costs incurred by Landlord due to breaches of leases by other tenants or Landlord; Landlord's general overhead and administrative expenses; parking garage/lot expenses; and cost of commercial concessions in building? [*Items marked are normally excluded.]
- Is there a method specified for projecting base year/comparison year to full occupancy?

_____ (f) Run sample figures to verify methods of calculation/allocation work.

_____ (g) Is the statement of expenses to be prepared by a CPA?
May Tenant examine the books? Does Tenant have a right to object to the statement?

_____ (h) May Tenant challenge increased tax assessments in the name of Landlord if Landlord fails to do so? If so, is Tenant required to post a bond or otherwise indemnify Landlord?

Other Charges and Payments.

_____ (a) Are all other sums of money or charges required to be paid by lease defined as additional rent?

Delinquent Payments.

_____ (1) Is minimum annual rent or additional rent not paid within _____ (_____) days after due date (no notice required from Landlord) to bear interest until paid at the lesser of [specified interest rate] per annum or the highest rate allowed by law/or flat percentage late charge with liquidated damages recitals?

_____ (2) Check with local counsel regarding legality of late charges.

_____ (3) Is a penalty imposed for NSF/dishonored checks or rent late more than three times in any consecutive twelve (12) months (e.g., require rent and other charges to be paid quarterly in advance, cashier's checks only)?

Address for Payment.

5. COMMON AREAS.

Definition of "Common Areas."

_____ (1) Are common areas broadly defined including, but not limited to, the following: parking areas; access and perimeter roads; truck passageways (which may be in whole or in part subsurface); service corridors and stairways; landscaped areas; exterior walks, arcades, stairways, elevators, escalators and/or ramps, interior fountains, toilets and other public facilities; and bus stations and taxi stands?

_____ (2) Is any portion of the property not included within common areas to be included when designated and improved by Landlord for common use?

_____ B. Control of Common Areas. Are the common areas subject to the exclusive control and management of Landlord or Landlord's nominee?

C. Tenant's Use of Common Areas.

_____ (1) Is Tenant's use of common areas and parking spaces specifically defined?

_____ (2) Does Tenant acknowledge that Landlord makes no representation or warranty concerning the safety of the common areas or any security system? [Check with local counsel regarding Landlord's obligation to keep the common area safe.] Also, does Landlord have the right (but not the obligation) to limit access during nonbusiness hours?

_____ (3) Are specific restrictions placed on Tenant's right to sell or solicit in any manner on the common areas, or otherwise obstruct any part of the common areas?

6. USE OF PREMISES.

_____ A. Permitted Uses. Is the nature of Tenant's business specifically and narrowly defined?

B. Prohibited Uses.

_____ (1) Are specific types of businesses or activities not to be conducted on the premises specified?

_____ (2) Is Tenant prohibited from any use or purpose in violation of the laws, statutes, ordinances, rules or regulations imposed by any federal, state, local, municipal or other authority having jurisdiction? Does Tenant have an affirmative obligation to comply with laws and regulations?

_____ (3) Does the lease specify that Tenant shall not produce, handle, store, dispose, discharge or release any hazardous material, substance, waste, contaminant or pollutant on the property of which the premises and the common areas are a part, or into or upon ground or surface water in and around such property?

_____ C. [Shopping Centers Only.] Continuous Operation.

_____ (1) Does Tenant covenant to continuously operate Tenant's business in the premises during specified business hours?

_____ (2) Are limited exceptions granted for remodeling at the commencement of lease and taking inventory?

_____ D. Trash and Rubbish. Is Tenant required to deposit all trash and rubbish in designated receptacles?

_____ E. Rules and Regulations.

_____ (1) Is Tenant's use of the premises and the common areas subject to reasonable rules and regulations, subject to change by Landlord from time to time?

_____ (2) Do the provisions of the lease prevail in the event of a conflict between any rules and regulations and any provisions of the lease?

_____ F. [Shopping Centers Only.] No Covenants. Are no covenants given, express or implied, regarding majors, tenant mix, noncompetition, etc.?

7. CONSTRUCTION.

Construction by Tenant.

- _____ (1) Are Tenant's obligations to construct improvements/remodel specified in a work letter attached as an exhibit to lease?
- _____ (2) Is Tenant required to submit plans and specifications to Landlord for Landlord's prior written approval before any remodeling or construction is commenced and to give Landlord at least ten (10) days' prior notice of actual commencement to allow Landlord to post notice of nonresponsibility?
- _____ (3) Is Tenant required to comply, at Tenant's sole cost, with all laws, statutes, ordinances, rules and regulations (including, but not limited to, obtaining permits, all applicable building codes, zoning ordinances, etc.)?
- _____ (4) Is Landlord's approval of the contractor required before commencement of remodeling or construction?
- _____ (5) Is Tenant obligated to indemnify, defend and hold Landlord harmless from and against any and all liens, costs, expenses, defects in construction, failure to complete construction (etc.) arising out of or in connection with Tenant's remodeling or construction? Does Tenant also affirmatively covenant to keep the property free of any liens arising out of Tenant's construction?
- _____ (6) Must remodeling and construction be completed in accordance with approved plans and specifications unless deviation is approved in advance in writing by Landlord?
- _____ (7) Is Tenant required to supply Landlord with "as built" plans and drawings?
- _____ (8) Do improvements become the property of Landlord, either immediately or at the end of the term? Does Landlord have the option to require Tenant to remove improvements? If so, is the right specified in sufficient detail (e.g., when Landlord must elect, when Tenant must remove, the condition in which the premises are to be left)?

Construction by Landlord.

- _____ (1) Are Landlord's obligations to construct improvements/remodel specified in a work letter attached as an exhibit to lease?
- _____ (2) Is delay in completion of Landlord's construction treated as delay in possession under section 2.A(3), supra? If delay caused or contributed to by Tenant, is there no abatement of rent?
- _____ (3) Is Landlord's work deemed completed when Landlord (or its architect) gives Tenant notice of substantial completion? Does Tenant have a right to

object to Landlord's construction? If so, when must Tenant object? Is there a "punchlist" procedure?

_____ (4) Does the lease deny Tenant access during Landlord's work, or does Tenant agree to perform its work in a manner which does not delay or hinder Landlord's work?

8. SIGNS, ANTENNAS AND OTHER EXTERIOR DECORATIONS.

_____ A. Is Tenant prohibited from erecting or installing any exterior signs or signs visible from the exterior; radio, television or microwave antennas; and loudspeakers, sound amplifiers or similar devices on the roof or exterior walls of the premises without Landlord's prior written consent?

_____ B. Are specifications for design and location of signs attached as an exhibit?

_____ C. Are there specifications for control of other exterior decorations, or decorations visible from the exterior (e.g., curtains)?

9. UTILITIES AND SERVICES.

_____ A. Does the lease require that all utilities and services used by Tenant are to be separately metered and billed directly to Tenant?

_____ B. If it is not practical to separately meter or directly bill any utilities or services, is Tenant required to reimburse Landlord for Tenant's pro rata share, together with any taxes thereon?

_____ C. Does the lease provide that Tenant's reimbursement shall be delinquent if not paid within ten (10) days of written demand by Landlord?

_____ D. Is the method for determining Tenant's pro rata share defined (e.g., based upon the ratio of the total number of square feet in the premises to the total number of leasable square feet in the property in which the premises are a part)?

_____ E. Does the lease provide that Landlord shall not be liable in damages or otherwise for any failure or interruption of any utilities or other services being furnished the premises, and no such failure or interruption shall entitle Tenant to terminate the lease or to abate payment of rent?

10. MAINTENANCE, REPAIRS AND ALTERATIONS.

Tenant's Obligations to Maintain and Repair Premises.

_____ (1) Except as provided in the section of the lease covering damage and destruction, is Tenant required to maintain the premises, including the interior surface of exterior walls; all windows, doors, door frames and door closures; all plate glass, storefronts and show cases; all carpeting and other floor covering; the HVAC system, all electrical equipment and all plumbing and sprinkler systems, if any? Is it feasible for

Tenant to maintain systems which serve other tenants. If not, should Landlord maintain as a common area expense?

_____ (2) Is Tenant required to make modifications or replacements to above as necessary or when required by governmental authority?

_____ (3) Is Tenant required to obtain a standard maintenance contract for the HVAC system for the premises, at Tenant's cost?

_____ (4) Is Tenant required to return the premises at the end of the term in as good condition as received, reasonable wear and tear excepted?

Landlord's Rights to Maintain and Repair Premises.

_____ (1) Does Landlord have the right, but not the obligation, to perform maintenance and repairs to the premises if Tenant refuses or neglects to?

_____ (2) Is the cost of any maintenance and repairs performed by Landlord to be paid for by Tenant as additional rent promptly upon demand, together with interest thereon from date of payment by Landlord?

Landlord's Obligations to Maintain and Repair Premises.

_____ (1) Except as provided in the section of the lease dealing with damage and destruction, is Landlord to maintain the foundations, exterior walls and roof (excluding interior ceiling), except for any repairs necessitated by any act, negligence or omission of Tenant or Tenant's agents, employees, invitees or customers?

_____ (2) Is the cost of all such maintenance and repairs to be passed through to Tenant?

_____ (3) Does Tenant waive any right to make repairs at Landlord's expense under the provisions of any laws permitting repairs by a tenant at the expense of the Landlord, to the extent allowed by law?

_____ (4) Does Tenant specifically waive any right to vacate the premises under the provisions of any laws permitting a tenant to vacate premises where the Landlord has failed to repair the premises, to the extent allowed by law?

Landlord's Maintenance and Repair of Common Areas.

_____ (1) Is Landlord to maintain and repair common areas? May Landlord specifically assess Tenant for damage Tenant has caused to the common areas?

_____ (2) Is Tenant's reimbursement of Landlord's common area maintenance costs covered by the lease? (See section 4.D(2), supra.)

_____ E. Emergency Repairs. Does Landlord have the right, but not the obligation, to make emergency repairs and to enter the premises at any time to do so?

11. INSURANCE.

_____ A. Risk of Loss. Does the lease require Tenant to bear all risk of loss to the premises, common areas and other buildings and structures located on or in the property which may occur, arise or be caused by the intentional or negligent act or omission of Tenant, Tenant's agents, employees, invitees or customers?

B. Worker's Compensation; Liability Insurance.

_____ (1) Is Tenant required to maintain worker's compensation insurance?

_____ (2) Is Tenant required to maintain in full force and effect bodily injury liability and property damage liability insurance adequate to protect Landlord against liability for injury to or death of any person in connection with the use, operation or condition of the premises, in a specified minimum amount of combined coverage?

Fire and Extended Coverage Insurance.

_____ (1) Is Tenant required to maintain insurance covering:

_____ (a) Tenant's leasehold improvements;

_____ (b) Trade fixtures, merchandise and other personal property on the premises in an amount of not less than one hundred percent (100%) of actual replacement cost providing protection against any peril included within the classification "fire and extended coverage," together with insurance against sprinkler damage and vandalism and malicious mischief, and, to the extent available, flood (require if in flood zone) and earthquake coverage (may be prohibitively expensive); and

_____ (c) All plate glass on the premises (if necessary)?

_____ (2) Are the proceeds of such insurance to be used to repair or replace the property insured?

Landlord's Insurance; Costs.

_____ (1) Is Landlord to maintain "fire and extended coverage" insurance covering the building of which the premises are a part?

_____ (2) May such insurance include coverage on buildings or stores other than the premises?

_____ (3) Is Tenant required to pay Landlord Tenant's pro rata share of the costs of such insurance [by monthly installments]?

_____ (4) Is all insurance coverage provided by Landlord for the sole benefit of Landlord, and all proceeds to be paid to Landlord, free and clear of any claims by Tenant?

Policy Form, Content, Insurer.

- _____ (1) Does the lease require that all insurance carried by Tenant be issued by responsible insurance companies acceptable to Landlord (or specific ratings -- e.g., Best's AA) and licensed to do business in state where property located?
- _____ (2) Is Landlord to be named as an additional insured?
- _____ (3) Are copies of all policies or certificates of insurance to be provided to Landlord prior to Tenant's opening for business in the premises?
- _____ (4) Is no policy to be cancelable except after thirty (30) days' prior written notice to Landlord?
- _____ (5) Is Tenant required to provide Landlord with renewals or binders at least thirty (30) days prior to the expiration of any policy, or Landlord may order such insurance and charge the cost to Tenant?

Periodic Increase in Coverage.

- _____ (1) If specified dollar amounts of coverage are required to be maintained by Tenant, does Landlord reserve the right to annually increase the minimum amount of such policy limits? [Note that increased coverage may not always be reasonably obtainable.]

Waiver of Subrogation.

- _____ (1) Does Tenant waive rights of recovery against Landlord and officers, employees, agents and representatives of Landlord?
- _____ (2) Is Tenant to obtain and furnish evidence of the waiver of the right of subrogation by Tenant's insurance carriers?
- _____ (3) Consider waiver of subrogation as to Tenant as well.

12. INDEMNIFICATION OF LANDLORD.

- _____ A. Is Tenant required to indemnify, defend and hold Landlord harmless? For causes other than Tenant's negligence? Are injuries caused by Landlord's negligence (gross negligence? ordinary negligence?) or willful misconduct excluded? Must Tenant indemnify Landlord for injury sustained by third parties in common areas? For breach of Tenant's obligations under the Lease?

13. DAMAGE AND DESTRUCTION.

Destruction Due to Peril Covered by Insurance.

- _____ (1) If premises are totally or partially destroyed during the term from a peril covered by insurance carried pursuant to the lease, is Landlord to restore premises to extent permitted by insurance proceeds?

_____ (2) Does Landlord have the option not to restore premises if destruction exceeds specified percent of value of premises or specified dollar amount? Does Landlord also have the option not to restore if the damage is near the end of the lease term (e.g., during the last twelve (12) to fourteen (14) months)?

_____ (3) Is Landlord allowed to terminate lease in the event that existing laws do not permit reconstruction?

Destruction Due to Peril Not Covered by Insurance.

_____ (1) If the premises are totally or partially destroyed during the term from a peril not covered by insurance, does Landlord have the option to either restore premises or terminate lease?

_____ (2) Is Landlord allowed to terminate lease in the event that existing laws do not permit reconstruction?

Abatement of Rent.

_____ (1) Does the lease provide that unless the lease is terminated by Landlord, damage or destruction does not terminate lease, and Tenant required to continue the operation of its business to the extent reasonably practicable?

_____ (2) [Options:--Provided that the minimum annual rent and additional rent shall be reduced in the proportion to the extent that Tenant is deprived of the use of the premises (note: if rent to be abated, Landlord should carry rental interruption insurance, the cost of which to be passed through to Tenant) -- OR: the minimum annual rent and additional rent shall not be abated or reduced (Tenant should be required to carry business interruption insurance).]

Effect of Termination on Payments.

_____ (1) If lease terminates due to damage or destruction, do all monetary obligations terminate as of date Landlord gives notice to Tenant of termination, and are any prepayments to be repaid?

_____ (2) Does the lease provide that Tenant shall not be relieved of liability for any sums accrued but unpaid?

14. EMINENT DOMAIN; CONDEMNATION.

_____ A. Total Taking. If a total taking of premises occurs, does the lease terminate as of the date the condemning authority takes actual physical possession of the premises?

B. Partial Taking.

_____ (1) If a partial taking of the premises occurs, does the lease, as to the portion of the premises taken, terminate as of the date on which the condemning authority takes actual physical possession of such portion?

_____ (2) Does the lease continue in full force and effect as to the remainder of the premises?

_____ (3) Is the minimum annual rent payable by Tenant for the balance of the term to be proportionately abated, and is the method of computation specified?

Distribution of Compensation and Awards.

_____ (1) Is all compensation and damages awarded for the taking of all or any portion of the premises to belong to and be the sole property of Landlord?

_____ (2) Is Tenant entitled to recover from the condemning authority, but not from Landlord, any award for diminution in value of Tenant's leasehold interest or for Tenant's trade fixtures and equipment? Consider whether Tenant should be allowed any award for destruction of Tenant's leasehold interest.

15. ASSIGNMENT AND SUBLETTING.

Landlord's Consent Required.

_____ (1) Is Tenant prohibited from assigning, transferring, subletting, mortgaging or otherwise transferring or encumbering all or any part of the lease or premises without Landlord's prior written consent?

_____ (2) May Landlord refuse to give such consent for any reasonable reason?

_____ (3) Is Landlord to get [all rent/percentage of rent] in excess of lease rent?

_____ (4) Is Tenant not released by assignment or subletting?

_____ (5) Does Landlord reserve right to recapture the premises and terminate the lease?

_____ (6) Does the lease specifically prohibit assignment or subletting to affiliates of Tenant without Landlord's prior written consent?

_____ (7) Are mergers and reorganizations deemed assignments? Are transfer of more than a specified percentage (e.g., fifty percent (50%)) of Tenant's corporate stock deemed assignments? Are transfers of more than a specified percentage (e.g., fifty percent (50%)) of the partnership interests in Tenant, or any change of general partners, deemed assignments?

16. DEFAULTS; REMEDIES.

Default by Tenant. Does the lease define events of default by Tenant? Typical provisions:

- _____ (1) Any failure by Tenant to pay the minimum annual rent, the additional rent or any other payment required to be made by Tenant, as and when due;
- _____ (2) Tenant's abandonment or vacation of the premises for over _____ (_____) days;
- _____ (3) A failure by Tenant to observe and perform any other provision of the lease to be observed or performed by Tenant [where such failure continues for thirty (30) days after written notice thereof by Landlord to Tenant]; or
- _____ (4) The making by Tenant of any general assignment for the benefit of creditors, the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt, or a petition for reorganization or arrangement under any law relating to bankruptcy or insolvency (unless, in the case of a petition filed involuntarily against Tenant, the same is dismissed within sixty (60) days), the appointment of a trustee or receiver to take possession of any of Tenant's assets located at the premises, or of Tenant's interest in the lease or the premises, where possession is not restored to Tenant within thirty (30) days, or the attachment, execution or other judicial seizure of any of Tenant's assets located at the premises or of Tenant's interest in the lease or the premises, where such seizure is not discharged within thirty (30) days.

_____ B. Landlord's Remedies. Does the lease specify Landlord's remedies (note: remedies available to Landlord upon Tenant's default will vary depending upon local law)? Does the lease specify that Landlord's listed remedies are in addition to any other remedies Landlord may have under law or in equity?

C. Default by Landlord and Tenant's Remedies.

- _____ (1) Is Landlord not to be in default unless Landlord fails to perform obligations required of Landlord within sixty (60) days after written notice by Tenant to Landlord, specifying wherein Landlord has failed to perform such obligations; if the nature of Landlord's obligations is such that more than sixty (60) days are required for performance, then Landlord not in default if Landlord commences performance within sixty (60)-day period and thereafter diligently prosecutes the same to completion?
- _____ (2) Is Tenant's sole remedy if Landlord is in default to terminate lease?

17. REPRESENTATIONS AND WARRANTIES.

Representations and Warranties of Tenant.

Does Tenant warrant that:

- _____ (a) The nature of Tenant's business entity is as stated in lease;

_____ (b) Tenant has full right, power and authority to execute, deliver and carry out the terms of the lease and all documents and agreements necessary to give effect to the provisions contained in the lease; and

_____ (c) [Add other desirable warranties and representations depending on circumstances]?

_____ (2) Does Tenant agree and acknowledge that neither Landlord nor any agent or employee of Landlord has made any representation, promise or warranty except as expressly set forth in the lease?

Representations and Warranties of Landlord.

(1) Does Landlord warrant that:

_____ (a) The lease has been duly authorized, executed and delivered by Landlord?

_____ (b) The nature of Landlord's title to the premises is as stated in the lease (if desired)?

_____ (c) Repeat disclaimer -- no other representations or warranties given.

18. MISCELLANEOUS.

_____ A. Quiet Possession.

_____ B. Unavoidable Delays. Do unavoidable delays excuse performance but do not extend term of lease?

C. Estoppel Certificate.

_____ (1) Is Tenant required to submit to Landlord, within ten (10) days after demand, an estoppel statement substantially in the form of an exhibit attached to the lease, stating that (a) the lease is in full force and effect, without modification except as may be represented, (b) that there are no uncured defaults in the Landlord's performance under the lease, and (c) that no payments have been made in advance?

_____ (2) May the estoppel statement be conclusively relied upon by any prospective purchaser, assignee, sublessee or encumbrancer of the premises or the property of which the premises are a part?

_____ (3) Does Tenant's failure to deliver estoppel statement within ten (10) days of demand constitute agreement that the matters set forth in the demand are true?

Subordination, Attornment.

- _____ (1) Upon request of Landlord or any mortgagee of Landlord, is Tenant required to subordinate to the lien of any mortgage or deed of trust against the land or the building of which the premises are a part?
- _____ (2) Is Tenant required to attorn to the purchaser at any foreclosure or trustee's sale?

Sale of Premises by Landlord.

- _____ (1) May Landlord sell, transfer or assign, in whole or in part, Landlord's interest in the lease and the property of which the premises are a part, without the consent of Tenant and without notice to Tenant?
- _____ (2) Upon any such sale, transfer or assignment, is Landlord relieved of all liability and obligations under the lease?

Landlord's Access.

- _____ (1) Does Landlord have the right to enter the premises at reasonable times for the purpose of inspecting the premises, showing the premises to prospective purchasers, lenders or lessees, and making alterations, repairs, improvements or additions to the premises or the building?
- _____ (2) Does Landlord have the right during the last one hundred twenty (120) days of the lease term to place "For Lease" signs on or about the premises without rebate of rent or liability to Tenant?

_____ G. No Partnership, Association, Joint Venture or Other Relationship.

H. Notices.

- _____ (1) Are notices required to be in writing and either served personally or sent by registered or certified United States mail, postage prepaid with return receipt requested, at addresses specified in the lease?
- _____ (2) Is a method specified for designating a different address to which notices may be sent?
- _____ (3) Are notices effective when delivered or _____ (_____) days after mailed?

Waivers.

- _____ (1) Does the lease provide that no waiver by Landlord of any provision of the lease is to be deemed a waiver of any other provision of the lease or of any subsequent breach by Tenant?

_____ (2) Does the lease provide that Landlord's acceptance of rent shall not be a waiver of any preceding breach by Tenant other than the failure of Tenant to pay the particular rent accepted, regardless of Landlord's knowledge of breach?

Merger.

_____ (1) Does the lease provide that surrender, mutual cancellation or termination of the lease does not automatically work a merger, but at the option of Landlord terminates all subtenancies or may, at the option of Landlord, operate as an assignment to Landlord of all subtenancies?

_____ K. Severability Clause. Is there one?

_____ L. Headings. For convenience only?

_____ M. Integration Clause. Is there one?

_____ N. Governing Law and Venue. In the state in which the premises are located?

_____ O. Attorneys' Fees. Is Landlord entitled to recover attorneys' fees in any arbitration, action, trial, proceeding or appeal brought to enforce the terms of the lease or to declare rights under the lease? [Check with local counsel to determine if reciprocal.]

_____ P. Recording. Is recording of lease or memorandum of lease prohibited, except at request of Landlord?

_____ Q. Counterparts. Is there a provision for execution of lease in one (1) or more counterparts?

_____ R. Is the manner of amending specified?

_____ S. Is time of the essence?

_____ T. Is the lease binding on successors and assigns of the parties?

_____ U. Are the signatures properly executed and notarized where required?

PUBLIC AGENCY ISSUES

- _____ Has Cal. Rev. and Tax Code Sec. 107.6 disclosure been given for possible tax on tenant's possessory interest when landlord is public entity and tenant is private?
- _____ Will prevailing wage or Davis Bacon act be triggered by tenant improvements or lease concessions, or below FMV rent? Include disclosure of possible applicability.
- _____ Is enough time given for Landlord/Tenant to respond if it needs to meet agenda deadlines and take approvals to public hearing? Generally need 30-45 days for decisions on options to purchase/rights of refusal or other decisions on property purchase or lease.
- _____ Avoid deemed approval for tenant's proposed assignment or sublease and allow for enough review and approval time. Require a second notice and include cc to City/County attorney instead of deemed approval.
- _____ Is there a confidentiality clause? If so, remove clause or insert warning that public entity cannot keep documents private because it is subject to PRA and FOIA.
- _____ Indemnified landlord parties should include public officials and volunteers in addition to normal parties (employees, contractors and agents)
- _____ Eliminate or limit any Landlord indemnity of Tenant; limit to claims arising from lease and limit any claims to property interest only- no general fund access.
- _____ Look for multi-year obligations and debt limitations under California Constitution; insert lease termination clause for loss of funding if tenant is a public entity
- _____ Insert condition precedent to lease effectiveness that lease be approved by appropriate public authority (City Council, Board of Supervisors, etc.).
- _____ If lease rent is nominal (\$1 or ?), be sure parties address responsibility and cost of any capital improvements during lease term (roof repair, HVAC replacement, parking replacement, ADA improvements).
- _____ If landlord is public entity who is also utility provider, be sure responsibilities are separate and distinct. Interruptions should not be landlord's responsibility- but should be utility providers (different employees, etc.), unless caused by landlord in such function. Sometimes this is not possible.
- _____ If landlord is public entity who is also permitting authority, be sure responsibilities are separate and distinct- i.e. landlord cannot contract away its land use approval rights, and any approval under lease is only as landlord, not as regulatory authority.
- _____ Has form of lease been reviewed and approved by City Attorney/County Counsel?

BASIC LEASE INFORMATION (TRIPLE NET)

LEASE DATE:

TENANT:

TENANT'S NOTICE ADDRESS:

TENANT'S BILLING ADDRESS:

TENANT CONTACT:

PHONE NUMBER:

FAX NUMBER:

EMAIL ADDRESS:

LANDLORD:

City of Monterey, a municipal corporation

LANDLORD'S NOTICE ADDRESS:

City Manager
City of Monterey
City Hall
580 Pacific Street
Monterey, CA 93940

LANDLORD'S PAYMENT ADDRESS:

City of Monterey
Revenue Department
735 Pacific Street
Monterey, CA 93940

LANDLORD CONTACT:

Housing & Property Manager

PHONE NUMBER: (831) 646-3995

FAX NUMBER: (831) 646-5616

EMAIL ADDRESS: hpm@monterey.org

Project Description:

101,444 gross square feet of retail and closed water mooring space leased as part of the Fisherman's Wharf 1, City of Monterey

Building Description:

Premises:

The Building located at ___ Old Fisherman's Wharf consisting of _____ square feet, described in Exhibit A-1 and depicted on Exhibit A-2

Permitted Use:

Retail use, including [full service restaurant, coffee house, gift shop and] other lawful retail uses, except as may be prohibited or restricted by the Lease (See Section 4.2) or the Prohibited and Restricted Uses in Exhibit E.

Tenant's Business/Trade Name:

Commencement Date:

Term (in years):

Expiration Date:

RENT:

Base Rent:

\$_____ per month
(subject to adjustment as provided in Section 6.1A hereof)

Percentage Rent:

____%

Estimated First Year Operating Expenses:

\$_____ per month

Tenant's Proportionate Share:

____%

Security Deposit:

\$_____

Radius Restriction:

_____ miles

Guarantor:

The foregoing Basic Lease Information is incorporated into and made a part of this Lease. Each reference in this Lease to any of the Basic Lease Information shall mean the respective information above and shall be construed to incorporate all of the terms provided under the particular Lease paragraph pertaining to such information. In the event of any conflict between the Basic Lease Information and the Lease, the latter shall control.

LANDLORD

TENANT

City of Monterey, a municipal corporation

By: _____

Its: _____

Date: _____

By: _____

Its: _____

Date: _____

By: _____

Its: _____

Date: _____

TABLE OF CONTENTS

	Page
1. PREMISES	1
2. POSSESSION AND LEASE COMMENCEMENT	1
3. TERM.....	2
4. USE	3
5. RULES AND REGULATIONS.....	5
6. RENT	5
7. OPERATING EXPENSES.....	7
8. INSURANCE AND INDEMNIFICATION.....	10
9. WAIVER OF SUBROGATION	12
10. CONTROL OF AND CHANGES TO COMMON AREA	12
11. TENANT'S REPAIRS AND MAINTENANCE	13
12. ALTERATIONS	13
13. SIGNS	14
14. TENANT'S SIGNS, AWNINGS AND CANOPIES.....	15
15. INSPECTION/POSTING NOTICES	15
16. SERVICES AND UTILITIES.....	15
17. SUBORDINATION	17
18. FINANCIAL STATEMENTS	17
19. ESTOPPEL CERTIFICATE	17
20. SECURITY DEPOSIT	17
21. LIMITATION OF TENANT'S REMEDIES.....	18
22. CONSENT OF LANDLORD AND TENANT	18
23. ASSIGNMENT AND SUBLETTING	18
24. AUTHORITY.....	20
25. CONDEMNATION	20
26. CASUALTY DAMAGE	20
27. HOLDING OVER.....	21
28. DEFAULT.....	22
29. LIENS	24
30. SUBSTITUTION	25
31. TRANSFERS BY LANDLORD.....	25
32. RIGHT OF LANDLORD TO PERFORM TENANT'S COVENANTS	25
33. WAIVER.....	25
34. NOTICES	25
35. ATTORNEYS' FEES	26
36. SUCCESSORS AND ASSIGNS.....	26
37. FORCE MAJEURE.....	26
38. SURRENDER OF PREMISES	26
39. PARKING.....	27
40. CONTINUOUS OPERATION	27
41. MISCELLANEOUS.....	28
42. ADDITIONAL PROVISIONS.....	29
43. GOVERNING LAW; WAIVER OF TRIAL BY JURY	30
44. ARBITRATION OF DISPUTES	30

TABLE OF CONTENTS
(Continued)

	Page
Exhibits:	
Exhibit A-1	Premises Description/Floor Plan
Exhibit A-2	Project/Building Site Plan
Exhibit B	Rules and Regulations
Exhibit C	Tenant Work
Exhibit D	Gross Sales Reporting Statement
Exhibit E	Prohibited and Restricted Uses
Exhibit F	Guaranty
Additional Exhibits as Required	

LEASE

THIS LEASE is made as of the ____ day of _____, 20__, by and between **CITY OF MONTEREY, a municipal corporation** (hereinafter called "**Landlord**"), and _____, a _____ (hereinafter called "**Tenant**").

1. PREMISES.

1.1 Landlord leases to Tenant and Tenant leases from Landlord, upon the terms and conditions hereinafter set forth, those premises (the "**Premises**") depicted on **Exhibit A-1**. The Premises shall be all or part of a building (the "**Building**") and of the Wharf I project (the "**Project**" or "**Wharf I**") as described in the Basic Lease Information. The Building and Project are shown on **Exhibit A-2**. Landlord and Tenant acknowledge that physical changes may occur from time to time in the Premises, Building or Project, and that the number of buildings and additional facilities which constitute the Project may change from time to time, which may result in an adjustment in Tenant's Proportionate Share, as defined in the Basic Lease Information, as provided in Section 7.1.

1.2 The term "Wharf 1" shall mean that certain structure commonly known as the Monterey Wharf 1 or Fisherman's Wharf which includes the underlying sand up to the mean high tide line and the underlying tide lands seaward of the mean high tide line, as more particularly depicted in **Exhibit A-2**, and any replacements or betterments thereof. The term "Substructure" means the structure that lies just below the Wharf 1 decking and building floors and includes all pilings, columns, caps, stringers, shoring, braces and other supporting members as well as main feeder electrical, water, sewer, gas, drainage lines and other main feeder utility lines.

1.3 Grant from State of California. It is expressly understood and agreed to by Tenant that in the event any tenancy hereunder is or becomes inconsistent with the Grant from the State of California by which Landlord holds the Premises, or the Operating Agreement by and between the City and State, the rights and the obligations of the parties hereto will be governed solely and exclusively by the Grant and the applicable laws of the State of California, but in no event will Landlord have any responsibility or incur any liability to Tenant as a result of any such inconsistency.

2. POSSESSION AND LEASE COMMENCEMENT.

2.1 Existing Improvements. If this Lease pertains to Premises in which the interior improvements have already been constructed ("**Existing Improvements**"), the provisions of this Section 2.1 shall apply and the term commencement date ("**Commencement Date**") shall be the earlier of the date on which: (1) Tenant takes possession of some or all of the Premises under this Lease Agreement; or (2) Landlord notifies Tenant that Tenant may occupy the Premises. If for any reason Landlord cannot deliver possession of the Premises to Tenant on the scheduled Commencement Date, Landlord shall not be subject to any liability therefor, nor shall Landlord be in default hereunder nor shall such failure affect the validity of this Lease, and Tenant agrees to accept possession of the Premises at such time as Landlord is able to deliver the same, which date shall then be deemed the Commencement Date. Tenant shall not be liable for any Rent (defined below) for any period prior to the Commencement Date. Tenant's taking of possession of the Premises or any part thereof shall constitute Tenant's acceptance of the Building or Project. Tenant acknowledges that Tenant has inspected and accepts the Premises in their present condition, "as is," and as suitable for, the Permitted Use (as defined below), and for Tenant's intended operations in the Premises. Tenant agrees that the Premises and other improvements are in good and satisfactory condition as of when possession was taken. Tenant further acknowledges that no representations as to the condition or repair of the Premises nor promises to alter, remodel or improve the Premises have been made by Landlord or any agents of Landlord unless such are expressly set forth in this Lease. If for any reason Landlord cannot deliver possession of the Premises to Tenant within 30 days of the execution of this Lease, Landlord shall not be subject to any liability therefor, nor shall Landlord be in default hereunder nor shall such failure affect the validity of this Lease, and Tenant agrees to accept possession of the Premises at such time as possession is provided, which date shall then be deemed the Commencement Date. Tenant shall not be liable for any Rent for any period prior to the Rent Commencement Date, which shall be delayed day for day for each day Landlord does not deliver possession of the Premises. Upon Landlord's request, Tenant shall promptly execute and return to Landlord a "Start-Up Letter" in which Tenant shall agree, among other things, to acceptance of the Premises and to the determination of the Commencement Date, in accordance with the terms of this Lease, but Tenant's failure or refusal to do so shall not negate Tenant's acceptance of the Premises or affect determination of the Commencement Date.

2.2 Construction of Improvements. If this Lease pertains to a Building to be constructed or improvements to be constructed within a Building, the provisions of this Section 2.2 shall apply in lieu of the provisions of Section 2.1 above and the term commencement date ("**Commencement Date**") shall be the earlier of the date on which: (1) Tenant takes possession of some or all of the Premises; or (2) the improvements to be constructed or performed in the Premises by Landlord (if any) shall have been substantially completed in accordance with the plans and specifications, if any. Tenant's taking of possession of the Premises or any part thereof shall constitute Tenant's confirmation of substantial completion for all purposes hereof, whether or not substantial completion of the Building or Project shall have occurred. If for any reason Landlord cannot deliver possession of the Premises to Tenant on the scheduled Commencement Date, Landlord shall not be subject to any liability therefor, nor shall Landlord be in default hereunder nor shall such failure affect the validity of this Lease, and Tenant agrees to accept possession of the Premises at such time as such improvements have been substantially completed, which date shall then be deemed the Commencement Date. Tenant shall not be liable for any Rent for any period prior to the Commencement Date (but without affecting any obligations of Tenant under any improvement agreement appended to this Lease). In the event of any dispute as to substantial completion of work performed or required to be performed by Landlord, the certificate of Landlord's architect or general contractor shall be conclusive. Substantial completion shall have occurred notwithstanding Tenant's submission of a punchlist to Landlord, which Tenant shall submit, if at all, within three (3) business days after the Commencement Date or otherwise in accordance with any improvement agreement appended to this Lease. Upon Landlord's request, Tenant shall promptly execute and return to Landlord a "Start-Up Letter" in which Tenant shall agree, among other things, to acceptance of the Premises and to the determination of the Commencement Date, in accordance with the terms of this Lease, but Tenant's failure or refusal to do so shall not negate Tenant's acceptance of the Premises or affect determination of the Commencement Date.

2.3 Occupancy under a Prior Lease. If this Lease pertains to a Building in which Tenant has been in occupancy under a prior Lease, the provisions of this Section 2.3 shall apply in lieu of the provisions of Section 2.1 or 2.2 above. Tenant has been in occupancy in the Premises under the Lease dated _____, as amended, between City of Monterey and _____ (the "**Prior Lease**"). This Lease shall supersede and replace the prior Lease between Tenant and Landlord and their predecessors in interest, if any, except as such obligations expressly survive. The Premises shall be those that are in place as of the date this Lease is executed ("**Existing Improvements**"), subject to Tenant's Work as defined in Section 11.3 and the Tenant Improvements defined in Section 12.1. The term commencement date ("**Commencement Date**") shall be the date shown in the Basic Lease Information. Tenant acknowledges that due to Tenant's prior occupancy, Tenant is very familiar with and knowledgeable of the Premises, the Building and the Project, has had ample time to inspect and or investigate the condition of same, and accepts the Premises in their present condition, "as is," and as suitable for, the Permitted Use (as defined below), and for Tenant's intended operations in the Premises. Tenant agrees that the Premises and other improvements are in good and satisfactory condition as of the Commencement Date. Tenant further acknowledges that no representations as to the condition or repair of the Premises or Common Areas nor promises to alter, remodel or improve the Premises or Common Areas have been made by Landlord or any agents of Landlord unless such are expressly set forth in this Lease. Upon Landlord's request, Tenant shall promptly execute and return to Landlord a "Start-Up Letter" in which Tenant shall agree, among other things, to acceptance of the Premises and to the determination of the Commencement Date, in accordance with the terms of this Lease, but Tenant's failure or refusal to do so shall not negate Tenant's acceptance of the Premises or affect determination of the Commencement Date.

2.4 Pilings. The parties acknowledge that the Premises, Building, and Project are supported by pilings under the wharf, and that these pilings require maintenance over time. Landlord shall be responsible for the maintenance of all wharf pilings under the Building and Premises, and the expense for such maintenance shall be a common area maintenance charge. Maintenance, repairs and replacement of the pilings shall occur over a 3-year cycle based on work schedules, work crew capacity, and availability of reserve funds. The charge for piling repair may be collected as a reserve, in Landlord's reasonable discretion, resulting in carried reserve balances over such time period pursuant to the Operating Expense reconciliation procedures described in Section 7.3.

3. TERM.

3.1 Term. The term of this Lease (the "**Term**") shall commence on the Commencement Date and continue in full force and effect for the number of months or years specified as the Length of Term in the Basic Lease Information or until this Lease is terminated as otherwise provided herein. If the Commencement Date is a date other than the first day of the calendar month, the Term shall be the number of months or years of the Length of Term in addition to the remainder of the calendar month following the Commencement Date.

3.2 Option to Extend. Landlord hereby grants to Tenant the right and option (the "**Option**") to extend the term of this Lease, for the Premises in "as is" condition, for **one (1)** additional period of _____ years (the "**Option**").

Term"). Provided Tenant is not at the time of exercise and has not been in default under the Lease more than twice during the 24 months prior to the Option exercise, even if such default is cured, Tenant may exercise the Option by sending written notice to Landlord ("**Exercise Notice**") no more than twelve months but no less than nine months prior to the expiration of the Lease Term. If Tenant fails to provide such notice, Tenant shall have no further or additional right to extend or renew the term of this Lease. If Tenant is in default on the date the Option Term is to commence beyond all applicable notice and cure periods, at Landlord's option, the Option Term shall not commence and this Lease shall expire at the end of the Lease Term as described in Section 3.1 above. This Option to Extend is personal to Tenant and may not be exercised by any assignee or subtenant. Any exercise by Tenant of any option to renew under this Section shall be irrevocable. If requested by Landlord, Tenant agrees to execute a lease amendment or, at Landlord's option, a new lease agreement on Landlord's then standard lease form for the Building, reflecting the forgoing terms and conditions, prior to the commencement of the renewal term. [Minimum Rent for the first year of the Option Term shall be the Minimum Rent for the last month of the Lease Term increased by 100% of the percentage of increase, if any, shown by the Consumer Price Index, as determined by the U.S. Bureau of Labor Statistics for all Urban Consumers for the San Francisco/Oakland/San Jose Metropolitan Areas ("**Index**"), for the month immediately preceding the date on which the Option Term begins ("**Option Term Commencement Date**") as compared with the Index for the same month in the immediately preceding calendar year. Beginning on the first anniversary of the Option Term Commencement Date and on each successive anniversary thereafter during the Option Term ("**Adjustment Date**"), Base Rent shall be increased by 100% of the percentage of increase, if any, shown by the most recent published Index immediately preceding the Adjustment Date as compared with the Index for the same month in the immediately preceding calendar year. In no event shall option rent be less than Minimum Rent in effect at end of previous term. Landlord shall calculate the amount of this increase in Base Rent after the United States Department of Labor publishes the statistics on which the amount of the increase will be based. Landlord shall give written notice of the amount of the increase at least 10 days prior to the Option Term Commencement Date or, for subsequent years in the Option Term, at least 10 days prior to the Adjustment Date. Tenant shall pay this amount, together with the monthly rent next becoming due under this Lease, and shall thereafter pay the monthly rent due under this Lease at this increased rate, which shall constitute Base Rent. Landlord's failure to make the required calculations promptly shall not be considered a waiver of Landlord's rights to adjust the monthly Base Rent due, nor shall it affect Tenant's obligations to pay the increased Base Rent. If the Index is changed so that the base year differs from that in effect on the Lease Commencement Date, the Index shall be converted in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics. If the Index is discontinued or revised during the Lease Term, the government index or computation with which it is replaced shall be used to obtain substantially the same result as if the Index had not been discontinued or revised.]

4. USE.

4.1 General. Tenant shall use the Premises for the permitted use specified in the Basic Lease Information ("**Permitted Use**") and for no other use or purpose. So long as Tenant is occupying the Premises, Tenant and Tenant's employees, agents, customers, visitors, invitees, licensees, contractors, assignees and subtenants (collectively, "**Tenant's Parties**") shall have the nonexclusive right to use, in common with other parties occupying the Building or Project, the driveways and other Common Area of the Building and Project, subject to the terms of this Lease and such rules and regulations as Landlord may from time to time prescribe. Landlord reserves the right, without notice or liability to Tenant, and without the same constituting an actual or constructive eviction, to alter or modify the Common Area from time to time, including the location and configuration thereof, and the amenities and facilities which Landlord may determine to provide from time to time.

4.2 Limitations. Tenant shall not permit any odors, smoke, dust, gas, substances, noise or vibrations to emanate from the Premises or from any portion of the Common Area as a result of Tenant's or any Tenant's Party's use thereof, nor take any action which would constitute a nuisance or would disturb, obstruct or endanger any other tenants or occupants of the Building or Project or elsewhere, or interfere with their use of their respective premises or Common Areas. Tenant shall not use or allow the Premises to be used for any immoral, improper or unlawful purpose, nor shall Tenant cause or maintain or permit any nuisance in, on or about the Premises. Tenant shall not commit or suffer the commission of any waste in, on or about the Premises. Tenant shall not place any loads upon the floors, walls or ceilings which could endanger the structure, or place any harmful substances in the drainage system of the Building or Project. No waste, materials or refuse shall be dumped upon or permitted to remain outside the Premises. Tenant shall not permit any uses as described in **Exhibit E**, Prohibited and Restricted Uses. Landlord shall not be responsible to Tenant for the non-compliance by any other tenant or occupant of the Building or Project with any of the above-referenced rules or any other terms or provisions of such tenant's or occupant's lease or other contract.

4.3 Compliance with Regulations. By entering the Premises, Tenant accepts the Premises and Building in the condition existing as of the date of such entry. Tenant agrees that if, as a consequence of Landlord's ownership (or ownership of an interest) in the Building or the use of Landlord's funds in connection with any construction

project on the Premises, Building and/or Project, any legal requirements applicable to construction projects (a) undertaken by California cities, or (b) supported by City funds (including, but not limited to, competitive bidding requirements, prevailing wage requirements, and public works bonding requirements) are triggered, Tenant shall cause all such requirements to be fully complied with at Tenant's sole cost and expense. Any failure by Tenant to cause all such applicable requirements to be fully complied with shall be a material breach of this Lease. Tenant shall at its sole cost and expense strictly comply with all existing or future applicable municipal, state and federal and other governmental statutes, rules, requirements, regulations, laws and ordinances, including zoning ordinances and regulations, and covenants, easements and restrictions of record governing and relating to the use, occupancy or possession of the Premises, to Tenant's use of the Common Area, or to the use, storage, generation or disposal of Hazardous Materials (hereinafter defined) (collectively "**Regulations**"). Tenant agrees to comply with all Regulations pertaining to prevailing wage, competitive bidding and public bonding requirements at its sole cost and expense which may be triggered due to this Lease. Tenant shall at its sole cost and expense obtain any and all licenses or permits necessary for Tenant's use of the Premises. Tenant shall at its sole cost and expense promptly comply with the requirements of any board of fire underwriters or other similar body now or hereafter constituted. Tenant shall not do or permit anything to be done in, on, under or about the Project or bring or keep anything which will in any way increase the rate of any insurance upon the Premises, Building or Project or upon any contents therein or cause a cancellation of said insurance or otherwise affect said insurance in any manner. Tenant shall indemnify, defend (by counsel reasonably acceptable to Landlord), protect and hold Landlord harmless from and against any loss, cost, expense, damage, attorneys' fees or liability arising out of the failure of Tenant to comply with any Regulation. Tenant's obligations pursuant to the foregoing indemnity shall survive the expiration or earlier termination of this Lease.

4.4 Hazardous Materials. As used in this Lease, "**Hazardous Materials**" shall include, but not be limited to, hazardous, toxic and radioactive materials and those substances defined as "hazardous substances," "hazardous materials," "hazardous wastes," "toxic substances," or other similar designations in any Regulation. Tenant shall not cause, or allow any of Tenant's Parties to cause, any Hazardous Materials to be handled, used, generated, stored, released or disposed of in, on, under or about the Premises, the Building or the Project or surrounding land or environment in violation of any Regulations. Tenant must obtain Landlord's written consent prior to the introduction of any Hazardous Materials onto the Project. Notwithstanding the foregoing, Tenant may handle, store, use and dispose of products containing small quantities of Hazardous Materials for "general office purposes" (such as toner for copiers) to the extent customary and necessary for the Permitted Use of the Premises; provided that Tenant shall always handle, store, use, and dispose of any such Hazardous Materials in a safe and lawful manner and never allow such Hazardous Materials to contaminate the Premises, Building, or Project or surrounding land or environment. Tenant shall immediately notify Landlord in writing of any Hazardous Materials' contamination of any portion of the Project of which Tenant becomes aware, whether or not caused by Tenant. Landlord shall have the right at all reasonable times and if Landlord determines in good faith that Tenant may not be in compliance with this Section 4.4 to inspect the Premises and to conduct tests and investigations to determine whether Tenant is in compliance with the foregoing provisions, the costs of all such inspections, tests and investigations to be borne by Tenant. Tenant shall indemnify, defend (by counsel reasonably acceptable to Landlord), protect and hold Landlord harmless from and against any and all claims, liabilities, losses, costs, loss of rents, liens, damages, injuries or expenses (including attorneys' and consultants' fees and court costs), demands, causes of action, or judgments directly or indirectly arising out of or related to the use, generation, storage, release, or disposal of Hazardous Materials by Tenant or any of Tenant's Parties in, on, under or about the Premises, the Building or the Project or surrounding land or environment, which indemnity shall include, without limitation, damages for personal or bodily injury, property damage, damage to the environment or natural resources occurring on or off the Premises, losses attributable to diminution in value or adverse effects on marketability, the cost of any investigation, monitoring, government oversight, repair, removal, remediation, restoration, abatement, and disposal, and the preparation of any closure or other required plans, whether such action is required or necessary prior to or following the expiration or earlier termination of this Lease. Neither the consent by Landlord to the use, generation, storage, release or disposal of Hazardous Materials nor the strict compliance by Tenant with all laws pertaining to Hazardous Materials shall excuse Tenant from Tenant's obligation of indemnification pursuant to this Section 4.4. Tenant's obligations pursuant to the foregoing indemnity shall survive the expiration or earlier termination of this Lease.

4.5 Restricted Uses. Tenant shall warehouse, store and/or stock in the Premises only such goods, wares and merchandise as Tenant intends to offer for retail sale or use in preparation of goods or food items or services for sale at, in, from or upon the Premises. This shall not preclude occasional emergency transfers of merchandise to the other stores of Tenant, if any, not located in the Project. Tenant shall use for office, clerical or other non-selling purposes only such limited space in the Premises as is, from time to time, reasonably required for Tenant's business in the Premises. No auction, "fire," bankruptcy or sidewalk sales may be conducted in or upon the Premises without Landlord's prior written consent. The Premises shall not be used for any purpose which shall interfere with commerce, navigation or fishing or in any manner be inconsistent with the Grant or any trusts upon which the Premises or the Pier are now or may hereinafter be held by Landlord.

4.6 Refuse and Sewage. Tenant agrees not to keep any trash, garbage, waste or other refuse on the Premises, including any designated refuse collection area in the Common Area, except in sanitary containers and agrees to regularly and frequently remove same from the Premises. Tenant shall keep all containers or other equipment used for storage of such materials in a clean and sanitary condition. Tenant shall properly dispose of all sanitary sewage and shall not use the sewage disposal system for the disposal of anything except sanitary sewage. Tenant shall keep the sewage disposal system free of all obstructions and in good operating condition. Tenant shall separately contract and pay directly for its trash disposal services.

4.7 Active Use. The parties acknowledge that Wharf 1 is a valuable historic resource of the City which is intended to be developed, used and preserved as a public resource for enjoyment by the general public. Since the Premises is located on Wharf 1, the parties acknowledge that the use of the Premises is to be in accordance with this stated intent, and that the ultimate objective of this Lease is for the active public use of the Premises as described under Permitted Use by and for the benefit of the general public and in a manner consistent with this Section 4.7.

4.8 Right to Close. In addition to any powers Landlord has or may have in the future, including but not limited to any powers due to its governmental capacities, Landlord shall have the right to require the temporary closure of Wharf I or Premises if, in Landlord's sole judgment and opinion, crowd control, weather conditions or other conditions so mandate. Nothing in this provision shall be deemed as limiting in any manner the City's regulatory authority to close Wharf I or Premises.

4.9 City Municipal Powers. The Landlord is entering into this Lease in its proprietary capacity, and not in its regulatory or governmental capacity. Nothing in this Lease shall be construed as restraining, impairing or restricting the City in its regulatory capacity, or granting any rights upon the Tenant with respect to the use, occupancy or operation of the Premises in a manner inconsistent with Law. This Lease does not grant any development rights upon the Tenant with respect to the Premises and any such development shall be subject to all applicable provisions of the Monterey Municipal Code.

5. RULES AND REGULATIONS. Tenant and Tenant's Parties shall faithfully observe and comply with the Project rules and regulations attached hereto as **Exhibit B** and any other rules and regulations and any modifications or additions thereto which Landlord may from time to time prescribe in writing for the purpose of maintaining the proper care, cleanliness, safety, traffic flow and general order of the Premises or the Building or Project. Tenant shall cause Tenant's Parties to comply with such rules and regulations. Landlord shall not be responsible to Tenant for the non-compliance by any other tenant or occupant of the Building or Project with any of such rules and regulations, any other tenant's or occupant's lease or any Regulations.

6. RENT.

6.1 Base Rent. Tenant shall pay to Landlord and Landlord shall receive, without notice or demand throughout the Term, monthly Base Rent as specified in the Basic Lease Information, payable in monthly installments in advance on or before the first day of each calendar month, in lawful money of the United States, without deduction or offset whatsoever, at the Payment Address specified in the Basic Lease Information or to such other place as Landlord may from time to time designate in writing. Base Rent for the first full month of the Term shall be paid by Tenant upon Tenant's execution of this Lease. If the obligation for payment of Base Rent commences on a day other than the first day of a month, then Base Rent shall be prorated and the prorated installment shall be paid on the first day of the calendar month next succeeding the Term Commencement Date. As used herein, the term "Base Rent" shall mean the Base Rent specified in the Basic Lease Information as it may be so adjusted from time to time. The Base Rent payable by Tenant hereunder is subject to adjustment as provided in Section 6.1A.

A. [Annual Adjustment.] Beginning on the first anniversary of the Commencement Date, Base Rent shall increase annually at the end of each 12-month period by any increase in the Consumer Price Index as determined by the U. S. Bureau of Labor Statistics for all Urban Consumers for the San Francisco/Oakland/San Jose Metropolitan Area over the previous year. **[In no event will the increase be less than 3% or greater than 7%.]** Should the CPI be discontinued, the index used for comparison shall be a comparable index as designated by the Bureau. It is recognized by both parties that the Index for any month is not published for approximately two months. Tenant shall, therefore, continue to pay the current rental paid by Tenant until such time as the new rental is calculated and, at that time, Tenant shall pay within ten (10) days of notice of the new Base Rent the new amount plus arrearages. In no event shall Base Rent ever decrease below the prior year's Base Rent even if the CPI is negative. In such event, the Base Rent **shall increase at the minimum rate specified in this Section 6.1A, remain the same.** **[Choose one]**

A. **ALTERNATE RENT INCREASE CLAUSE [Annual Adjustment.** Base Rent shall increase, beginning on the first anniversary of the Commencement Date, as follows:

[INSERT TABLE OF RENT INCREASES]

6.2 Percentage Rent. During the Term, Tenant will pay to Landlord, as provided below, the dollar amount by which the percent specified in Percentage Rent of Basic Lease Information above of Tenant's "Gross Sales" (as hereinafter defined) exceeds the Base Rent paid by Tenant to Landlord during each month of the Term ("**Percentage Rent**"). Calculations of Base Rent and Percentage Rent shall not include any consideration for Operating Expense contributions. Percentage rent will be calculated monthly, but for convenience, shall be paid quarterly. Tenant will furnish or cause to be furnished to Landlord a statement of the monthly Gross Sales of Tenant within ten (10) days after the close of each calendar quarter and a statement of the annual Gross Sales of Tenant within thirty (30) days after the close of each fiscal year. Such statements will be in a form substantially similar to **Exhibit D** attached to this Lease or in another form mutually acceptable to Landlord and Tenant. Such statements will be certified as an accurate accounting of Tenant's Gross Sales by an authorized representative of Tenant. Within ten (10) days after the end of each calendar quarter, Tenant will pay to Landlord the amount, if any, by which the product of the Percentage Rent Rate multiplied by the monthly Gross Sales during each of the immediately preceding 3 calendar months exceeds the respective monthly installment of Base Rent paid by Tenant. Annual reconciliation shall verify or correct the original reported monthly Gross Sales but shall not recalculate the Percentage Rent on an annual basis. Within ninety (90) days after the close of each fiscal year, an accounting of Tenant's Gross Sales during said fiscal year and the amounts paid to Landlord as Base Rent and as Percentage Rent during each month of such fiscal year will be made by Landlord and, on such accounting, an adjustment will be made with respect to Percentage Rent as follows: if Tenant has paid to Landlord an amount greater than Tenant is required to pay under the terms of this Section 6.2, Landlord shall issue a check in the amount of such excess Percentage Rent within thirty (30) days of such determination; or if Tenant has paid an amount less than the Percentage Rent required to be paid under this Section 6.2, Tenant will pay to Landlord such difference within thirty (30) days of such determination. On termination of this Lease, if Tenant is not in default under this Lease, Landlord will refund to Tenant the amount of any excess, promptly on Landlord's receipt of Tenant's request therefore.

A. Gross Sales. "Gross Sales," as used in this Lease, means the gross selling price of all merchandise or services sold or rented on a monthly basis in or from the Premises by Tenant, its subtenants, licensees, and concessionaires (including food and beverages; provided that this reference to food and beverages does not permit the sale of food or beverages from the Premises if not otherwise expressly permitted by this Lease), whether for cash or on credit, whether made by store personnel or by machines, or whether made by catalogue or Internet sale (from on or off the Premises), excluding therefrom the following: (i) sales taxes, excise taxes, or gross receipts taxes imposed by governmental entities on the sale of merchandise or services, but only if collected from customers separately from the selling price and paid directly to the respective governmental entities; and (ii) proceeds from the sale of fixtures, equipment, or property that are not stock in trade ("Exclusions from Gross Sales"). Tenant will use its reasonable good faith efforts to maximize Gross Sales from the Premises.

B. Recordation of Sales. At the time of a sale or other transaction, Tenant must record the sale or other transaction in a cash register with sealed continuous tape, or on a computer, or by using any other method of recording sequentially numbered purchases and keeping a cumulative total.

C. Books and Records. For a period of three (3) years following the submittal of its certified annual statement for each calendar or fiscal year, Tenant must keep and maintain full and accurate accounting books and records relative to transactions from the Premises in accordance with generally accepted accounting principles consistently applied. The accounting books and records kept and maintained by Tenant for audit purposes must include all records, receipts, journals, ledgers, and documents reasonably necessary to enable Landlord or its auditors to perform a complete and accurate audit of Gross Sales and Exclusions from Gross Sales in accordance with generally accepted accounting principles.

D. Audits. Landlord, at any time within three (3) years after receipt of any certified annual statement and on not less than ten (10) days' prior written notice to Tenant, may cause an audit to be made of Gross Sales and Exclusions from Gross Sales and all of Tenant's records and accounting books necessary (in Landlord's judgment) to audit such items. Tenant will make all such books and records available for the audit at the Premises or at Tenant's offices in the state in which the Premises is situated. If the audit discloses an underpayment of Percentage Rent, Tenant will immediately pay to Landlord the amount of the underpayment with interest, which will accrue from the date the payment should have been made through and including the date of payment. If the audit discloses an underreporting of Net Sales in excess of two percent (2%) of the reported Gross Sales, whether or not additional Percentage Rent is due, then Tenant will also immediately pay to Landlord all reasonable costs and expenses incurred in the audit and in collecting the underpayment,

including auditing costs and attorney fees. If the audit discloses an overpayment of Percentage Rent, Tenant will be entitled to a credit in the amount of the overpayment against the next payment(s) of Percentage Rent due, unless the audit was for the last year of the Term, in which event Landlord will refund to Tenant the overpayment within sixty (60) days following the date of the finalization of the audit.

E. Computing Percentage Rent. For the purpose of computing Percentage Rent, Tenant's Gross Sales for any period during which Tenant does not continuously and uninterruptedly conduct its business, as required by Section 40, will be deemed to be Tenant's Gross Sales for the corresponding period during the last calendar year in which Tenant operated continuously and uninterruptedly.

F. Confidentiality of Gross Sales Reporting. Landlord is a public entity subject to the Public Records Act. Information provided to Landlord pursuant to this Section III may be disclosed publicly as required by law. If Landlord receives a request for records related to information obtained from Tenant pursuant to this section, Landlord agrees to promptly provide Tenant with written notice of the request. Tenant will then have the time specified in the Landlord's notice to determine whether it considers any of the information confidential proprietary information and whether it will take legal action to preclude disclosure of the requested information. Tenant understands that the Landlord's notice of a request for records under the California Public Records Act (Gov. Code, section 6250, et seq.) will require a prompt response from Tenant given the Landlord's obligation to respond to such a request within 10 days of its receipt. Absent a timely response, Landlord may release the requested records. Landlord shall have no monetary liability to Tenant for release of information pursuant to a request under the California Public Records Act or any subpoena; nor shall Landlord be obligated to defend against any challenge related to a California Public Records Act request or a subpoena for records that Tenant asserts are confidential. Tenant further agrees to be liable for and pay all judgments against the Landlord, as well as attorney fees and costs, resulting from a challenge related to a records request or subpoena for records that Tenant asserts are confidential.

6.3 Additional Rent. All monies other than Base Rent required to be paid by Tenant hereunder, including, but not limited to, Tenant's Proportionate Share of Operating Expenses, as specified in Section 7 of this Lease, charges to be paid by Tenant under Section 16, the interest and late charge described in Sections 28.4 and 28.5, Percentage Rent, Landlord's Share of Profit (as defined in Section 23.3), and any monies spent by Landlord pursuant to Section 32, shall be considered additional rent ("**Additional Rent**"). "**Rent**" shall mean Base Rent and Additional Rent.

7. OPERATING EXPENSES.

7.1 Operating Expenses. In addition to the Base Rent required to be paid hereunder, Tenant shall pay as Additional Rent, Tenant's Proportionate Share of the Building and/or Project (as applicable), as defined in the Basic Lease Information, of Operating Expenses (defined below) in the manner set forth below. Tenant shall pay the applicable Tenant's Proportionate Share of each such Operating Expenses. Landlord and Tenant acknowledge that if the number of buildings which constitute the Project increases or decreases, or if physical changes are made to the Premises, Building or Project or the configuration of any thereof, Landlord may at its discretion reasonably adjust Tenant's Proportionate Share of the Building or Project to reflect the change. Landlord's determination of Tenant's Proportionate Share of the Building and of the Project shall be conclusive so long as it is reasonably and consistently applied. "**Operating Expenses**" shall mean all expenses and costs of every kind and nature which Landlord shall pay or become obligated to pay, because of or in connection with the ownership, management, maintenance, repair, preservation, replacement and operation of the Building or Project and its supporting facilities and such additional facilities now and in subsequent years as may be determined by Landlord to be necessary or desirable to the Building and/or Project (as determined in a reasonable manner) other than those expenses and costs which are specifically attributable to Tenant or which are expressly made the financial responsibility of Landlord or specific tenants of the Building or Project pursuant to this Lease. Operating Expenses shall include, but are not limited to, the following:

A. Taxes. All real property taxes and assessments, possessory interest taxes, sales taxes, personal property taxes, business or license taxes or fees, gross receipts taxes, service payments in lieu of such taxes or fees, annual or periodic license or use fees, excises, transit charges, and other impositions, general and special, ordinary and extraordinary, unforeseen as well as foreseen, of any kind (including fees "in-lieu" of any such tax or assessment) which are now or hereafter assessed, levied, charged, confirmed, or imposed by any public authority upon the Building or Project, its operations or the Rent (or any portion or component thereof), or any tax, assessment or fee imposed in substitution, partially or totally, of any of the above. Operating Expenses shall also include any taxes, assessments, reassessments, or other fees or impositions with respect to the development, leasing, management, maintenance, alteration, repair, use or occupancy of the Premises, Building or Project or any portion thereof, including, without limitation, by or for Tenant, and all increases therein or reassessments thereof whether the increases or reassessments result from increased rate and/or valuation (whether upon a

transfer of the Building or Project or any portion thereof or any interest therein or for any other reason). Operating Expenses shall not include inheritance or estate taxes imposed upon or assessed against the interest of any person in the Project, or taxes computed upon the basis of the net income of any owners of any interest in the Project. .

B. Revenue & Taxation Code Section 107.6. Possessory Interest Tax. Tenant recognizes and understands that this Lease may create a possessory interest subject to property taxes and that, if a possessory interest is created, Tenant shall, in accordance with this Section 7.1B hereof, be responsible for payment of property taxes levied against such possessory interest.

C. Insurance. All insurance premiums and costs, including, but not limited to, any deductible amounts, premiums and other costs of insurance incurred by Landlord, including for the insurance coverage set forth in Section 8.1 herein.

D. Common Area Maintenance.

(1) Repairs, replacements, supplies, utilities, and general maintenance of the Common Area for the Project which may include wharf structure and substructure (including pilings), balconies, public restrooms, mechanical rooms, building exteriors, compactor room, alarm systems, pest extermination, landscaped areas, surface decking, stringers, caps, docks, parking and service areas, driveways, sidewalks, loading areas, fire sprinkler systems, appurtenant buildings, sanitary and storm sewer lines, utility services, electrical, mechanical or other systems, telephone equipment and wiring servicing, plumbing, lighting, trash collection, security, extermination fees, signage, day porter and janitorial services, and any other items or areas which affect the operation or appearance of the Building or Project, which determination shall be at Landlord's discretion, except for: those items to the extent paid for by the proceeds of insurance; and those items attributable solely or jointly to specific tenants of the Building or Project. Landlord shall have the sole right and discretion to increase or decrease the Common Area. The public and common areas and facilities of and comprising the Building and Project, including, but not limited to, those areas of Wharf I open to the public or operating or supporting those areas open to the public and the Building and/or the Project shall be known as the "**Common Area**".

Common Area expenses shall be shared 40% by Landlord, 60% by the tenants of the Project. Tenant shall pay Tenant's Proportionate Share based on such 60% portion of the expenses for Common Area repairs, replacements, supplies, utilities, and general maintenance, as described in this Section 7.1D, for the Project. For avoidance of doubt, 40% of the Project's Common Area Maintenance expenses shall not be passed through to Tenant; Tenant shall pay Tenant's Proportionate Share based on the remaining 60% portion of the Project's Common Area maintenance expenses.

(2) Repairs, replacements, and general maintenance shall include the cost of any improvements made to or assets acquired for the Project or Building that in Landlord's discretion may reduce any other Operating Expenses, including present or future repair work, are reasonably necessary for the health and safety of the occupants of the Building or Project, or for the operation of the Building systems, services and equipment, or are required to comply with any Regulation, such costs or allocable portions thereof to be amortized over such reasonable period as Landlord shall determine, together with interest on the unamortized balance at the publicly announced "prime rate" charged by Wells Fargo Bank, N.A. (San Francisco) or its successor at the time such improvements or capital assets are constructed or acquired, plus two (2) percentage points, or in the absence of such prime rate, then at the U.S. Treasury six-month market note (or bond, if so designated) rate as published by any national financial publication selected by Landlord, plus four (4) percentage points, but in no event more than the maximum rate permitted by law, plus reasonable financing charges or reserves for the replacement of such improvements.

(3) Payment under or for any easement, license, permit, operating agreement, declaration, restrictive covenant or instrument relating to the Building or Project.

(4) All expenses and rental related to services and costs of supplies, materials and equipment used in operating, managing and maintaining the Premises, Building and Project, the equipment therein and the adjacent sidewalks, driveways, parking and service areas, including, without limitation, expenses related to service agreements regarding security, fire and other alarm systems, janitorial services, window cleaning, Building exterior maintenance, landscaping and expenses related to the administration, management and operation of the Project, including without limitation salaries, wages and benefits and management office rent.

(5) The cost of supplying any services and utilities which benefit all or a portion of the Premises, Building or Project, including without limitation services and utilities provided pursuant to Section 16 hereof.

(6) Legal expenses and the cost of audits by certified public accountants; provided, however, that legal expenses chargeable as Operating Expenses shall not include the cost of negotiating leases, collecting rents, evicting tenants nor shall it include costs incurred in legal proceedings with or against any tenant or to enforce the provisions of any lease.

(7) A management and accounting cost recovery fee not to exceed five percent (5%) of the sum of the Project's revenues whether managed by Landlord or third party management.

(8) All amounts necessary to inspect, maintain, repair and replace the bearing and fender pilings, structures and improvements of Wharf I. Such amounts may be collected after the expense has been incurred, or may be collected as reserve in advance for the estimated cost of such replacements pursuant to Section 2.4.

If the rentable area of the Building and/or Project is not fully occupied during any fiscal year of the Term as determined by Landlord, an adjustment shall be made in Landlord's reasonable discretion in computing the Operating Expenses for such year so that Tenant pays an equitable portion of all variable items (e.g., utilities, janitorial services and other component expenses that are affected by variations in occupancy levels) of Operating Expenses, as reasonably determined by Landlord; provided, however, that in no event shall Landlord be entitled to collect in excess of one hundred percent (100%) of the total Operating Expenses from all of the tenants in the Building or Project, as the case may be.

Operating Expenses shall not include the cost of providing tenant improvements or other specific costs incurred for the account of, separately billed to and paid by specific tenants of the Building or Project, the initial construction cost of the Building, lease commissions, or debt service on any mortgage or deed of trust recorded with respect to the Project other than pursuant to Section 7.1D(2) above. Notwithstanding anything herein to the contrary, in any instance wherein Landlord, in Landlord's sole discretion, deems Tenant to be responsible for any amounts greater than Tenant's Proportionate Share, Landlord shall have the right to allocate costs in any manner Landlord deems appropriate.

The above enumeration of services and facilities shall not be deemed to impose an obligation on Landlord to make available or provide such services or facilities except to the extent, if any, that Landlord has specifically agreed elsewhere in this Lease to make the same available or provide the same. Without limiting the generality of the foregoing, Tenant acknowledges and agrees that it shall be responsible for providing adequate security for its use of the Premises, the Building and the Project and that Landlord shall have no obligation or liability with respect thereto, except to the extent, if any, that Landlord has specifically agreed elsewhere in this Lease to provide the same.

7.2 Payment of Estimated Operating Expenses. "Estimated Operating Expenses" for any particular year shall mean Landlord's estimate of the Operating Expenses for such fiscal year made with respect to such fiscal year as hereinafter provided. Landlord shall have the right from time to time to revise its fiscal year and interim accounting periods so long as the periods as so revised are reconciled with prior periods in a reasonable manner. During the last month of each fiscal year during the Term, or as soon thereafter as practicable, Landlord shall give Tenant written notice of the Estimated Operating Expenses for the ensuing fiscal year. Tenant shall pay Tenant's Proportionate Share of the Estimated Operating Expenses with installments of Base Rent for the fiscal year to which the Estimated Operating Expenses applies in monthly installments on the first day of each calendar month during such year, in advance. Such payment shall be construed to be Additional Rent for all purposes hereunder. If at any time during the course of the fiscal year, Landlord determines that Operating Expenses are projected to vary from the then Estimated Operating Expenses by more than five percent (5%), Landlord may, by written notice to Tenant, revise the Estimated Operating Expenses for the balance of such fiscal year, and Tenant's monthly installments for the remainder of such year shall be adjusted so that by the end of such fiscal year Tenant has paid to Landlord Tenant's Proportionate Share of the revised Estimated Operating Expenses for such year, such revised installment amounts to be Additional Rent for all purposes hereunder.

7.3 Computation of Operating Expense Adjustment. "Operating Expense Adjustment" shall mean the difference between Estimated Operating Expenses and actual Operating Expenses for any fiscal year determined as hereinafter provided. Within one hundred twenty (120) days after the end of each fiscal year, or as soon thereafter as practicable, Landlord shall deliver to Tenant a statement of actual Operating Expenses for the fiscal year just ended, accompanied by a computation of Operating Expense Adjustment. If such statement shows that Tenant's payment based upon Estimated Operating Expenses is less than Tenant's Proportionate Share of Operating Expenses, then Tenant shall pay to Landlord the difference within twenty (20) days after receipt of such statement, such payment to constitute Additional Rent for all purposes hereunder. If such statement shows that Tenant's payments of Estimated Operating Expenses exceed Tenant's Proportionate Share of Operating Expenses, then (provided that Tenant is not in default under this Lease) Landlord shall pay to Tenant the difference within twenty (20) days after delivery of such statement to Tenant. Notwithstanding the foregoing, piling repair work and certain structural maintenance items that Landlord undertakes during the Lease term

pursuant to Section 2.4 ("**Piling Repair and Structural Maintenance**") shall be reconciled and statements provided on a three year basis. The Piling Repair and Structural Maintenance charge may be collected as a reserve, in Landlord's reasonable discretion, resulting in carried reserve balances over the 3-year cycle. The statement of actual Operating Expenses and computation of Operating Expense Adjustment for Piling Repair and Structural Maintenance shall be provided to Tenant within 120 days after the end of the third fiscal year following the Commencement Date or as soon thereafter as practicable, and at the same time every three years thereafter, at which times the Tenant shall pay the Operating Expense Adjustment (or adjusted reserve amount) for Piling Repair and Structural Maintenance within 20 days after the statement of actual Operating Expenses is delivered, or Landlord shall issue a refund for the remaining reserve balance within such 20 days. No refunds will occur from the Piling Repair and Structural Maintenance reserve account on an annual basis, although Landlord may adjust up or down the estimated reserve collection amounts from year to year based on adjusted repair schedules and required maintenance in order to fund the reserve and complete the repairs. The remaining balance at the end of the 3-year cycle shall be refunded, or the deficit shall be billed to Tenant. If this Lease has been terminated or the Term hereof has expired prior to the date of any statement of actual Operating Expenses, including a statement for Piling Repair and Structural Maintenance, then the annual Operating Expense Adjustment or the Operating Expense Adjustment for that portion of Piling Repair and Structural Maintenance completed before the Lease Termination shall be paid by the appropriate party within twenty (20) days after the date of delivery of the statement of actual Operating Expenses. Should this Lease commence or terminate at any time other than the first day of the fiscal year, Tenant's Proportionate Share of the Operating Expense Adjustment shall be prorated based on a month of 30 days and the number of calendar months during such fiscal year that this Lease is in effect. Notwithstanding anything to the contrary contained in Section 7.1 or 7.2, Landlord's failure to provide any notices or statements within the time periods specified in those sections shall in no way excuse Tenant from its obligation to pay Tenant's Proportionate Share of Operating Expenses.

7.4 Net Lease. This shall be a triple net Lease and Base Rent shall be paid to Landlord absolutely net of all costs and expenses, except as specifically provided to the contrary in this Lease. The provisions for payment of Operating Expenses and the Operating Expense Adjustment are intended to pass on to Tenant and reimburse Landlord for all costs and expenses of the nature described in Section 7.1 incurred in connection with the ownership, management, maintenance, repair, preservation, replacement and operation of the Building and/or Project and its supporting facilities and such additional facilities now and in subsequent years as may be determined by Landlord to be necessary or desirable to the Building and/or Project.

7.5 Tenant Audit. If Tenant shall dispute the amount set forth in any statement provided by Landlord under Section 7.2 or 7.3 above, Tenant shall have the right, to cause Landlord's books and records with respect to Operating Expenses for such fiscal year to be audited by certified public accountants selected by Tenant and subject to Landlord's reasonable right of approval. The Operating Expense Adjustment shall be appropriately adjusted on the basis of such audit. If such audit discloses a liability for a refund in excess of ten percent (10%) of Tenant's Proportionate Share of the Operating Expenses previously reported, the cost of such audit shall be borne by Landlord; otherwise the cost of such audit shall be paid by Tenant. If Tenant shall not request an audit in accordance with the provisions of this Section 7.5 within twenty (20) days after receipt of Landlord's statement provided pursuant to Section 7.2 or 7.3, such statement shall be final and binding for all purposes hereof. Tenant acknowledges and agrees that any information revealed in the above described audit may contain proprietary and sensitive information and that significant damage could result to Landlord if such information were disclosed to any party other than Tenant's auditors. Tenant shall not in any manner disclose, provide or make available any information revealed by the audit to any person or entity without Landlord's prior written consent, which consent may be withheld by Landlord in its sole and absolute discretion. The information disclosed by the audit will be used by Tenant solely for the purpose of evaluating Landlord's books and records in connection with this Section 7.5.

8. INSURANCE AND INDEMNIFICATION.

8.1 Landlord's Insurance. If, and to the extent Landlord elects to do so (in Landlord's sole discretion), Landlord may maintain insurance through individual or blanket policies insuring the Building against fire and extended coverage (including, if Landlord elects, "all risk" coverage, earthquake/volcanic action, flood and/or surface water insurance) for all or a portion of the full replacement cost of the Building, with deductibles and the form and endorsements of such coverage as selected by Landlord, together with rental interruption insurance against loss of Rent. Landlord may also carry such other insurance as Landlord may deem prudent or advisable, including, without limitation, liability insurance in such amounts and on such terms as Landlord shall determine. All such insurance maintained by Landlord shall be for the exclusive benefit of Landlord and Tenant shall have no right or interest therein.

8.2 Tenant Insurance. Tenant shall, at Tenant's expense, obtain and keep in force at all times the following:

A. Commercial General Liability Insurance (Occurrence Form). A policy of commercial general liability insurance (occurrence form) having a combined single limit of not less than Two Million Dollars (\$2,000,000) per occurrence, Four Million Dollars (\$4,000,000) in aggregate, providing coverage for, among other things, blanket contractual liability, Premises, products/completed operations with an "Additional Insured-Managers or Lessors of Premises Endorsement" and containing the "Amendment of the Pollution Exclusion Endorsement" for damage caused by heat, smoke or fumes from a hostile fire, and personal and advertising injury coverage, with deletion of (a) the exclusion for operations within fifty (50) feet of a railroad track (railroad protective liability), if applicable, and (b) the exclusion for explosion, collapse or underground hazard, if applicable. The policy shall not contain any intra-insured exclusions as between insured persons or organizations, and shall include coverage for liability assumed under this Lease as an "insured contract" for the performance of Tenant's indemnity obligations under this Lease;

B. Automobile Liability Insurance. Business automobile liability insurance having a combined single limit of not less than One Million Dollars (\$1,000,000) per occurrence and insuring Tenant against liability for claims arising out of ownership, maintenance, or use of any owned, hired or non-owned automobiles;

C. Workers' Compensation and Employer's Liability Insurance. Workers' compensation insurance having limits not less than those required by state statute and federal statute, if applicable, and covering all persons employed by Tenant in the conduct of its operations on the Premises including coverage for all states and, if applicable, voluntary compensation, together with employer's liability insurance coverage in the amount of at least One Million Dollars (\$1,000,000);

D. Property Insurance. "All risk" property insurance including boiler and machinery comprehensive form, if applicable, covering damage to or loss of any of Tenant's personal property, fixtures, equipment and alterations, including electronic data processing equipment (collectively, "**Tenant's Property**") (and coverage for the full replacement cost thereof including business interruption of Tenant), together with, if the property of Tenant's invitees is to be kept in the Premises, warehouse's legal liability or bailee customers insurance for the full replacement cost of the property belonging to invitees and located in the Premises; and

E. Business Interruption. Loss of income and extra expense insurance in amounts as will reimburse Tenant for direct or indirect loss of earnings attributable to all peril commonly insured against by prudent Tenants in the business of Tenant or to prevention of access to the Premises as a result of such perils.

8.3 General.

A. Insurance Companies. Insurance required to be maintained by Tenant shall be written by companies licensed to do business in the state in which the Premises are located and having a "General Policyholders Rating" of at least "A-VIII" (or such higher rating as may be required by lender having a lien on the Premises) as set forth in the most current issue of "Best's Insurance Guide."

B. Certificates of Insurance. Tenant shall deliver to Landlord certificates of insurance for all insurance required to be maintained by Tenant in a form acceptable to Landlord in its sole discretion, no later than seven (7) days prior to the date of possession of the Premises. Tenant shall, at least ten (10) days prior to expiration of the policy, furnish Landlord with certificates of renewal or "binders" thereof. Each certificate shall expressly provide that such policies shall not be cancelable or otherwise subject to modification except after thirty (30) days' prior written notice to the parties named as additional insureds in this Lease (except in the case of cancellation for nonpayment of premium in which case cancellation shall not take effect until at least ten (10) days' notice has been given to Landlord). If Tenant fails to maintain any insurance required in this Lease, Tenant shall be liable for all losses and costs suffered or incurred by Landlord (including litigation costs and attorneys' fees and expenses) resulting from said failure.

C. Additional Insured. Landlord, Landlord's lender, if any, and any property management company of Landlord for the Premises shall be named as additional insureds on a form approved by Landlord under all of the policies required by Section 8.2. The policies required under Section 8.2 shall provide for severability of interest.

D. Primary Coverage. All insurance to be maintained by Tenant shall, except for workers' compensation and employer's liability insurance, be primary, without right of contribution from insurance of Landlord. Any umbrella liability policy or excess liability policy (which shall be in "following form") shall provide that if the underlying aggregate is exhausted, the excess coverage will drop down as primary insurance. The limits of insurance maintained by Tenant shall not limit Tenant's liability under this Lease.

E. Waiver of Subrogation. Tenant waives any right to recover against Landlord for claims for damages to Tenant's Property whether or not covered by insurance. This provision is intended to waive fully, and for the benefit of Landlord, any rights and/or claims which might give rise to a right of subrogation in favor of any insurance carrier. The coverage obtained by Tenant pursuant to this Lease shall include, without limitation, a waiver of subrogation endorsement attached to the certificate of insurance.

F. Notification of Incidents. Tenant shall notify Landlord immediately and as soon as practicable, but no later than within twenty-four (24) hours after the occurrence of any accidents or incidents in the Premises, which could give rise to a claim under any of the insurance policies required under this Section 8.

8.4 Indemnity. Tenant shall indemnify, protect, defend (at Tenant's sole cost and with legal counsel acceptable to Landlord) and hold harmless, Landlord and Landlord's affiliated entities, and each of their respective members, managers, partners, officers, employees, council members, board members, lenders, agents, contractors, successors and assigns from and against any and all claims, judgments, causes of action, damages, penalties, costs, liabilities, and expenses, including all court costs and attorneys' fees, arising at any time during or after the Term, as a result (directly or indirectly) of or in connection with (i) default in the performance of any Obligation on Tenant's part to be performed under the terms of this Lease, or (ii) Tenant's use of the Premises, the conduct of Tenant's business or any activity, work or things done, permitted or suffered by Tenant or Tenant's employees, agents, customers, visitors, invitees, licensees, contractors, assignees or subtenants (individually, a "**Tenant Party**" and collectively, "**Tenant's Parties**") in or about the Premises, the Building, the Common Area or other portions of the Premises except as provided by law or for claims caused solely by Landlord's gross negligence or willful misconduct. Tenant's indemnity is not intended to nor shall it relieve any insurance carrier of its obligations under policies required to be carried by Licensee pursuant to the provisions of this Lease to the extent such policies cover the results of negligent acts or omissions of Landlord, its employees, agents, contractors, council members, board members and officers or the failure of Landlord to perform any of its obligations under this Lease. The obligations of Tenant under this Section 8.4 shall survive the termination or earlier expiration of this Lease.

8.5 Exemption of Landlord from Liability. Tenant, as a material part of the consideration to Landlord, hereby assumes all risk of damage to the Premises and its property including, but not limited to, Tenant's fixtures, equipment, furniture and alterations, or illness or injury to persons in, upon or about the Premises, arising from any cause, and Tenant hereby expressly releases Landlord and waives all claims in respect thereof against Landlord, except only such claims as are caused solely by Landlord's gross negligence or willful misconduct.

Tenant hereby agrees that Landlord shall not be liable for injury to Tenant's business or any loss of income therefrom or for damage to the property of Tenant, or injury to or illness or death of Tenant or any Tenant Party or any other person in or about the Premises, whether such damage, illness or injury is caused by fire, steam, electricity, gas, water or rain, or from the breakage, leakage or other defects of sprinklers, wires, appliances, ventilation, plumbing, air conditioning or lighting fixtures, or from any other cause, and whether said damage, illness or injury results from conditions arising upon the Premises, upon other portions of the Building or from other sources or places, and regardless of whether the cause of such damage, illness or injury or the means of repairing the same is inaccessible to Tenant, except only damage, illness or injury caused solely by Landlord's gross negligence or willful misconduct.

Landlord shall not be liable for any damages arising from any action, inaction or neglect by any contractor or other tenant, if any, of the Building or Landlord's failure to enforce the terms of any agreements with parties other than Tenant.

9. WAIVER OF SUBROGATION. Landlord and Tenant each waives any claim, loss or cost it might have against the other for any injury to or death of any person or persons, or damage to or theft, destruction, loss, or loss of use of any property (a "**Loss**"), to the extent the same is insured against (or is required to be insured against under the terms hereof) under any property damage insurance policy covering the Building, the Premises, Landlord's or Tenant's fixtures, personal property, leasehold improvements, or business, regardless of whether the negligence of the other party caused such Loss.

10. CONTROL OF AND CHANGES TO COMMON AREA. Landlord shall have the sole and exclusive control of the Common Area, and the right to make changes to the Common Area. The manner in which the Common Area shall be maintained shall be solely determined by Landlord. Furthermore, Landlord's rights shall include, but not be limited to, the right to (a) restrain the use of the Common Area by unauthorized persons; (b) utilize from time to time any portion of the Common Area for promotional, entertainment and related matters; (c) place permanent or temporary kiosks, displays, carts and stands in the Common Area and to lease same to tenants; (d) temporarily close any portion of the Common Area for repairs (including but not limited to paving or piling repairs (such closure shall be up to 1 week but no more often than once per 5 years, such week to be chosen by a majority vote of the tenants), improvements or Alterations, or to discourage non-

customer use, to prevent dedication or an easement by prescription or for any other reason deemed sufficient in Landlord's reasonable judgment; and (e) renovate, upgrade or change the shape and size of the Common Area or add, eliminate or change the location of improvements to the Common Area including, without limitation, buildings, parking areas, roadways and curb cuts, and to construct buildings on the Common Area. Landlord, at any time, may change the shape, size, location, number and extent of the improvements shown on **Exhibit A-2** and eliminate, add or relocate any improvements to any portion of the Project, and may add land to and/or withdraw land from the Project.

11. TENANT'S REPAIRS AND MAINTENANCE.

11.1 By taking possession of the Premises and Building, Tenant accepts them "as is," as being in good order, condition and repair and the condition in which Landlord is obligated to deliver them and suitable for the Permitted Use and Tenant's intended operations in the Premises, whether or not any notice of acceptance is given. Tenant shall at all times during the Term at Tenant's expense maintain the Building, including structural soundness of the roof, foundations, and exterior walls electrical, mechanical or other systems, telephone equipment and wiring servicing, plumbing, lighting in, or about the Building (but not the Common Area) and the Premises in a first-class, good, clean and secure condition and promptly make all necessary repairs and replacements, as determined by Landlord, with materials and workmanship of the same character, kind and quality as the original. Tenant shall, at its expense, promptly repair any damage to the Premises or the Building or Project resulting from or caused by any negligence or act of Tenant or Tenant's Parties.

11.2 If any portion of the Premises is used for the sale or storage of food, then Tenant, at Tenant's expense, will have a bonded, professional pest-and-sanitation control operator provide monthly pest control services. In addition, Tenant agrees to annually inspect the lateral sewer line to point of connection at main sewer line and have the lateral sewer line inspected with a plumbing camera every five years. Results of said inspections shall be provided to Landlord. Throughout Term Tenant will, at Tenant's sole expense, maintain the Premises in a clean, sanitary, and quiet manner and will take such steps as may be necessary, in the reasonable discretion of Landlord, to keep the Premises and/or contiguous other tenant-occupied premises and the Project free of nuisances, odors, and loud sounds, including music associated with Tenant's business or from the operation of any instrument, apparatus, equipment, radio, television, or amplification system. On Tenant's receipt of notice of any complaint of odor or noise that may be resulting from, directly or indirectly, the operation of Tenant's business, Tenant, at Tenant's sole expense, will take such steps as may be necessary to immediately remedy such odor or noise.

11.3 Operations by Tenant. Tenant will at its expense: (a) keep the inside and outside of all glass in the doors and windows located in the Premises intact and clean; (b) keep all exterior surfaces located on the Premises clean and free of graffiti; (c) replace promptly any cracked or broken glass located on the Premises with glass of like grade and quality; (d) maintain the Premises in a clean, orderly and sanitary condition and free of insects, rodents, vermin and other pests; (e) keep any garbage, trash, rubbish or other refuse in rat-proof containers within the interior of the Premises or in Landlord designated trash containers until removed; (f) have such garbage, trash, rubbish and refuse removed on a daily basis; (g) keep all mechanical apparatus reasonably free of vibration and noise which may be transmitted beyond the Premises; (h) comply with all applicable Law; (i) light the show windows of the Premises and exterior signs during Tenant's business hours and turn the same off to the extent reasonably required by Landlord; (j) comply with and observe all rules and regulations established by Landlord or its designee; (k) maintain sufficient and seasonal inventory and have sufficient number of personnel to maximize sales volume in the Premises; and (l) conduct its business in all respects in accordance with high standards of restaurant and retail operation as reasonably determined by Landlord.

12. ALTERATIONS.

12.1 [Except for the initial tenant improvements approved by Landlord and repairs for property condition under Section 12.3 and **Exhibit F**] Tenant shall not make, or allow to be made, any alterations, physical additions, improvements or partitions, including without limitation the attachment of any fixtures or equipment, in, about or to the Premises ("**Alterations**") without obtaining the prior written consent of Landlord, which consent shall not be unreasonably withheld with respect to proposed Alterations which: (a) comply with all applicable Regulations; (b) are, in Landlord's opinion, compatible with the Building or the Project and its mechanical, plumbing, electrical, heating/ventilation/air conditioning systems, and will not cause the Building or Project or such systems to be required to be modified to comply with any Regulations (including, without limitation, the Americans With Disabilities Act); and (c) will not interfere with the use and occupancy of any other portion of the Building or Project by any other tenant or its invitees. Specifically, but without limiting the generality of the foregoing, Landlord shall have the right of written consent for all plans and specifications for the proposed Alterations, construction means and methods, all appropriate permits and licenses, any contractor or subcontractor to be employed on the work of Alterations, and the time for performance of such work, and may impose rules and regulations for contractors and subcontractors performing such work. Tenant shall also supply to Landlord any

documents and information reasonably requested by Landlord in connection with Landlord's consideration of a request for approval hereunder. Tenant shall cause all Alterations to be accomplished in a first-class, good and workmanlike manner, and to comply with all applicable Regulations and Section 29 hereof. Tenant shall at Tenant's sole expense, perform any additional work required under applicable Regulations due to the Alterations hereunder. No review or consent by Landlord of or to any proposed Alteration or additional work shall constitute a waiver of Tenant's obligations under this Section 12, nor constitute any warranty or representation that the same complies with all applicable Regulations, for which Tenant shall at all times be solely responsible. Tenant shall reimburse Landlord for all costs which Landlord may incur in connection with granting approval to Tenant for any such Alterations, including any costs or expenses which Landlord may incur in electing to have outside architects and engineers review said plans and specifications. All such Alterations shall remain the property of Tenant until the expiration or earlier termination of this Lease, at which time they shall be and become the property of Landlord; provided, however, that Landlord may, at Landlord's option, require that Tenant, at Tenant's expense, remove any or all Alterations made by Tenant and restore the Premises by the expiration or earlier termination of this Lease, to their condition existing prior to the construction of any such Alterations. All such removals and restoration shall be accomplished in a first-class and good and workmanlike manner so as not to cause any damage to the Premises or Project whatsoever. If Tenant fails to remove such Alterations or Tenant's trade fixtures or furniture or other personal property, Landlord may keep and use them or remove any of them and cause them to be stored or sold in accordance with applicable law, at Tenant's sole expense. In addition to and wholly apart from Tenant's obligation to pay Tenant's Proportionate Share of Operating Expenses, Tenant shall be responsible for and shall pay prior to delinquency any taxes or governmental service fees, possessory interest taxes, fees or charges in lieu of any such taxes, capital levies, or other charges imposed upon, levied with respect to or assessed against its fixtures or personal property, on the value of Alterations within the Premises, and on Tenant's interest pursuant to this Lease, or any increase in any of the foregoing based on such Alterations. To the extent that any such taxes are not separately assessed or billed to Tenant, Tenant shall pay the amount thereof as invoiced to Tenant by Landlord.

In addition, at Landlord's election and notwithstanding the foregoing, however, Tenant shall pay to Landlord the cost of removing any such Alterations and restoring the Premises to their original condition, and such amount may be deducted from the Security Deposit or any other sums or amounts held by Landlord under this Lease.

12.2 Notices of Construction. In compliance with Section 29 hereof, at least ten (10) business days before beginning construction of any Alteration, Tenant shall give Landlord written notice of the expected commencement date of that construction to permit Landlord to post and record a notice of non-responsibility. Upon substantial completion of construction, if the law so provides, Tenant shall cause a timely notice of completion to be recorded in the office of the recorder of the county in which the Building is located.

12.3 Condition of Premises. Tenant shall correct any items within ninety (90) days of Lease Commencement shown on the Property Condition Report. If the Term is longer than sixty (60) months, then Landlord may, at any time after the expiration of month forty-eight (48) and prior to the commencement of the final twelve (12)-month period of the Term, require Tenant, at Tenant's cost, to make cosmetic changes to the Premises such as new floor finishes, painting, new wall covering, casework, and new tenant fixtures as necessary to maintain the Premises as a first-class operation as specified in a new property condition report to be obtained by Landlord. A new report may be obtained at Landlord's option and expense every five (5) years of the Lease Term. All such work by Tenant will be in accordance with Section 12 and will be completed within three (3) months after the date of Landlord's notice.

12.4 Prevailing Wages. Tenant acknowledges that Landlord has made no representation, express or implied, to Tenant or any person associated with Tenant regarding whether or not laborers employed relative to any construction on the Premises, Building, or Project must be paid the prevailing per diem wage rate for their labor classification, as determined by the State of California, pursuant to California Labor Code Sections 1720 et seq. Tenant agrees with Landlord that Tenant shall assume the responsibility and be solely responsible for determining whether or not laborers employed relative to any construction on the Premises, Building, or Project undertaken by Tenant must be paid the prevailing per diem wage rate for their labor classification, as determined by the State of California, pursuant to California Labor Code Sections 1720 et seq. Landlord shall not be under any duty to monitor or ensure the compliance of Tenant with any State of California labor laws, including, without limitation, prevailing wage laws. Tenant shall indemnify Landlord in accordance with the provisions of Section 8.4 against any claims pursuant to California Labor Code Section 1781 arising from Tenant's construction of any improvements, work or alterations on the Premises, Building, or Project.

13. SIGNS. Tenant shall not place, install, affix, paint or maintain any signs, notices, graphics or banners whatsoever or any window decor which is visible in or from public view or corridors, the Common Area or the exterior of the Premises or the Building, in or on any exterior window or window fronting upon any Common Area, the water, beach or ocean side, or service area without Landlord's prior written approval which Landlord shall have the right to withhold in its

absolute and sole discretion. Any installation of signs, notices, graphics or banners on or about the Premises or Project approved by Landlord shall be subject to any Regulations and to any other requirements imposed by Landlord. Tenant shall remove all such signs or graphics by the expiration or any earlier termination of this Lease. Such installations and removals shall be made in such manner as to avoid injury to or defacement of the Premises, Building or Project and any other improvements contained therein, and Tenant shall repair any injury or defacement including without limitation discoloration caused by such installation or removal.

14. TENANT'S SIGNS, AWNINGS AND CANOPIES. Tenant will not place, or allow any third party to place, or maintain on the roof or on any exterior door or wall of the Premises any permanent sign, banner, flag, awning or canopy or advertising matter without Landlord's prior written consent, which consent shall not be unreasonably withheld, delayed or conditioned. Tenant shall be permitted temporary window and exterior banner signage so long as such temporary signage is professionally produced and approved by Landlord in advance of installation. Tenant shall be allowed permanent building signage up to the maximum size permitted by local governmental authorities. Rear Building signage is prohibited. Tenant's sign shall comply with the City of Monterey Citywide Sign Guidelines adopted March 20, 2012, as the same may be amended or changed from time to time, and any other applicable governmental requirements and approvals. Tenant acknowledges that no pylon sign exists for the Project and no monument sign exists with respect to the Premises. Tenant's sign(s) shall be installed prior to Tenant's opening for business. Tenant further agrees to maintain such sign, awning, canopy, decoration, lettering, or advertising matter as may be approved in good condition and repair at all times at its own expense. If Tenant installs any sign, awning, canopy, decoration, lettering, or advertising matter without Landlord's prior written consent, Landlord may have it removed and stored at Tenant's expense. The removal and storage costs shall bear interest until paid at the maximum rate allowed by law. If Tenant elects to change its exterior signage after initial installation, any such new exterior signage shall be subject to approval by Landlord and the City. If any governmental requirement that Landlord is obligated to comply with necessitates replacement of Tenant's exterior signage, then Tenant shall remove Tenant's existing sign, patch the fascia, and install a new sign that complies with such governmental requirement, at Tenant's sole cost and expense.

No advertising medium shall be utilized by Tenant which can be heard or experienced outside the Premises, including without limitation, flashing lights, searchlights, loudspeakers, phonographs, radios or television, provided that this prohibition does not prevent Tenant from the placement of advertisements on television or radio to promote its business which are then broadcast over public and private mediums or to orally advertise in compliance with applicable laws. Except with Landlord's prior written consent, Tenant shall not display, paint or place, or cause to be displayed, painted or placed, any handbills, bumper stickers or other advertising devices on any vehicle parked in the adjacent parking area to the Project, including those belonging to Tenant, or to Tenant's agent or any other person; nor shall Tenant distribute or cause to be distributed in the Project any handbills or other advertising devices. Tenant shall have no right to spray paint the exterior or interior of the exterior doors without Landlord's prior written consent.

15. INSPECTION/POSTING NOTICES. After reasonable notice, except in emergencies where no such notice shall be required, Landlord and Landlord's agents and representatives, shall have the right to enter the Premises to inspect the same, to clean, to perform such work as may be permitted or required hereunder, to make repairs, improvements or alterations to the Premises, Building or Project or to other tenant spaces therein, to deal with emergencies, to post such notices as may be permitted or required by law to prevent the perfection of liens against Landlord's interest in the Project or to exhibit the Premises to prospective tenants, purchasers, encumbrancers or to others, or for any other purpose as Landlord may deem necessary or desirable; provided, however, that Landlord shall use reasonable efforts not to unreasonably interfere with Tenant's business operations. Tenant shall not be entitled to any abatement of Rent by reason of the exercise of any such right of entry. Tenant waives any claim for damages for any injury or inconvenience to or interference with Tenant's business, any loss of occupancy or quiet enjoyment of the Premises, and any other loss occasioned thereby. Landlord shall at all times have and retain a key with which to unlock all of the doors in, upon and about the Premises, excluding Tenant's vaults and safes or special security areas (designated in advance), and Landlord shall have the right to use any and all means which Landlord may deem necessary or proper to open said doors in an emergency, in order to obtain entry to any portion of the Premises, and any entry to the Premises or portions thereof obtained by Landlord by any of said means, or otherwise, shall not be construed to be a forcible or unlawful entry into, or a detainer of, the Premises, or an eviction, actual or constructive, of Tenant from the Premises or any portions thereof. At any time within six (6) months prior to the expiration of the Term or following any earlier termination of this Lease or agreement to terminate this Lease, Landlord shall have the right to erect on the Premises, Building and/or Project a suitable sign indicating that the Premises are available for lease.

16. SERVICES AND UTILITIES. Tenant shall contract directly for and obtain (and Landlord is to have no responsibility for) all utilities and services necessary for the use and occupancy of the Premises, with exception for domestic water and sewer services which shall be invoiced by Landlord to Tenant. Landlord shall not be liable for, and Tenant shall not be entitled to any abatement or reduction of Rent by reason of, the discontinuation of utilities to the Premises where such

failure is caused by accident, breakage, repairs, strikes, lockouts or other labor disturbances or labor disputes of any character or for any other causes. In the event of an interruption of utility services, Landlord shall cooperate with and assist Tenant as reasonably requested by Tenant (and at Tenant's expense) to reestablish such services as soon as is possible. Tenant hereby waives the provisions of California Civil Code Section 1932(1) or any other applicable existing or future Laws, permitting the termination of this Lease due to the interruption or failure of or inability to provide any services.

16.1 Tenant acknowledges that Tenant has inspected and accepts the water, electricity and other utilities and services being supplied or furnished to the Premises as of the date Tenant takes possession of the Premises, as being sufficient for use of the Premises for reasonable and normal use in their present condition, "as is," and suitable for the Permitted Use, and for Tenant's intended operations in the Premises. Tenant also agrees at all times to cooperate fully with Landlord and to abide by all of the regulations and requirements which Landlord may prescribe for the proper functioning and protection of electrical and plumbing.

16.2 Tenant shall not without written consent of Landlord use any apparatus, equipment or device in the Premises, which will in any way increase the amount of electricity, water, or any other resource being furnished or supplied for the use of the Premises for reasonable and normal retail use, in each case as of the date Tenant takes possession of the Premises and as determined by Landlord, or which will require additions or alterations to or interfere with the Building power distribution systems; nor connect with electric current, except through existing electrical outlets in the Premises or water pipes, any apparatus, equipment or device for the purpose of using electrical current, water, or any other resource. If Tenant shall require water or electric current or any other resource in excess of that being furnished or supplied for the use of the Premises as of the date Tenant takes possession of the Premises as determined by Landlord, Tenant shall first procure the written consent of Landlord which Landlord may refuse, to the use thereof, and Landlord may cause a special meter to be installed in the Premises so as to measure the amount of water, electric current or other resource consumed for any such other use. Tenant shall pay directly to Landlord upon demand as an addition to and separate from payment of Operating Expenses the cost of all such additional resources, energy, utility service and meters (and of installation, maintenance and repair thereof and of any additional circuits or other equipment necessary to furnish such additional resources, energy, utility or service). Landlord may add to the separate or metered charge a recovery of additional expense incurred in keeping account of the excess water, electric current or other resource so consumed. Following receipt of Tenant's request to do so, Landlord shall use good faith efforts to restore any service specifically to be provided under Section 15 that becomes unavailable and which is in Landlord's reasonable control to restore; provided, however, that Landlord shall in no case be liable for any damages directly or indirectly resulting from nor shall the Rent or any monies owed Landlord under this Lease herein reserved be abated by reason of: (a) the installation, use or interruption of use of any equipment used in connection with the furnishing of any such utilities or services, or any change in the character or means of supplying or providing any such utilities or services or any supplier thereof; (b) the failure to furnish or delay in furnishing any such utilities or services when such failure or delay is caused by acts of God or the elements, labor disturbances of any character, or otherwise or because of any interruption of service due to Tenant's use of water, electric current or other resource in excess of that being supplied or furnished for the use of the Premises as of the date Tenant takes possession of the Premises; (c) the inadequacy, limitation, curtailment, rationing or restriction on use of water, electricity, gas or any other form of energy or any other service or utility whatsoever serving the Premises or Project, whether by Regulation or otherwise; or (d) the partial or total unavailability of any such utilities or services to the Premises or the Building or the diminution in the quality or quantity thereof, whether by Regulation or otherwise; or (e) any interruption in Tenant's business operations as a result of any such occurrence; nor shall any such occurrence constitute an actual or constructive eviction of Tenant or a breach of an implied warranty by Landlord. Landlord shall further have no obligation to protect or preserve any apparatus, equipment or device installed by Tenant in the Premises, including without limitation by providing additional or after-hours heating or air conditioning. Landlord shall be entitled to cooperate voluntarily and in a reasonable manner with the efforts of national, state or local governmental agencies or utility suppliers in reducing energy or other resource consumption. The obligation to make services available hereunder shall be subject to the limitations of any such voluntary, reasonable program. In addition, Landlord reserves the right to change the supplier or provider of any such utility or service from time to time. Tenant shall have no right to contract with or otherwise obtain any electrical or other such service for or with respect to the Premises or Tenant's operations therein from any supplier or provider of any such service. Tenant shall cooperate with Landlord and any supplier or provider of such services designated by Landlord from time to time to facilitate the delivery of such services to Tenant at the Premises and to the Building and Project, including without limitation allowing Landlord and Landlord's suppliers or providers, and their respective agents and contractors, reasonable access to the Premises for the purpose of installing, maintaining, repairing, replacing or upgrading such service or any equipment or machinery associated therewith.

16.3 Utilities. Commencing on the Term Commencement Date, Tenant shall ensure that the Premises has sufficient electric, water, gas, telephone, sanitary and storm sewer lines to the Premises and equipment required to provide such services for Tenant's intended Use. If necessary, Landlord will, at Landlord's sole cost and expense, provide separate meters to measure Tenant's individual consumption of utilities. Tenant shall pay, upon demand, for all utilities

furnished to the Premises, or if not separately billed to or metered to Tenant, Tenant's Proportionate Share of all charges jointly serving the Project in accordance with Section 7. All sums payable under this Section 16 shall constitute Additional Rent hereunder.

16.4 Telecommunications Providers. Tenant may contract separately with providers of telecommunications or cellular products, systems or services for the Premises. Even though such products, systems or services may be installed or provided by such providers in the Building, in consideration for Landlord's permitting such providers to provide such services to Tenant, Tenant agrees that Landlord and the Landlord Indemnitees shall in no event be liable to Tenant or any Tenant Party for any damages of any nature whatsoever arising out of or relating to the products, systems or services provided by such providers (or any failure, interruption, defect in or loss of the same) or any acts or omissions of such providers in connection with the same or any interference in Tenant's business caused thereby. Tenant waives and releases all rights and remedies against Landlord and the Landlord Indemnitees that are inconsistent with the foregoing.

16.5 Energy Programs. Within thirty (30) days after the Delivery Date Tenant shall provide to Landlord authorizations from each utility to be used by Tenant in the operation of its Premises whose power consumption Landlord is required to report upon pursuant to California's Energy Use Program. Tenant agrees to cooperate with Landlord to satisfy any governmental requirements regarding energy efficiencies, or to qualify the Project for any energy efficiency programs.

17. SUBORDINATION. Without the necessity of any additional document being executed by Tenant for the purpose of effecting a subordination, this Lease shall be and is hereby declared to be subject and subordinate at all times to: (a) all ground leases or underlying leases which may now exist or hereafter be executed affecting the Premises and/or the land upon which the Premises and Project are situated, or both; and (b) any mortgage or deed of trust which may now exist or be placed upon the Building, the Project and/or the land upon which the Premises or the Project are situated, or said ground leases or underlying leases, or Landlord's interest or estate in any of said items which is specified as security. Notwithstanding the foregoing, Landlord shall have the right to subordinate or cause to be subordinated any such ground leases or underlying leases or any such liens to this Lease. If any ground lease or underlying lease terminates for any reason or any mortgage or deed of trust is foreclosed or a conveyance in lieu of foreclosure is made for any reason, Tenant shall, notwithstanding any subordination, attorn to and become the Tenant of the successor in interest to Landlord provided that Tenant shall not be disturbed in its possession under this Lease by such successor in interest so long as Tenant is not in default under this Lease. Within ten (10) days after request by Landlord, Tenant shall execute and deliver any additional documents evidencing Tenant's attornment or the subordination of this Lease with respect to any such ground leases or underlying leases or any such mortgage or deed of trust, in the form requested by Landlord or by any ground landlord, mortgagee, or beneficiary under a deed of trust, subject to such nondisturbance requirement. If requested in writing by Tenant, Landlord shall use commercially reasonable efforts to obtain a subordination, nondisturbance and attornment agreement for the benefit of Tenant reflecting the foregoing from any ground landlord, mortgagee or beneficiary, at Tenant's expense, subject to such other terms and conditions as the ground landlord, mortgagee or beneficiary may require.

18. FINANCIAL STATEMENTS. At the request of Landlord from time to time, no more often than once per year, Tenant shall provide to Landlord Tenant's and any guarantor's current financial statements or other information discussing financial worth of Tenant and any guarantor, which Landlord shall use solely for purposes of this Lease and in connection with the ownership, management, financing and disposition of the Project.

19. ESTOPPEL CERTIFICATE. Tenant agrees from time to time, within ten (10) days after request of Landlord, to deliver to Landlord, or Landlord's designee, an estoppel certificate stating that this Lease is in full force and effect, that this Lease has not been modified (or stating all modifications, written or oral, to this Lease), the date to which Rent has been paid, the unexpired portion of this Lease, that there are no current defaults by Landlord or Tenant under this Lease (or specifying any such defaults), that the leasehold estate granted by this Lease is the sole interest of Tenant in the Premises and/or the land at which the Premises are situated, and such other matters pertaining to this Lease as may be reasonably requested by Landlord or any mortgagee, beneficiary, purchaser or prospective purchaser of the Building or Project or any interest therein. Failure by Tenant to execute and deliver such certificate shall constitute an acceptance of the Premises and acknowledgment by Tenant that the statements included are true and correct without exception. Tenant agrees that if Tenant fails to execute and deliver such certificate within such ten (10)-day period, Landlord may execute and deliver such certificate on Tenant's behalf and that such certificate shall be binding on Tenant. Landlord and Tenant intend that any statement delivered pursuant to this section may be relied upon by any mortgagee, beneficiary, purchaser or prospective purchaser of the Building or Project or any interest therein. The parties agree that Tenant's obligation to furnish such estoppel certificates in a timely fashion is a material inducement for Landlord's execution of this Lease, and shall be an event

of default (without any cure period that might be provided under Section 28.1C of this Lease) if Tenant fails to fully comply or makes any material misstatement in any such certificate.

20. SECURITY DEPOSIT. Tenant agrees to deposit with Landlord upon execution of this Lease, a security deposit as stated in the Basic Lease Information (the "**Security Deposit**"), which sum shall be held and owned by Landlord, without obligation to pay interest, as security for the performance of Tenant's covenants and obligations under this Lease. The Security Deposit is not an advance rental deposit or a measure of damages incurred by Landlord in case of Tenant's default. Upon the occurrence of any event of default by Tenant, Landlord may from time to time, without prejudice to any other remedy provided herein or by law, use such fund as a credit to the extent necessary to credit against any arrears of Rent or other payments due to Landlord hereunder, and any other damage, injury, expense or liability caused by such event of default, and Tenant shall pay to Landlord, on demand, the amount so applied in order to restore the Security Deposit to its original amount. Although the Security Deposit shall be deemed the property of Landlord, any remaining balance of such deposit shall be returned by Landlord to Tenant at such time after termination of this Lease that all of Tenant's obligations under this Lease have been fulfilled, reduced by such amounts as may be required by Landlord to remedy defaults on the part of Tenant in the payment of Rent or other obligations of Tenant under this Lease, to repair damage to the Premises, Building or Project caused by Tenant or any Tenant's Parties and to clean the Premises. Landlord is hereby granted a security interest in the Security Deposit in accordance with applicable provisions of the California Commercial Code. Landlord may use and commingle the Security Deposit with other funds of Landlord. Tenant hereby waives the provisions of Section 1950.7 of the California Civil Code, and all other provisions of any Regulations, now or hereinafter in force, which restricts the amount or types of claim that a landlord may make upon a security deposit or imposes upon a landlord (or its successors) any obligation with respect to the handling or return of security deposits.

21. LIMITATION OF TENANT'S REMEDIES. The obligations and liability of Landlord to Tenant for any default by Landlord under the terms of this Lease are not personal obligations of Landlord or Landlord's affiliated entities, and each of their respective members, managers, partners, officers, employees, council members, board members, lenders, agents, contractors, successors and assigns, and Tenant agrees to look solely to Landlord's interest in the Project for the recovery of any amount from Landlord, and shall not look to other assets of Landlord nor seek recourse against the assets of Landlord's affiliated entities, and each of their respective members, managers, partners, officers, employees, council members, board members, lenders, agents, contractors, successors and assigns. Any lien obtained to enforce any such judgment and any levy of execution thereon shall be subject and subordinate to any lien, mortgage or deed of trust on the Project. Under no circumstances shall Tenant have the right to offset against or recoup Rent or other payments due and to become due to Landlord hereunder except as expressly provided in this Lease, which Rent and other payments shall be absolutely due and payable hereunder in accordance with the terms hereof. In no case shall Landlord be liable to Tenant for any lost profits, damage to business, or any form of special, indirect or consequential damage on account of any breach of this Lease or otherwise, notwithstanding anything to the contrary contained in this Lease.

22. CONSENT OF LANDLORD AND TENANT. Except as expressly provided to the contrary, wherever in this Lease consent or approval is required, such consent or approval shall be given in writing and shall not be unreasonably withheld, delayed, or conditioned. Landlord shall not be deemed to have withheld its consent unreasonably where Landlord's right to give its consent is conditioned on Landlord obtaining the consent of any person, agency or authority with the right to withhold its consent pursuant to applicable Laws.

If Landlord or Tenant fails to properly give any such consent, the other party hereto shall be entitled to specific performance and shall have such other remedies as are reserved to it under this Lease, but in no event shall Landlord or Tenant be entitled to terminate this Lease as a result of such failure to give consent (including any right of termination under Section 1995.310 of the California Civil Code) unless consent is withheld maliciously or in bad faith.

23. ASSIGNMENT AND SUBLETTING.

23.1 General. This Lease has been negotiated to be and is granted as an accommodation to Tenant. Accordingly, this Lease is personal to Tenant, and Tenant's rights granted hereunder do not include the right to assign this Lease or sublease the Premises, or to receive any excess, either in installments or lump sum, over the Rent which is expressly reserved by Landlord as hereinafter provided, except as otherwise expressly hereinafter provided. Tenant shall not assign or pledge this Lease or sublet the Premises or any part thereof, whether voluntarily or by operation of law, or permit the use or occupancy of the Premises or any part thereof by anyone other than Tenant, or suffer or permit any such assignment, pledge, subleasing or occupancy, without Landlord's prior written consent except as provided herein. If Tenant desires to assign this Lease or sublet any or all of the Premises, Tenant shall give Landlord written notice (the "**Transfer Notice**") at least ninety (90) days prior to the anticipated effective date of the proposed assignment or sublease, which shall contain all of the information reasonably requested by Landlord to address Landlord's decision criteria specified hereinafter. Landlord shall

then have a period of sixty (60) days following receipt of the Transfer Notice to notify Tenant in writing that Landlord elects either: (i) to terminate this Lease as to the space so affected as of the date so requested by Tenant; or (ii) to consent to the proposed assignment or sublease, subject, however, to Landlord's prior written consent of the proposed assignee or subtenant and of any related documents or agreements associated with the assignment or sublease. If Landlord should fail to notify Tenant in writing of such election within said period, Landlord shall be deemed to have waived option (i) above, but written consent by Landlord of the proposed assignee or subtenant shall still be required. If Landlord does not exercise option (i) above, Landlord's consent to a proposed assignment or sublease shall not be unreasonably withheld. Consent to any assignment or subletting shall not constitute consent to any subsequent transaction to which this Section 23 applies.

23.2 Conditions of Landlord's Consent. Without limiting the other instances in which it may be reasonable for Landlord to withhold Landlord's consent to an assignment or subletting, Landlord and Tenant acknowledge that it shall be reasonable for Landlord to withhold Landlord's consent in the following instances: if the proposed assignee does not agree to be bound by and assume the obligations of Tenant under this Lease in form and substance satisfactory to Landlord; the use of the Premises by such proposed assignee or subtenant would not be a Permitted Use or would violate any exclusivity or other arrangement which Landlord has with any other tenant or occupant or any Regulation or would increase the occupancy burden of the Building or Project, or would otherwise result in an undesirable tenant mix for the Project as determined by Landlord in its sole discretion; the proposed assignee or subtenant is not of sound financial condition as determined by Landlord in Landlord's sole discretion; the proposed assignee or subtenant does not have a good reputation as a tenant of property or a good business reputation; the proposed assignee or subtenant is a person with whom Landlord is negotiating to lease space in the Project or is a present tenant of the Project; the assignment or subletting would entail any Alterations which would lessen the value of the leasehold improvements in the Premises or use of any Hazardous Materials or other noxious use or use which may disturb other tenants of the Project; or Tenant is in default of any obligation of Tenant under this Lease, or Tenant has defaulted under this Lease on two (2) or more occasions during any twelve (12) months preceding the date that Tenant shall request consent. Failure by or refusal of Landlord to consent to a proposed assignee or subtenant shall not cause a termination of this Lease. Upon a termination under Section 23.1(i), Landlord may lease the Premises to any party, including parties with whom Tenant has negotiated an assignment or sublease, without incurring any liability to Tenant. At the option of Landlord, a surrender and termination of this Lease shall operate as an assignment to Landlord of some or all subleases or subtenancies. Landlord shall exercise this option by giving notice of that assignment to such subtenants on or before the effective date of the surrender and termination.

23.3 Bonus Rent. Tenant shall pay to Landlord as Additional Rent under the Lease 90% ("Landlord's Share") of the Profit (defined below) on such transaction as and when received by Tenant, unless Landlord gives written notice to Tenant and the assignee or subtenant that Landlord's Share shall be paid by the assignee or subtenant to Landlord directly. Landlord's Share of the Profit shall be in addition to any Percentage Rent which may be applicable to the assignee or sublessee. The "Profit" means (A) all amounts paid to Tenant for such assignment or sublease, including "key" money, monthly rent in excess of the monthly rent payable under the Lease, and all fees and other consideration paid for the assignment or sublease, including fees under any collateral agreements, less (B) real estate broker's commissions and costs of construction of tenant improvements required under such assignment or sublease directly incurred by Tenant for such assignment or sublease. For key money which includes the sale of assets as in a business purchase or assignment, (B) shall also include furniture fixtures and equipment, and merchandise, as applicable. Tenant is entitled to recover such costs and expenses before Tenant is obligated to pay Landlord's Share to Landlord. The Profit in the case of a sublease of less than all the Property is the rent allocable to the subleased space as a percentage on a square footage basis. Tenant shall provide Landlord a written statement certifying all amounts to be paid from any assignment or sublease of the Premises within thirty (30) days after the transaction documentation is signed, and Landlord may inspect Tenant's books and records to verify the accuracy of such statement. On written request, Tenant shall promptly furnish to Landlord copies of all the transaction documentation, all of which shall be certified by Tenant to be complete, true and correct. Landlord's receipt of Landlord's Share shall not be a consent to any further assignment or subletting. The breach of Tenant's obligation under this Section 23.3 shall be a material default of the Lease.

23.4 Corporation. If Tenant is a corporation, a transfer of corporate shares by sale, assignment, bequest, inheritance, operation of law or other disposition (including such a transfer to or by a receiver or trustee in federal or state bankruptcy, insolvency or other proceedings) resulting in a change in the present control of such corporation or any of its parent corporations by the person or persons owning a majority of said corporate shares, shall constitute an assignment for purposes of this Lease.

23.5 Unincorporated Entity. If Tenant is a partnership, joint venture, unincorporated limited liability company or other unincorporated business form, a transfer of the interest of persons, firms or entities responsible for managerial control of Tenant by sale, assignment, bequest, inheritance, operation of law or other disposition, so as to result in a change in the present control of said entity and/or of the underlying beneficial interests of said entity and/or a change in the

identity of the persons responsible for the general credit obligations of said entity shall constitute an assignment for all purposes of this Lease.

23.6 Liability. No assignment or subletting by Tenant, permitted or otherwise, shall relieve Tenant of any obligation under this Lease or any guarantor of this Lease of any liability under its guaranty or alter the primary liability of the Tenant named herein for the payment of Rent or for the performance of any other obligations to be performed by Tenant, including obligations contained in Section 27 with respect to any assignee or subtenant. Landlord may collect rent or other amounts or any portion thereof from any assignee, subtenant, or other occupant of the Premises, permitted or otherwise, and apply the net rent collected to the Rent payable hereunder, but no such collection shall be deemed to be a waiver of this Section 23, or the acceptance of the assignee, subtenant or occupant as tenant, or a release of Tenant from the further performance by Tenant of the obligations of Tenant under this Lease or of any guarantor. Any assignment or subletting which conflicts with the provisions hereof shall be void.

24. AUTHORITY. Landlord represents and warrants that it has full right and authority to enter into this Lease and to perform all of Landlord's obligations hereunder and that all persons signing this Lease on its behalf are authorized to do. Tenant and the person or persons, if any, signing on behalf of Tenant, jointly and severally represent and warrant that Tenant has full right and authority to enter into this Lease, and to perform all of Tenant's obligations hereunder, and that all persons signing this Lease on its behalf are authorized to do so.

25. CONDEMNATION.

25.1 Condemnation Resulting in Termination. If the whole or any substantial part of the Premises should be taken or condemned for any public use under any Regulation, or by right of eminent domain, or by private purchase in lieu thereof, and the taking would prevent or materially interfere with the Permitted Use of the Premises, either party shall have the right to terminate this Lease at its option. If any material portion of the Building or Project is taken or condemned for any public use under any Regulation, or by right of eminent domain, or by private purchase in lieu thereof, Landlord may terminate this Lease at its option. In either of such events, the Rent shall be abated during the unexpired portion of this Lease, effective when the physical taking of said Premises shall have occurred.

25.2 Condemnation Not Resulting in Termination. If a portion of the Project of which the Premises are a part should be taken or condemned for any public use under any Regulation, or by right of eminent domain, or by private purchase in lieu thereof, and the taking prevents or materially interferes with the Permitted Use of the Premises, and this Lease is not terminated as provided in Section 25.1 above, the Rent payable hereunder during the unexpired portion of this Lease shall be reduced, beginning on the date when the physical taking shall have occurred, to such amount as may be fair and reasonable under all of the circumstances, but only after giving Landlord credit for all sums received or to be received by Tenant by the condemning authority. Notwithstanding anything to the contrary contained in this section, if the temporary use or occupancy of any part of the Premises shall be taken or appropriated under power of eminent domain during the Term, this Lease shall be and remain unaffected by such taking or appropriation and Tenant shall continue to pay in full all Rent payable hereunder by Tenant during the Term; in the event of any such temporary appropriation or taking, Tenant shall be entitled to receive that portion of any award which represents compensation for the use of or occupancy of the Premises during the unexpired Term.

25.3 Award. Landlord shall be entitled to (and Tenant shall assign to Landlord) any and all payment, income, rent, award or any interest therein whatsoever which may be paid or made in connection with such taking or conveyance and Tenant shall have no claim against Landlord or otherwise for any sums paid by virtue of such proceedings, whether or not attributable to the value of any unexpired portion of this Lease, except as expressly provided in this Lease. Notwithstanding the foregoing, any compensation specifically and separately awarded Tenant for Tenant's personal property and moving costs, shall be and remain the property of Tenant.

25.4 Waiver of CCP § 1265.130. Each party waives the provisions of California Civil Code Procedure Section 1265.130 allowing either party to petition the superior court to terminate this Lease as a result of a partial taking.

26. CASUALTY DAMAGE.

26.1 General. If the Premises or Building should be damaged or destroyed by fire, flood, earthquake, tornado, or other casualty (collectively, "**Casualty**"), Tenant shall give immediate written notice thereof to Landlord. Within thirty (30) days after Landlord's receipt of such notice, Landlord shall notify Tenant whether in Landlord's estimation material restoration of the Premises can reasonably be made within one hundred eighty (180) days from the date of such notice and receipt of required permits for such restoration. Landlord's determination shall be binding on Tenant.

26.2 Within 180 Days. If the Premises or Building should be damaged by Casualty to such extent that material restoration can in Landlord's estimation be reasonably completed within one hundred eighty (180) days after the date of such notice and receipt of required permits for such restoration, this Lease shall not terminate. Provided that insurance proceeds are received by Landlord to fully repair the damage, Landlord shall proceed to rebuild and repair the Premises diligently and in the manner determined by Landlord, except that Landlord shall not be required to rebuild, repair or replace any part of any Alterations which may have been placed on or about the Premises or paid for by Tenant. [If the Premises are untenantable in whole or in part following such damage, the Rent payable hereunder during the period in which they are untenantable shall be abated proportionately, but only to the extent of rental abatement insurance proceeds received by Landlord during the time and to the extent the Premises are unfit for occupancy.]

26.3 Greater than 180 Days. If the Premises or Building should be damaged by Casualty to such extent that rebuilding or repairs cannot in Landlord's estimation be reasonably completed within one hundred eighty (180) days after the date of such notice and receipt of required permits for such rebuilding or repair, then Landlord shall have the option of either: (1) terminating this Lease effective upon the date of the occurrence of such damage, in which event the Rent shall be abated during the unexpired portion of this Lease; or (2) electing to rebuild or repair the Premises diligently and in the manner determined by Landlord. Landlord shall notify Tenant of its election within thirty (30) days after Landlord's receipt of notice of the damage or destruction. Notwithstanding the above, Landlord shall not be required to rebuild, repair or replace any part of any Alterations which may have been placed, on or about the Premises or paid for by Tenant. [If the Premises are untenantable in whole or in part following such damage, the Rent payable hereunder during the period in which they are untenantable shall be abated proportionately, but only to the extent of rental abatement insurance proceeds received by Landlord during the time and to the extent the Premises are unfit for occupancy.]

26.4 Tenant's Fault. Notwithstanding anything herein to the contrary, if the Premises or any other portion of the Building are damaged by Casualty resulting from the fault, negligence, or breach of this Lease by Tenant or any of Tenant's Parties, Base Rent and Additional Rent shall not be diminished during the repair of such damage and Tenant shall be liable to Landlord for the cost and expense of the repair and restoration of the Building caused thereby to the extent such cost and expense is not covered by insurance proceeds.

26.5 Insurance Proceeds. Notwithstanding anything herein to the contrary, if the Premises or Building are damaged or destroyed and are not fully covered by the insurance proceeds received by Landlord or if the holder of any indebtedness secured by a mortgage or deed of trust covering the Premises requires that the insurance proceeds be applied to such indebtedness, then in either case Landlord shall have the right to terminate this Lease by delivering written notice of termination to Tenant within thirty (30) days after the date of notice to Landlord that said damage or destruction is not fully covered by insurance or such requirement is made by any such holder, as the case may be, whereupon this Lease shall terminate.

26.6 Waiver. This Section 26 shall be Tenant's sole and exclusive remedy in the event of damage or destruction to the Premises or the Building. As a material inducement to Landlord entering into this Lease, Tenant hereby waives any rights it may have under Sections 1932, 1933(4), 1941 or 1942 of the Civil Code of California with respect to any destruction of the Premises, Landlord's obligation for tenantability of the Premises and Tenant's right to make repairs and deduct the expenses of such repairs, or under any similar law, statute or ordinance now or hereafter in effect.

26.7 Tenant's Personal Property. In the event of any damage or destruction of the Premises or the Building, under no circumstances shall Landlord be required to repair any injury or damage to, or make any repairs to or replacements of, Tenant's personal property.

26.8 Closure of Wharf. If the Wharf shall be damaged such that it is reasonably necessary, in Landlord's judgment, to close the Pier for safety, reconstruction or other purposes, Landlord may close the same for such time as it reasonably determines.

27. HOLDING OVER. Unless Landlord expressly consents in writing to Tenant's holding over, Tenant shall be unlawfully and illegally in possession of the Premises, whether or not Landlord accepts any rent from Tenant or any other person while Tenant remains in possession of the Premises without Landlord's written consent. If Tenant shall retain possession of the Premises or any portion thereof without Landlord's consent following the expiration of this Lease or sooner termination for any reason, then Tenant shall pay to Landlord for each day of such retention 150% of the amount of daily rental as of the last month prior to the date of expiration or earlier termination. Tenant shall also indemnify, defend, protect and hold Landlord harmless from any loss, liability or cost, including consequential and incidental damages and reasonable attorneys' fees, incurred by Landlord resulting from delay by Tenant in surrendering the Premises, including, without limitation, any claims made by the succeeding tenant founded on such delay. Acceptance of Rent by Landlord following

expiration or earlier termination of this Lease, or following demand by Landlord for possession of the Premises, shall not constitute a renewal of this Lease, and nothing contained in this Section 27 shall waive Landlord's right of reentry or any other right. Additionally, if upon expiration or earlier termination of this Lease, or following demand by Landlord for possession of the Premises, Tenant has not fulfilled its obligation with respect to repairs and cleanup of the Premises or any other Tenant obligations as set forth in this Lease, then Landlord shall have the right to perform any such obligations as it deems necessary at Tenant's sole cost and expense, and any time required by Landlord to complete such obligations shall be considered a period of holding over and the terms of this Section 27 shall apply. The provisions of this Section 27 shall survive any expiration or earlier termination of this Lease.

28. DEFAULT.

28.1 Events of Default. The occurrence of any of the following shall constitute an event of default on the part of Tenant:

A. Abandonment. Abandonment or vacation of the Premises for a continuous period in excess of five (5) days. Tenant waives any right to notice Tenant may have under Section 1951.3 of the Civil Code of the State of California, the terms of this Section 28.1 being deemed such notice to Tenant as required by said Section 1951.3.

B. Nonpayment of Rent. Failure to pay any installment of Rent or any other amount due and payable hereunder upon the date when said payment is due, as to which time is of the essence.

C. Other Obligations. Failure to perform any obligation, agreement or covenant under this Lease other than those matters specified in subsections A and B of this Section 28.1, and in Sections 8, 17, 19, and 27, such failure continuing for fifteen (15) days after written notice of such failure, as to which time is of the essence.

D. General Assignment. A general assignment by Tenant for the benefit of creditors.

E. Bankruptcy. The filing of any voluntary petition in bankruptcy by Tenant, or the filing of an involuntary petition by Tenant's creditors, which involuntary petition remains undischarged for a period of thirty (30) days. If under applicable law, the trustee in bankruptcy or Tenant has the right to affirm this Lease and continue to perform the obligations of Tenant hereunder, such trustee or Tenant shall, in such time period as may be permitted by the bankruptcy court having jurisdiction, cure all defaults of Tenant hereunder outstanding as of the date of the affirmance of this Lease and provide to Landlord such adequate assurances as may be necessary to ensure Landlord of the continued performance of Tenant's obligations under this Lease.

F. Receivership. The employment of a receiver to take possession of substantially all of Tenant's assets or Tenant's leasehold of the Premises, if such appointment remains undismissed or undischarged for a period of fifteen (15) days after the order therefor.

G. Attachment. The attachment, execution or other judicial seizure of all or substantially all of Tenant's assets or Tenant's leasehold of the Premises, if such attachment or other seizure remains undismissed or undischarged for a period of fifteen (15) days after the levy thereof.

H. Insolvency. The admission by Tenant in writing of its inability to pay its debts as they become due.

28.2 Remedies Upon Default.

A. Termination. In the event of the occurrence of any event of default, Landlord shall have the right to give a written termination notice to Tenant, and on the date specified in such notice, Tenant's right to possession shall terminate, and this Lease shall terminate unless on or before such date all Rent in arrears and all costs and expenses incurred by or on behalf of Landlord hereunder shall have been paid by Tenant and all other events of default of this Lease by Tenant at the time existing shall have been fully remedied to the satisfaction of Landlord. At any time after such termination, Landlord may recover possession of the Premises or any part thereof and expel and remove therefrom Tenant and any other person occupying the same, including any subtenant or subtenants notwithstanding Landlord's consent to any sublease, by any lawful means, and again repossess and enjoy the Premises without prejudice to any of the remedies that Landlord may have under this Lease, or at law or equity by any reason of Tenant's default or of such termination. Landlord hereby reserves the right, but shall not have the obligation, to recognize the continued possession of any subtenant. The delivery or surrender

to Landlord by or on behalf of Tenant of keys, entry codes, or other means to bypass security at the Premises shall not terminate this Lease.

B. Continuation After Default. Even though an event of default may have occurred, this Lease shall continue in effect for so long as Landlord does not terminate Tenant's right to possession under Section 28.2B hereof. Landlord shall have the remedy described in California Civil Code Section 1951.4 ("Landlord may continue this Lease in effect after Tenant's breach and abandonment and recover Rent as it becomes due, if Tenant has the right to sublet or assign, subject only to reasonable limitations"), or any successor code section. Accordingly, if Landlord does not elect to terminate this Lease on account of any event of default by Tenant, Landlord may enforce all of Landlord's rights and remedies under this Lease, including the right to recover Rent as it becomes due. Acts of maintenance, preservation or efforts to lease the Premises or the appointment of a receiver under application of Landlord to protect Landlord's interest under this Lease or other entry by Landlord upon the Premises shall not constitute an election to terminate Tenant's right to possession.

C. Increased Security Deposit. If Tenant is in default under Section 28.1B hereof and such default remains uncured for ten (10) days after such occurrence or such default occurs more than two (2) times in any twelve (12)-month period, Landlord may require that Tenant increase the Security Deposit to the amount of three times the current month's Rent at the time of the most recent default.

D. Mitigation of Damages. Both Landlord and Tenant shall each use commercially reasonable efforts to mitigate any damages resulting from a default of the other party under this Lease.

(1) Landlord's obligation to mitigate damages after a default by Tenant under this Lease that results in Landlord regaining possession of all or part of the Premises shall be satisfied in full if Landlord undertakes to lease the Premises to another tenant (a "**Substitute Tenant**") in accordance with the following criteria:

(a) Landlord shall have no obligation to solicit or entertain negotiations with any other prospective tenants for the Premises until Landlord obtains full and complete possession of the Premises including, without limitation, the final and unappealable legal right to re-let the Premises free of any claim of Tenant.

(b) Landlord shall not be obligated to offer the Premises to any prospective tenant when other premises in the Project suitable for that prospective tenant's use are currently available, or will be available within the next six (6) months.

(c) Landlord shall not be obligated to lease the Premises to a Substitute Tenant for a rental less than the current fair market rental then prevailing for similar retail space in the same market area as the Project.

(d) Landlord shall not be obligated to enter into a new lease under terms and conditions that are unacceptable to Landlord under Landlord's then current leasing policies for comparable space in the Project, provided such policies are commercially reasonable and have been regularly enforced by Landlord prior to the date of Tenant's default of this Lease.

(e) Landlord shall not be obligated to enter into a lease with any proposed Substitute Tenant that does not have, in Landlord's reasonable opinion, sufficient financial resources or operating experience to operate the Premises in a first-class manner, as evidenced by Landlord's willingness to accept other tenants at the Project and in other of Landlord's properties during the Term of this Lease.

(f) Landlord shall not be required to expend any amount of money to alter, remodel, or otherwise make the Premises suitable for a Substitute Tenant.

(g) Landlord shall not be obligated to enter into a lease with any Substitute Tenant whose use would:

- (2) Materially interfere with the tenant mix or balance of the Project;
- (3) Violate any restriction, covenant, or requirement contained in the lease of another tenant of the Project;

- (4) Adversely affect the reputation of the Project; or
- (5) Be incompatible with the operation of the Project as a first-class Project.

(6) Upon compliance with the criteria regarding the re-letting of the Premises after a default by Tenant, Landlord shall be deemed to have fully satisfied Landlord's obligation to mitigate damages under this Lease and under any law or judicial ruling in effect on the date of this Lease or at the time of Tenant's default; and Tenant waives and releases, to the fullest extent legally permissible, any right to assert in any action by Landlord to enforce the terms of this Lease, any defense, counterclaim, or rights of setoff or recoupment respecting the mitigation of damages by Landlord, unless and to the extent Landlord maliciously or in bad faith fails to act in accordance with the requirements of this clause.

(7) Tenant's right to seek damages from Landlord as a result of a default by Landlord under this Lease shall be conditioned on Tenant taking all actions reasonably required, under the circumstances, to minimize any loss or damage to Tenant's property or business, or to any of Tenant's officers, employees, agents, invitees, or other third parties that may be caused by any such default of Landlord.

28.3 Damages After Default. Should Landlord terminate this Lease pursuant to the provisions of Section 28.2A hereof, Landlord shall have the rights and remedies of a Landlord provided by Section 1951.2 of the Civil Code of the State of California, or any successor code sections. Upon such termination, in addition to any other rights and remedies to which Landlord may be entitled under applicable law or at equity, Landlord shall be entitled to recover from Tenant: (1) the worth at the time of award of the unpaid Rent and other amounts which had been earned at the time of termination, (2) the worth at the time of award of the amount by which the unpaid Rent and other amounts that would have been earned after the date of termination until the time of award exceeds the amount of such Rent loss that Tenant proves could have been reasonably avoided; (3) the worth at the time of award of the amount by which the unpaid Rent and other amounts for the balance of the Term after the time of award exceeds the amount of such Rent loss that the Tenant proves could be reasonably avoided; and (4) any other amount and court costs necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform Tenant's obligations under this Lease or which, in the ordinary course of things, would be likely to result therefrom. The "worth at the time of award" as used in (1) and (2) above shall be computed at the Applicable Interest Rate (defined below). The "worth at the time of award" as used in (3) above shall be computed by discounting such amount at the Federal Discount Rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%). If this Lease provides for any periods during the Term during which Tenant is not required to pay Base Rent or if Tenant otherwise receives a Rent concession, then upon the occurrence of an event of default, Tenant shall owe to Landlord the full amount of such Base Rent or value of such Rent concession, plus interest at the Applicable Interest Rate, calculated from the date that such Base Rent or Rent concession would have been payable.

28.4 Late Charge. In addition to its other remedies, Landlord shall have the right without notice or demand to add to the amount of any payment required to be made by Tenant hereunder, and which is not paid and received by Landlord within five (5) days of the due date, an amount equal to an amount equal to five percent (5%) of the delinquent amount, or \$100.00, whichever is greater, for each month or portion thereof that the delinquency remains outstanding to compensate Landlord for the loss of the use of the amount not paid and the administrative costs caused by the delinquency, the parties agreeing that Landlord's damage by virtue of such delinquencies would be extremely difficult and impracticable to compute and the amount stated herein represents a reasonable estimate thereof. Any waiver by Landlord of any late charges or failure to claim the same shall not constitute a waiver of other late charges or any other remedies available to Landlord.

28.5 Interest. Interest shall accrue on all sums not paid when due hereunder at the lesser of eighteen percent (18%) per annum or the maximum interest rate allowed by law ("**Applicable Interest Rate**") from the due date until paid.

28.6 Remedies Cumulative. All of Landlord's rights, privileges and elections or remedies are cumulative and not alternative, to the extent permitted by law and except as otherwise provided herein.

28.7 Replacement of Statutory Notice Requirements. When this Lease requires service of a notice, that notice shall replace rather than supplement any equivalent or similar statutory notice, including any notice required by California Code of Civil Procedure Section 1161 or any similar or successor statute. When a statute requires service of a notice in a particular manner, service of that notice (or a similar notice required by this Lease) in the manner required by this Section 28 shall replace and satisfy the statutory service-of-notice procedures, including those required by California Code of Civil Procedure Section 1162 or any similar or successor statute.

29. LIENS. Tenant shall at all times keep the Premises, the Building and the Project free from liens arising out of or related to work or services performed, materials or supplies furnished or obligations incurred by or on behalf of Tenant or in connection with work made, suffered or done by or on behalf of Tenant in or on the Premises, the Building or Project. If Tenant shall not, within ten (10) days following the imposition of any such lien, cause the same to be released of record by payment or posting of a proper bond, Landlord shall have, in addition to all other remedies provided herein and by law, the right, but not the obligation, to cause the same to be released by such means as Landlord shall deem proper, including payment of the claim giving rise to such lien. All sums paid by Landlord on behalf of Tenant and all expenses incurred by Landlord in connection therefor shall be payable to Landlord by Tenant on demand with interest at the Applicable Interest Rate as Additional Rent. Landlord shall have the right at all times to post and keep posted on the Premises any notices permitted or required by law, or which Landlord shall deem proper, for the protection of Landlord, the Premises, the Project and any other party having an interest therein, from mechanics' and materialmen's liens, and Tenant shall give Landlord not less than ten (10) business days' prior written notice of the commencement of any work in the Premises or Project which could lawfully give rise to a claim for mechanics' or materialmen's liens to permit Landlord to post and record a timely notice of non-responsibility, as Landlord may elect to proceed or as the law may from time to time provide, for which purpose, if Landlord shall so determine, Landlord may enter the Premises. Tenant shall not remove any such notice posted by Landlord without Landlord's consent, and in any event not before completion of the work which could lawfully give rise to a claim for mechanics' or materialmen's liens.

30. SUBSTITUTION. At any time after execution of this Lease, Landlord may substitute for the Premises other premises in the Project (the "**New Premises**") upon not less than sixty (60) days' prior written notice, in which event the New Premises shall be deemed to be the Premises for all purposes hereunder and this Lease shall be deemed modified accordingly to reflect the new location and shall remain in full force and effect as so modified, provided that:

30.1 The New Premises shall be similar in area and in function for Tenant's purposes; and

30.2 If Tenant is occupying the Premises at the time of such substitution, Landlord shall pay the expense of physically moving Tenant, Tenant's property and equipment to the New Premises and shall, at Landlord's sole cost, improve the New Premises with improvements substantially similar to those the Landlord has committed to provide or has provided in the Premises.

31. TRANSFERS BY LANDLORD. In the event of a sale or conveyance by Landlord of the Building or a foreclosure by any creditor of Landlord, the same shall operate to release Landlord from any liability upon any of the covenants or conditions, express or implied, herein contained in favor of Tenant, to the extent required to be performed after the passing of title to Landlord's successor-in-interest. In such event, Tenant agrees to look solely to the responsibility of the successor-in-interest of Landlord under this Lease with respect to the performance of the covenants and duties of "Landlord" to be performed after the passing of title to Landlord's successor-in-interest. This Lease shall not be affected by any such sale and Tenant agrees to attorn to the purchaser or assignee. Landlord's successor(s)-in-interest shall not have liability to Tenant with respect to the failure to perform any of the obligations of "Landlord," to the extent required to be performed prior to the date such successor(s)-in-interest became the owner of the Building.

32. RIGHT OF LANDLORD TO PERFORM TENANT'S COVENANTS. All covenants and agreements to be performed by Tenant under any of the terms of this Lease shall be performed by Tenant at Tenant's sole cost and expense and without any abatement of Rent. If Tenant shall fail to pay any sum of money, other than Base Rent, required to be paid by Tenant hereunder or shall fail to perform any other act on Tenant's part to be performed hereunder, including Tenant's obligations under Section 11 hereof, and such failure shall continue for fifteen (15) days after notice thereof by Landlord, in addition to the other rights and remedies of Landlord, Landlord may make any such payment and perform any such act on Tenant's part. In the case of an emergency, no prior notification by Landlord shall be required. Landlord may take such actions without any obligation and without releasing Tenant from any of Tenant's obligations. All sums so paid by Landlord and all incidental costs incurred by Landlord and interest thereon at the Applicable Interest Rate, from the date of payment by Landlord, shall be paid to Landlord on demand as Additional Rent.

33. WAIVER. If either Landlord or Tenant waives the performance of any term, covenant or condition contained in this Lease, such waiver shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition contained herein, or constitute a course of dealing contrary to the expressed terms of this Lease. The acceptance of Rent by Landlord (including, without limitation, through any "lockbox") shall not constitute a waiver of any preceding breach by Tenant of any term, covenant or condition of this Lease, regardless of Landlord's knowledge of such preceding breach at the time Landlord accepted such Rent. Failure by Landlord to enforce any of the terms, covenants or conditions of this Lease for any length of time shall not be deemed to waive or decrease the right of Landlord to insist

thereafter upon strict performance by Tenant. Waiver by Landlord of any term, covenant or condition contained in this Lease may only be made by a written document signed by Landlord, based upon full knowledge of the circumstances.

34. NOTICES. Each provision of this Lease or of any applicable governmental laws, ordinances, regulations and other requirements with reference to sending, mailing, or delivery of any notice or the making of any payment by Landlord or Tenant to the other shall be deemed to be complied with when and if the following steps are taken:

34.1 Rent. All Rent and other payments required to be made by Tenant to Landlord hereunder shall be payable to Landlord at Landlord's Payment Address set forth in the Basic Lease Information, or at such other address as Landlord may specify from time to time by written notice delivered in accordance herewith. Tenant's obligation to pay Rent and any other amounts to Landlord under the terms of this Lease shall not be deemed satisfied until such Rent and other amounts have been actually received by Landlord.

34.2 Other. All notices, demands, consents and approvals which may or are required to be given by either party to the other hereunder shall be in writing and either personally delivered, sent by commercial overnight courier, mailed, certified or registered, postage prepaid or sent by facsimile or electronic mail with confirmed receipt (and with an original sent by commercial overnight courier or U.S. mail), and in each case addressed to the party to be notified at the Notice Address for such party as specified in the Basic Lease Information or to such other place as the party to be notified may from time to time designate by at least fifteen (15) days' notice to the notifying party. Notices shall be deemed served upon receipt or refusal to accept delivery. Tenant appoints as its agent to receive the service of all default notices and notice of commencement of unlawful detainer proceedings the person in charge of or apparently in charge of occupying the Premises at the time, and, if there is no such person, then such service may be made by attaching the same on the main entrance of the Premises.

34.3 Required Notices. Tenant shall immediately notify Landlord in writing of any notice of a violation or a potential or alleged violation of any Regulation that relates to the Premises or the Project, or of any inquiry, investigation, enforcement or other action that is instituted or threatened by any governmental or regulatory agency against Tenant or any other occupant of the Premises, or any claim that is instituted or threatened by any third party that relates to the Premises or the Project.

34.4 Tenant's Lenders and Equipment. In the event that Tenant seeks to obtain a loan from a lender ("**Lender**") and to secure said loan by Tenant's leasehold interest, furniture, fixtures or equipment ("**FFE**"), copies of all notices given in connection with said loan shall require that the Lender provide the Landlord with all notices given in connection with said loan. Provided that the Landlord receives a written request from the Tenant pursuant to this Section 34.4, the City agrees to provide such Lender with copies of all notices given hereunder to Tenant when and in the same manner given to Tenant at such address as Lender furnishes to Landlord. Without waiving any of the obligations of the Tenant pursuant to this Lease, Landlord agrees to accept payment of Rent from Lender by and on behalf of Tenant.

35. ATTORNEYS' FEES. If Landlord places the enforcement of this Lease, or any part thereof, or the collection of any Rent due, or to become due hereunder, or recovery of possession of the Premises in the hands of an attorney, Tenant shall pay to Landlord, upon demand, Landlord's reasonable attorneys' fees and court costs, whether incurred without trial, at trial, appeal or review. In any action which Landlord or Tenant brings to enforce its respective rights hereunder, the unsuccessful party shall pay all costs incurred by the prevailing party including reasonable attorneys' fees, to be fixed by the court, and said costs and attorneys' fees shall be a part of the judgment in said action.

36. SUCCESSORS AND ASSIGNS. This Lease shall be binding upon and inure to the benefit of Landlord, its successors and assigns, and shall be binding upon and inure to the benefit of Tenant, its successors, and to the extent assignment is approved by Landlord as provided hereunder, Tenant's assigns.

37. FORCE MAJEURE. If performance by a party of any portion of this Lease is made impossible by any prevention, delay, or stoppage caused by strikes, lockouts, labor disputes, acts of God, inability to obtain services, labor, or materials or reasonable substitutes for those items, government actions, civil commotions, fire or other casualty, or other causes beyond the reasonable control of the party obligated to perform, performance by that party for a period equal to the period of that prevention, delay, or stoppage is excused. Tenant's obligation to pay Rent, however, is not excused by this Section 37. Either party shall have the right to terminate this Lease in the event of Force Majeure for a consecutive twelve (12)-month period.

38. SURRENDER OF PREMISES. Tenant shall, upon expiration or sooner termination of this Lease, surrender the Premises to Landlord in the same condition as existed on the date Tenant originally took possession thereof,

including, but not limited to, all interior walls cleaned, all interior painted surfaces repainted in the original color, all holes in walls repaired, all carpets shampooed and cleaned, and all floors cleaned, waxed, and free of any Tenant-introduced marking or painting, all to the reasonable satisfaction of Landlord. Tenant shall remove all of its debris from the Project. At or before the time of surrender, Tenant shall comply with the terms of Section 12.1 hereof with respect to Alterations to the Premises and all other matters addressed in such Section. If the Premises are not so surrendered at the expiration or sooner termination of this Lease, the provisions of Section 25 hereof shall apply. All keys to the Premises or any part thereof shall be surrendered to Landlord upon expiration or sooner termination of the Term. Tenant shall give written notice to Landlord at least thirty (30) days prior to vacating the Premises and shall meet with Landlord for a joint inspection of the Premises at the time of vacating, but nothing contained herein shall be construed as an extension of the Term or as a consent by Landlord to any holding over by Tenant. In the event of Tenant's failure to give such notice or participate in such joint inspection, Landlord's inspection at or after Tenant's vacating the Premises shall conclusively be deemed correct for purposes of determining Tenant's responsibility for repairs and restoration. Any delay caused by Tenant's failure to carry out its obligations under this Section 38 beyond the term hereof, shall constitute unlawful and illegal possession of Premises under Section 27 hereof.

39. PARKING. Landlord and Tenant acknowledge that City of Monterey operates a public parking lot adjacent to the Project. Tenant's and Tenant's Parties' Rights to use the parking area are the same rights as those of any member of the public, no more and no less.

City of Monterey and Landlord shall have no liability for any damage to property or other items located in the parking areas of the Project, nor for any personal injuries or death arising out of the use of parking areas adjacent to the Project by Tenant or any Tenant's Parties. Without limiting the foregoing, if City of Monterey arranges for the parking areas to be operated by an independent contractor not affiliated with City of Monterey, Tenant acknowledges that neither Landlord (nor City of Monterey, if different from Landlord) shall have any liability for claims arising through acts or omissions of such independent contractor. In all events, Tenant agrees to look first to its insurance carrier and to require that Tenant's Parties look first to their respective insurance carriers for payment of any losses sustained in connection with any use of the parking areas.

40. CONTINUOUS OPERATION.

40.1 Tenant Operations/Recapture. Tenant shall open for business to the public for at least one (1) day with the Premises fully fixtured and stocked with merchandise and inventory on or before the Commencement Date. Except with specific, prior approval of Landlord, Tenant shall not display or sell any merchandise or allow vending machines to be stored or remain on the sidewalk or elsewhere outside of the defined exterior of the Premises.

If subsequent to commencing the operation of Tenant's business from within the Premises, Tenant ceases the operation of its business from within the Premises for its Permitted Use for more than thirty (30) consecutive days except in the case of temporary closures due to an event of casualty, condemnation, remodels or in force majeure events such as strikes, lockouts, labor disputes, inability to procure materials, power failure, or events of a similar nature, Landlord shall have the right to recapture possession of the Premises and terminate this Lease by providing Tenant with written notice of Landlord's election to do so (hereinafter referred to as the "**Recapture Notice**"). This Lease shall terminate on the date set forth in the Recapture Notice, which date shall in any event be within 30 days of the date of the Recapture Notice (the "**Recapture Date**"), provided, however, nothing in this Section 40 shall release Tenant from its obligation to pay Landlord all payments of Rent due under the terms of this Lease prior to such Recapture Date. If the Recapture Date occurs within the first five (5) years of the Term, Tenant shall reimburse to Landlord the unamortized amount of leasing commissions incurred by Landlord under this Lease, amortized over the initial term of this Lease. Subject to the foregoing, upon the Recapture Date: (i) all obligations of both parties shall terminate, and (ii) the Lease shall have no further force or effect.

40.2 Hours of Business. From and after the Commencement Date, Tenant will keep the entire Premises continuously open for business during those days and hours as are customary and usual for the type of business operated by Tenant. In any event, minimum hours every year shall be as follows:

From May 15 to and including October 15:

Restaurants	11:00 a.m. to 9:00 p.m.
Retail Stores	11:00 a.m. to 8:00 p.m.
Retail Fish Markets	10:00 a.m. to 6:00 p.m.

Charter Boats 6:00 a.m. to 12:00 p.m.

From October 16 to and including May 14:

Restaurants 11:00 a.m. to 9:00 p.m.

Retail Stores 11:00 a.m. to 7:00 p.m.

Retail Fish Markets 10:00 a.m. to 6:00 p.m.

Charter Boats 6:00 a.m. to 12:00 p.m., except during inclement weather

Tenant will have its window displays, exterior signs, and exterior advertising displays adequately illuminated continuously during those hours and days that the Premises are required to be open for business to the public.

40.3 Radius Restriction. During the Term, neither Tenant nor any entity affiliated with Tenant will own, operate, or have any financial interest in any business similar to the business of Tenant, or operating under the same or a similar trade name as set forth in Basic Lease Information, if such other business is opened after the Effective Date and its front door or storefront opening is located within the Radius Restriction set forth in Basic Lease Information. Without limiting Landlord's remedies, if Tenant violates this covenant, then Landlord, for so long as Tenant is operating the other business, may (a) include the gross sales (as the term Gross Sales is defined in this Lease) of the other business in the Gross Sales made from the Premises for the purpose of computing Percentage Rent; (b) terminate this Lease on written notice to Tenant; or (c) increase the Base Rent in effect during the period of the violation of this covenant by twenty-five percent (25%). Landlord or its authorized representative, at all reasonable times during the Term and for a period of at least three (3) years after expiration or earlier termination of this Lease, has the right to inspect, audit, copy, and make extracts of the books, records, and accounts pertaining to such other business, in the manner set forth in Section 6.2C, for the purpose of determining and verifying the additional Percentage Rent due to Landlord under this Section 40.

41. MISCELLANEOUS.

41.1 General. The term "Tenant" or any pronoun used in place thereof shall indicate and include the masculine or feminine, the singular or plural number, individuals, firms or corporations, and their respective successors, executors, administrators and permitted assigns, according to the context hereof.

41.2 Time. Time is of the essence regarding this Lease and all of its provisions.

41.3 Choice of Law. This Lease shall in all respects be governed by the laws of the State of California.

41.4 Entire Agreement. This Lease, together with its Exhibits, addenda and attachments and the Basic Lease Information, contains all the agreements of the parties hereto and supersedes any previous negotiations. There have been no representations made by the Landlord or understandings made between the parties other than those set forth in this Lease and its Exhibits, addenda and attachments and the Basic Lease Information.

41.5 Modification. This Lease may not be modified except by a written instrument signed by the parties hereto. Tenant accepts the area of the Premises as specified in the Basic Lease Information as the approximate area of the Premises for all purposes under this Lease, and acknowledges and agrees that no other definition of the area (rentable, usable or otherwise) of the Premises shall apply. Tenant shall in no event be entitled to a recalculation of the square footage of the Premises, rentable, usable or otherwise, and no recalculation, if made, irrespective of its purpose, shall reduce Tenant's obligations under this Lease in any manner, including without limitation the amount of Base Rent payable by Tenant or Tenant's Proportionate Share of the Building and of the Project.

41.6 Severability. If, for any reason whatsoever, any of the provisions hereof shall be unenforceable or ineffective, all of the other provisions shall be and remain in full force and effect.

41.7 Recordation. Tenant shall not record this Lease or a short form memorandum hereof without Landlord's prior written approval.

41.8 Examination of Lease. Submission of this Lease to Tenant does not constitute an option or offer to lease and this Lease is not effective otherwise until execution and delivery by both Landlord and Tenant.

41.9 Accord and Satisfaction. No payment by Tenant of a lesser amount than the total Rent due nor any endorsement on any check or letter accompanying any check or payment of Rent shall be deemed an accord and satisfaction of full payment of Rent, and Landlord may accept such payment without prejudice to Landlord's right to recover the balance of such Rent or to pursue other remedies. All offers by or on behalf of Tenant of accord and satisfaction are hereby rejected in advance.

41.10 Easements. Landlord may grant easements on the Project and dedicate for public use portions of the Project without Tenant's consent; provided that no such grant or dedication shall materially interfere with Tenant's Permitted Use of the Premises. Upon Landlord's request, Tenant shall execute, acknowledge and deliver to Landlord documents, instruments, maps and plats necessary to effectuate Tenant's covenants hereunder.

41.11 Drafting and Determination Presumption. The parties acknowledge that this Lease has been agreed to by both the parties, that both Landlord and Tenant have consulted with attorneys with respect to the terms of this Lease and that no presumption shall be created against Landlord because Landlord drafted this Lease. Except as otherwise specifically set forth in this Lease, with respect to any consent, determination or estimation of Landlord required or allowed in this Lease or requested of Landlord, Landlord's consent, determination or estimation shall be given or made solely by Landlord in Landlord's good faith opinion, whether or not objectively reasonable. If Landlord fails to respond to any request for its consent within the time period, if any, specified in this Lease, Landlord shall be deemed to have disapproved such request.

41.12 Exhibits. The Basic Lease Information, and the Exhibits, addenda and attachments attached hereto are hereby incorporated herein by this reference and made a part of this Lease as though fully set forth herein.

41.13 No Light, Air or View Easement. Any diminution or shutting off of light, air or view by any structure which may be erected on lands adjacent to or in the vicinity of the Building shall in no way affect this Lease or impose any liability on Landlord.

41.14 No Third Party Benefit. This Lease is a contract between Landlord and Tenant and nothing herein is intended to create any third party benefit.

41.15 Quiet Enjoyment. Upon payment by Tenant of the Rent, and upon the observance and performance of all of the other covenants, terms and conditions on Tenant's part to be observed and performed, Tenant shall peaceably and quietly hold and enjoy the Premises for the term hereby demised without hindrance or interruption by Landlord or any other person or persons lawfully or equitably claiming by, through or under Landlord, subject, nevertheless, to all of the other terms and conditions of this Lease. Landlord shall not be liable for any hindrance, interruption, interference or disturbance by other tenants or third persons, nor shall Tenant be released from any obligations under this Lease because of such hindrance, interruption, interference or disturbance.

41.16 Counterparts. This Lease may be executed in any number of counterparts, each of which shall be deemed an original.

41.17 Multiple Parties. If more than one person or entity is named herein as Tenant, such multiple parties shall have joint and several responsibility to comply with the terms of this Lease.

41.18 Prorations. Any Rent or other amounts payable to Landlord by Tenant hereunder for any fractional month shall be prorated based on a month of 30 days. As used herein, the term "fiscal year" shall mean the calendar year or such other fiscal year as Landlord may deem appropriate.

42. ADDITIONAL PROVISIONS.

42.1 Inspection by Certified Access Specialist. Landlord discloses that the Premises have undergone inspection by a Certified Access Specialist and such report has been provided to Tenant prior to Lease execution for its inspection. The CASp report indicates non-compliance. The parties agree that Tenant shall be responsible and required to bring the Premises into compliance. California Civil Code Section 1938 subsection (e) provides: "A Certified Access Specialist (CASp) can inspect the subject premises and determine whether the subject premises comply with all of the

applicable construction-related accessibility standards under state law. Although state law does not require a CASp inspection of the subject premises, the commercial property owner or lessor may not prohibit the lessee or tenant from obtaining a CASp inspection of the subject premises for the occupancy or potential occupancy of the lessee or tenant, if requested by lessee or tenant. The parties shall mutually agree on the arrangements for the time and manner of the CASp inspection, the payment of the fee for the CASp inspection, and the cost of making and repairs necessary to correct violations of construction-related accessibility standards within the premises.” Pursuant to Civil Code Section 1938(b), Tenant acknowledges and agrees that the CASp report provided by Landlord shall remain confidential and shall not be shared with other parties other than Tenant, its attorneys or contractors engaged to complete any CASp repairs. If Tenant wishes to have the Premises inspected by a CASp in addition to the initial report provided by Landlord: (i) Tenant must notify Landlord on or before the date when Tenant executes this Lease pursuant to the election below; (ii) the inspection will be at Tenant’s sole cost and expense; (iii) the inspection must be scheduled through Landlord and in coordination with the Building’s property manager; (iv) any repairs or modifications necessary to correct any violation of construction-related accessibility standards that is noted in the CASp report shall be Tenant’s responsibility; and (v) Tenant must provide a copy of the CASp report to Landlord on completion. By initialing below, Tenant represents that:

Tenant acknowledges that it received the CASp inspection for the Premises at least 48 hours prior to Lease execution.
Initials: _____

42.2 Guarantor. If there are any guarantors of this Lease, said guarantors shall have the same obligations as Tenant under this Lease, and shall execute a guaranty in the form attached hereto as **Exhibit G**.

42.3 Guard Service. Tenant hereby acknowledges that Landlord shall have no obligation whatsoever to provide guard service or other security measures for the benefit of the Premises, the Building or the Project. Tenant assumes all responsibility for the protection of Tenant, its agents, employees, contractors, customers and invitees and the property of Tenant and of Tenant's agents, employees, contractors, customers and invitees, from acts of third parties. Nothing herein contained shall prevent Landlord, in Landlord's reasonable judgment, from providing security protection for the Project or any part of it, in which event the cost thereof shall be a Common Area Cost subject to reimbursement as set forth in Article 7.

43. GOVERNING LAW; WAIVER OF TRIAL BY JURY. THIS LEASE SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA. IN ANY ACTION OR PROCEEDING ARISING HEREFROM, LANDLORD AND TENANT HEREBY CONSENT TO (I) THE JURISDICTION OF ANY COMPETENT COURT WITHIN THE STATE OF CALIFORNIA, (II) SERVICE OF PROCESS BY ANY MEANS AUTHORIZED BY CALIFORNIA LAW, AND (III) IN THE INTEREST OF SAVING TIME AND EXPENSE, TRIAL WITHOUT A JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THE PARTIES HERETO AGAINST THE OTHER OR THEIR SUCCESSORS IN RESPECT OF ANY MATTER ARISING OUT OF OR IN CONNECTION WITH THIS LEASE, THE RELATIONSHIP OF LANDLORD AND TENANT, TENANT'S USE OR OCCUPANCY OF THE PREMISES, AND/OR ANY CLAIM FOR INJURY OR DAMAGE, OR ANY EMERGENCY OR STATUTORY REMEDY.

44. ARBITRATION OF DISPUTES. IN THE EVENT THAT THE JURY WAIVER PROVISIONS OF SECTION 43 ABOVE ARE NOT ENFORCEABLE UNDER CALIFORNIA LAW, THEN THE FOLLOWING PROVISIONS OF THIS SECTION 44 SHALL APPLY. IT IS THE DESIRE AND INTENTION OF THE PARTIES TO AGREE UPON A MECHANISM AND PROCEDURE UNDER WHICH CONTROVERSIES AND DISPUTES ARISING OUT OF THIS LEASE OR RELATED TO THE PREMISES WILL BE RESOLVED IN A PROMPT AND EXPEDITIOUS MANNER. ACCORDINGLY, EXCEPT WITH RESPECT TO ACTIONS FOR UNLAWFUL OR FORCIBLE DETAINER OR WITH RESPECT TO THE PREJUDGMENT REMEDY OF ATTACHMENT, ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER PARTY HERETO AGAINST THE OTHER (AND/OR AGAINST ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS OR SUBSIDIARY OR AFFILIATED ENTITIES) ON ANY MATTERS WHATSOEVER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS LEASE, TENANT'S USE OR OCCUPANCY OF THE PREMISES AND/OR ANY CLAIM OF INJURY OR DAMAGE, SHALL BE HEARD AND RESOLVED BY A REFEREE UNDER THE PROVISIONS OF THE CALIFORNIA CODE OF CIVIL PROCEDURE, SECTIONS 638 - 645.1, INCLUSIVE (AS SAME MAY BE AMENDED, OR ANY SUCCESSOR STATUTE(S) THERETO) (THE "**REFEREE SECTIONS**"). ANY FEE TO INITIATE THE JUDICIAL REFERENCE PROCEEDINGS SHALL BE PAID BY THE PARTY INITIATING SUCH PROCEDURE; PROVIDED HOWEVER, THAT THE COSTS AND FEES, INCLUDING ANY INITIATION FEE, OF SUCH PROCEEDING SHALL ULTIMATELY BE BORNE IN ACCORDANCE WITH SECTION 35. THE VENUE OF THE PROCEEDINGS SHALL BE IN THE COUNTY IN WHICH THE PREMISES ARE LOCATED. WITHIN TEN (10) DAYS OF RECEIPT BY ANY PARTY OF A WRITTEN REQUEST TO RESOLVE ANY DISPUTE OR CONTROVERSY PURSUANT TO THIS SECTION 44, THE PARTIES

SHALL AGREE UPON A SINGLE REFEREE WHO SHALL TRY ALL ISSUES, WHETHER OF FACT OR LAW, AND REPORT A FINDING AND JUDGMENT ON SUCH ISSUES AS REQUIRED BY THE REFEREE SECTIONS. IF THE PARTIES ARE UNABLE TO AGREE UPON A REFEREE WITHIN SUCH TEN (10)-DAY PERIOD, THEN ANY PARTY MAY THEREAFTER FILE A LAWSUIT IN THE COUNTY IN WHICH THE PREMISES ARE LOCATED FOR THE PURPOSE OF APPOINTMENT OF A REFEREE UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 638 AND 640, AS SAME MAY BE AMENDED OF ANY SUCCESSOR STATUTE(S) THERETO. IF THE REFEREE IS APPOINTED BY THE COURT, THE REFEREE SHALL BE A NEUTRAL AND IMPARTIAL RETIRED JUDGE WITH SUBSTANTIAL EXPERIENCE IN THE RELEVANT MATTERS TO BE DETERMINED, FROM JAMS/ENDISPUTE, INC., THE AMERICAN ARBITRATION ASSOCIATION OR SIMILAR MEDIATION/ARBITRATION ENTITY. THE PROPOSED REFEREE MAY BE CHALLENGED BY ANY PARTY FOR ANY OF THE GROUNDS LISTED IN SECTION 641 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE, AS SAME MAY BE AMENDED OR ANY SUCCESSOR STATUTE(S) THERETO. THE REFEREE SHALL HAVE THE POWER TO DECIDE ALL ISSUES OF FACT AND LAW AND REPORT HIS OR HER DECISION ON SUCH ISSUES, AND TO ISSUE ALL RECOGNIZED REMEDIES AVAILABLE AT LAW OR IN EQUITY FOR ANY CAUSE OF ACTION THAT IS BEFORE THE REFEREE, INCLUDING AN AWARD OF ATTORNEYS' FEES AND COSTS IN ACCORDANCE WITH CALIFORNIA LAW. THE REFEREE SHALL NOT, HOWEVER, HAVE THE POWER TO AWARD PUNITIVE DAMAGES, NOR ANY OTHER DAMAGES WHICH ARE NOT PERMITTED BY THE EXPRESS PROVISIONS OF THIS LEASE, AND THE PARTIES HEREBY WAIVE ANY RIGHT TO RECOVER ANY SUCH DAMAGES. THE PARTIES SHALL BE ENTITLED TO CONDUCT ALL DISCOVERY AS PROVIDED IN THE CALIFORNIA CODE OF CIVIL PROCEDURE, AND THE REFEREE SHALL OVERSEE DISCOVERY AND MAY ENFORCE ALL DISCOVERY ORDERS IN THE SAME MANNER AS ANY TRIAL COURT JUDGE, WITH RIGHTS TO REGULATE DISCOVERY AND TO ISSUE AND ENFORCE SUBPOENAS, PROTECTIVE ORDERS AND OTHER LIMITATIONS ON DISCOVERY AVAILABLE UNDER CALIFORNIA LAW. THE REFERENCE PROCEEDING SHALL BE CONDUCTED IN ACCORDANCE WITH CALIFORNIA LAW (INCLUDING THE RULES OF EVIDENCE), AND IN ALL REGARDS, THE REFEREE SHALL FOLLOW CALIFORNIA LAW APPLICABLE AT THE TIME OF THE REFERENCE PROCEEDING. IN ACCORDANCE WITH SECTION 644 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE, THE DECISION OF THE REFEREE UPON THE WHOLE ISSUE MUST STAND AS THE DECISION OF THE COURT, AND UPON THE FILING OF THE STATEMENT OF DECISION WITH THE CLERK OF THE COURT, OR WITH THE JUDGE IF THERE IS NO CLERK, JUDGMENT MAY BE ENTERED THEREON IN THE SAME MANNER AS IF THE ACTION HAD BEEN TRIED BY THE COURT. THE PARTIES SHALL PROMPTLY AND DILIGENTLY COOPERATE WITH ONE ANOTHER AND THE REFEREE, AND SHALL PERFORM SUCH ACTS AS MAY BE NECESSARY TO OBTAIN A PROMPT AND EXPEDITIOUS RESOLUTION OF THE DISPUTE OR CONTROVERSY IN ACCORDANCE WITH THE TERMS OF THIS SECTION 44. TO THE EXTENT THAT NO PENDING LAWSUIT HAS BEEN FILED TO OBTAIN THE APPOINTMENT OF A REFEREE, ANY PARTY, AFTER THE ISSUANCE OF THE DECISION OF THE REFEREE, MAY APPLY TO THE COURT OF THE COUNTY IN WHICH THE PREMISES ARE LOCATED FOR CONFIRMATION BY THE COURT OF THE DECISION OF THE REFEREE IN THE SAME MANNER AS A PETITION FOR CONFIRMATION OF AN ARBITRATION AWARD PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1285 ET SEQ. (AS SAME MAY BE AMENDED OR ANY SUCCESSOR STATUTE(S) THERETO).

IN WITNESS WHEREOF, the parties hereto have executed this Lease as of the day and the year first above written.

LANDLORD

City of Monterey, a municipal corporation

By: _____

Its: _____

Date: _____

APPROVED

TENANT

By: _____

Its: _____

Date: _____

APPROVED AS TO FORM:

Nancy A. Park, Attorney for City
Best Best & Krieger, LLP

Exhibit A-1
Premises Description/Floor Plan

Exhibit A-2
Project/Building Site Plan
Project



Exhibit B

Rules and Regulations

A. GENERAL RULES AND REGULATIONS

1. No sign, advertisement, name or notice shall be installed or displayed on any part of the outside of the Premises or in any part of the Common Area without the prior written consent of Landlord. Landlord shall have the right to remove, at Tenant's expense and without notice, any sign installed or displayed in violation of this rule. All approved signs or lettering on doors and walls shall be printed, painted, affixed or inscribed at the expense of Tenant by a person approved by Landlord, using materials and in a style and format approved by Landlord.
2. Tenant shall not place anything or allow anything to be placed near the glass of any window, door, partition or wall which may appear unsightly from outside the Premises, in Landlord's sole discretion. No awnings or other projection shall be attached to the outside walls of the Premises without the prior written consent of Landlord.
3. Tenant shall not obstruct any sidewalks, halls, passages, exits, entrances, or loading docks of the Premises. Neither Tenant nor any employee, invitee, agent, licensee or contractor of Tenant shall go upon or be entitled to use any portion of the roof of the Premises without the prior written consent of Landlord.
4. Unless expressly set forth to the contrary in Tenant's Lease, Tenant shall have no right or entitlement to the display of Tenant's name or logo on any Project sign, monument sign or pylon sign.
5. All cleaning and janitorial services for the Premises shall be provided, at Tenant's sole cost and expense, exclusively by or through Tenant or Tenant's janitorial contractors in accordance with the provisions of Tenant's Lease. Tenant shall not cause any unnecessary labor by carelessness or indifference to the good order and cleanliness of the Premises.
6. Tenant, upon termination of its tenancy, shall deliver to Landlord the keys of all doors and any other locks to the Premises which have been furnished to, or otherwise procured by Tenant.
7. Electric wires, telephones, alarm systems, cable systems, satellite network systems, Internet provider systems or other similar apparatus shall not be installed in the Premises except with the approval and under the direction of Landlord. The location of telephones, call boxes, alarm apparatus, communications equipment and any other equipment affixed to the Premises shall be subject to the approval of Landlord. Any installation of telephones, telegraphs, electric wires, alarm systems, cable systems, satellite network systems, Internet provider systems or other electric apparatus made without permission shall be removed by Tenant at Tenant's own expense.
8. Tenant shall not use or keep in the Premises any kerosene, gasoline or inflammable or combustible fluid or material other than those limited quantities necessary for the operation or maintenance of office equipment, subject to any express provisions of Tenant's Lease to the contrary. Tenant shall not use or permit to be used in the Premises any foul or noxious gas or substance, or permit or allow the Premises to be occupied or used in a manner offensive or objectionable to Landlord or other occupants of the Premises by reason of noise, odors or vibrations, nor shall Tenant bring into or keep in or about the Premises any birds or animals.
9. Tenant shall not use any method of heating or air conditioning other than that supplied by Landlord without the prior written consent of Landlord.
10. Landlord reserves the right from time to time, in Landlord's sole and absolute discretion, exercisable without prior notice and without liability to Tenant: (a) to name or change the name of the Premises or the Project; (b) to change the address of the Premises, and/or (c) to install, replace or change any signs in, on or about the Common Areas, the Premises or Project (except for Tenant's signs, if any, which are expressly permitted by Tenant's Lease).
11. Tenant shall close and lock all doors of its Premises and entirely shut off all water faucets or other water apparatus, unless otherwise needed for Tenant's business and, except with regard to Tenant's computers and other equipment, if any, which reasonably require electricity on a 24-hour basis, all electricity, gas or air outlets before Tenant and its employees leave the Premises. Tenant shall be responsible for any damage or injuries sustained by other tenants or occupants of the Premises or by Landlord for noncompliance with this rule.

12. The toilet rooms, toilets, urinals, wash bowls and other apparatus shall not be used for any purpose other than that for which they were constructed, and no foreign substances of any kind whatsoever shall be placed therein.
13. Tenant shall not make any room to room solicitation of business from other tenants in the Project.
14. Tenant shall not install any radio or television antenna, loudspeaker, cable or other Internet device, or other device on the roof or exterior walls of the Premises. Tenant shall not interfere with radio, television, cable or Internet broadcasting or reception from or in the Building or elsewhere.
15. Except as expressly permitted in Tenant's Lease, Tenant shall not mark, drive nails, screw or drill into the partitions, window mullions, woodwork or plaster, or in any way deface the Premises or any part thereof, except to install normal wall hangings. Tenant shall repair any damage resulting from noncompliance under this rule.
16. Canvassing, soliciting and distribution of handbills or any other written material, and peddling in the Common Area and other portions of the Project are expressly prohibited, and each tenant shall cooperate to prevent same.
17. Landlord reserves the right to exclude or expel from the Project any person who, in Landlord's judgment, is intoxicated or under the influence of liquor or drugs or who is in violation of any of the Rules and Regulations of the Project.
18. Tenant shall store all its trash and garbage within its Premises or in designated trash containers or enclosures within the Project. Tenant shall not place in any trash box or receptacle any material which cannot be disposed of in the ordinary and customary manner of trash and garbage disposal. All garbage and refuse disposal shall be made in accordance with directions reasonably issued from time to time by Landlord.
19. Tenant agrees that it shall comply with all fire and security regulations that may be issued from time to time by Landlord, and Tenant also shall provide Landlord with the name of a designated responsible principal or employee to represent Tenant in all matters pertaining to such fire or security regulations. Tenant shall cooperate fully with Landlord in all matters concerning fire and other emergency procedures.
20. Tenant assumes any and all responsibility for protecting its Premises from theft, robbery and pilferage. Such responsibility shall include keeping doors locked and other means of entry to the Premises closed.
21. The requirements of Tenant will be attended to only upon the appropriate application to Landlord or Landlord's designated representative by an authorized individual. Employees of Landlord shall not perform any work or do anything outside of their regular duties unless under special instructions from Landlord.
22. Landlord may waive any one or more of these Rules and Regulations for the benefit of Tenant or any other tenant, but no such waiver by Landlord shall be construed as a waiver of such Rules and Regulations in favor of Tenant or any other such tenant, nor prevent Landlord from thereafter enforcing any such Rules and Regulations against any and all of the tenants in the Building.
23. These Rules and Regulations are in addition to, and shall not be construed to in any way modify or amend, in whole or in part, the terms, covenants, agreements and conditions of any lease of premises in the Project.
24. Landlord reserves the right to make such other and reasonable Rules and Regulations as, in its judgment, may from time to time be needed for safety, security, care and cleanliness of the Project and for the preservation of good order therein. Tenant agrees to abide by all such Rules and Regulations hereinabove stated and any additional rules and regulations which are adopted.
25. Tenant shall be responsible for the observance of all of the foregoing rules by Tenant's employees, agents, clients, customers, invitees or guests.

Exhibit C
Tenant Work

Exhibit D

Gross Sales Reporting Statement

CITY OF MONTEREY

PLEASE REMIT TO:
City of Monterey
735 Pacific Street, Suite A
Monterey, CA 93940
(831) 646-3944

QUARTERLY REPORT OF ACTUAL GROSS RECEIPTS

QUARTER ENDED _____

Tenant: _____

<u>Month</u>	<u>Gross Sales</u>	<u>Percentage</u>	<u>Percentage Rent</u>	<u>Less Minimum Rent</u>	<u>Amount Due</u>
_____	\$ _____	@ 6 %	\$ _____	\$ _____	\$ _____
_____	\$ _____	@ 6%	\$ _____	\$ _____	\$ _____
_____	\$ _____	@ 6%	\$ _____	\$ _____	\$ _____

Balance due with this report \$ _____

I certify that the above information is a true and accurate report of the total gross receipts for the period indicated.

Signed: _____
Tenant or Tenant's Principal Agent

Date: _____

Exhibit E

Prohibited and Restricted Uses

The following uses are prohibited under this Lease. All terms under this Section 1 shall have the meanings normally given to such terms.

1. No portion of the Premises shall be used for any non-retail use or for any of the following purposes: a flea market or a business selling so-called "second hand" goods, an establishment engaged in the business of selling, exhibiting or delivering pornographic or obscene materials; a so-called "head shop"; off-track betting parlor; a laundromat or dry-cleaning facility; a warehouse; a discotheque, dance hall, or adult entertainment facility; bowling alley; skating rink; billiard or pool hall; massage parlor; game parlor or video arcade or provision of any games in, on or around Premises including but not limited to, self-operated arcade games, mid-way games, games of skill, or virtual reality games; fitness center, workout facility, gym, health spa or studio, or exercise facility; a beauty school, barber college, reading room, place of instruction or any other operation catering primarily to students or trainees and not to retail customers; industrial, residential or manufacturing uses (except approved fishing related uses); house of worship; a medical marijuana dispensary or other business or activity related to the cultivation, possession, manufacture, processing, storing, laboratory testing, labeling, transporting, distribution or sale of medical marijuana or a medical marijuana product or device; bar, tavern or cocktail lounge, unless it is operated in conjunction with a restaurant where the service of alcoholic beverages for on-premises consumption is ancillary to the restaurant business.

2. No portion of the Premises shall be used (i) for the maintenance of any nuisance or the conduct of any activity that violates public policy; (ii) for any activity that physically interferes with the business of any other owner or occupant of any other parcel or property on Wharf 1; (iii) in violation of any law or governmental regulation; (iv) for any "sidewalk sales," or any other sales, promotional activities or displays of merchandise outside the exterior wall of the Premises, except for Wharf promotional events or other events that may be approved by the Landlord from time to time, which approval may be withheld in the sole and absolute discretion of the Landlord; (v) for the storage of any items or vehicles, other than the storage of items within the confines of any building located within the Premises, which items are incidental to the business conducted thereon, and other than trash to be stored in appropriate containers within an enclosed trash area; (vi) to permit advertising media which can be heard or experienced from the exterior of the Premises, from which it emanates, such as flashing lights, searchlights, loudspeakers, phonographs, radios, televisions or any computer devices; (vii) for the distribution of any handbills, bumper stickers or other advertising devices on any vehicle parked in the parking area of Wharf 1; or (viii) for any other unreasonable use not compatible with the operation of Wharf 1 as a vibrant and well maintained commercial retail and restaurant area with a diversified grouping of retail stores, restaurants, and other mercantile establishments.

Exhibit F

Guaranty

LEASE GUARANTY

This Guaranty of Lease ("**Guarantee**") is given as of _____, 20__, by _____ (jointly and severally, "**Guarantor**"), _____ ("**Landlord**"), with reference to the following facts:

A. Landlord and _____ ("**Tenant**"), have executed or will execute that certain Standard Form Retail Lease (the "**Lease**") for _____, California ("**Premises**").

B. As an inducement to Landlord to make the Lease, Guarantor has agreed to guarantee Tenant's obligations under the Lease. Guarantor is desirous that Landlord enter into the Lease with Tenant.

NOW, THEREFORE, in consideration of the execution of the Lease by Landlord, Guarantor hereby unconditionally and irrevocably guarantees the full performance of each and all of the terms, covenants and conditions of the Lease to be kept and performed by Tenant as hereinafter provided.

1. Obligations Guaranteed. Guarantor hereby absolutely, irrevocably and unconditionally guarantees (a) the due and punctual payment to Landlord of all rentals, charges, sums or any other monies due Landlord by Tenant, and (b) the full and faithful performance of all of the terms, covenants, conditions and agreements contained in the Lease and any amendments or extensions thereto to be performed by Tenant. If Tenant fails to timely pay any amount due Landlord, Guarantor shall pay, within 10 days after Landlord's demand, the amount due Landlord by cashier's check or wire transfer.

2. Representations and Warranties. Guarantor hereby represents and warrants that (a) Guarantor has investigated fully whether any benefit will inure to Guarantor by reason of the execution of this Guarantee, and has determined that a direct or indirect benefit will inure to Guarantor by reason of the execution of this Guarantee; (b) Guarantor is not aware of any facts or circumstances that would contradict that this Guarantee is a legal, valid and binding agreement of Guarantor which is enforceable in accordance with its terms; (c) Guarantor has full right, power and authority to execute and deliver this Guarantee, and to perform the undertakings contained herein and the transactions contemplated hereby; and (d) in the case of a Guarantor which is not an individual, all corporate or other action necessary to authorize the execution and delivery of this Guarantee, and the performance of the undertakings contained herein, have been taken.

3. Authority of Landlord. Guarantor hereby agrees that, without notice to Guarantor, Landlord may alter, modify, extend or otherwise change any term of the Lease, and Guarantor's obligations hereunder shall automatically apply to the Lease as altered, modified, extended or changed. No exercise or nonexercise by Landlord of any right given Landlord by this Guarantee and no dealing by Landlord with Guarantor or any other guarantor or any other person shall in any way affect any of the obligations of Guarantor hereunder or give Guarantor any recourse against Landlord. Notwithstanding the foregoing, in the event that Tenant assigns its rights under the Lease to a third party which is not an affiliate of Guarantor, then Guarantor shall not be obligated with respect to any increased obligation of such assignee tenant resulting from any alteration, modification, extension or other change of the Lease that is made without notice to Guarantor.

4. Waivers by Guarantor. Guarantor hereby expressly waives and relinquishes all rights and remedies accorded by applicable law to guarantors and agrees not to assert or take advantage of any such rights or remedies, including, but not limited to: (a) any right to require Landlord, as a condition precedent or concurrent to enforcement of this Guarantee, to proceed against Tenant or any other person or to proceed against or exhaust any security held by Landlord at any time or to pursue any other right or remedy in Landlord's power before proceeding against Guarantor; (b) any defense that may arise by reason of the incapacity, lack of authority, death or disability of any other person or persons or the failure of Landlord to file or enforce a claim against the estate (in administration, bankruptcy or any other proceeding) of any other person or persons; (c) notice of the acceptance of this Guarantee by any person; (d) demand, notice of default or nonpayment and all other notices of any kind to which Guarantor might otherwise be entitled in connection with this Guarantee or the Lease; (e) any defense based upon an election of remedies by Landlord; (f) any defense of whatsoever nature on the part of Tenant which otherwise may have been asserted by Guarantor as a defense hereunder; and (g) any defense arising because of Landlord's election, in any proceeding instituted under the federal Bankruptcy Code, of the application of Section 1111(b)(2) of the

federal Bankruptcy Code of 1978, as amended; it being agreed by the Guarantor that this Guarantee is an absolute guarantee of payment and performance and not of collection, that the failure of Landlord to exercise any rights or remedies Landlord has or may have against the Tenant shall in no way impair the obligation of the Guarantor and that the liability of the Guarantor hereunder is and shall be direct and unconditional. Without limiting the generality of the foregoing or any other provision hereof, Guarantor hereby expressly waives any and all benefits which might otherwise be available to Guarantor under California Civil Code Sections 2809, 2810, 2819, 2825, 2845, 2846, 2849, 2850, or any amendments thereto.

5. No Discharge of Guarantor. The Guarantor agrees that: (a) this Guarantee shall not be discharged or affected by the death or incompetency of the Guarantor; (b) Guarantor shall indemnify, defend, protect and hold Landlord harmless from any loss, cost or expense arising from or attributable to the failure of performance of any obligation, condition or event that is hereby guaranteed; and (c) the liability of Guarantor under this Guarantee shall be reinstated and revived, and the rights of Landlord shall continue, with respect to any amount at any time paid on account of the Lease, which shall thereafter be required to be restored or returned by Landlord upon the bankruptcy, insolvency or reorganization of Tenant, Guarantor or any other guarantor, or otherwise, all as though such amount had not been paid.

6. Independent Investigation by Guarantor. The Guarantor has made an independent investigation of the financial condition of Tenant and the ability of Tenant to perform the obligations hereby guaranteed prior to making this Guarantee. Guarantor hereby waives any defense that the Guarantor may have by reason of the failure of Landlord to provide the Guarantor with any information respecting the financial condition of Tenant, or Tenant's ability to perform any of the obligations hereby guaranteed, and any duty on the part of Landlord to disclose to Guarantor any facts that Landlord may now or hereafter know about Tenant, regardless of whether Landlord has reason to believe that any such facts materially increase the risk beyond that which Guarantor intends to assume or has reason to believe that such facts are unknown to Guarantor or has a reasonable opportunity to communicate such facts to Guarantor. Guarantor understands and agrees that Guarantor is fully responsible for being and keeping informed of the financial condition of Tenant and of all circumstances bearing on the risk of nonperformance of any obligations hereby guaranteed.

7. Counterparts. This Guarantee may be signed in multiple counterparts, with the same effect as if all signatories had executed the same counterpart.

8. Waiver of Subrogation. Until all obligations guaranteed hereby and all obligations of Guarantor hereunder have been fully performed, Guarantor shall have no right of subrogation or right of reimbursement from Tenant or any guarantor and waives any right to enforce any remedy which Landlord now has or may hereafter have against Tenant and any benefit of, and any right to participate in, any security now or hereafter held by Landlord.

9. Actions. The obligations of Guarantor hereunder are independent of the obligations of Tenant and, in the event of any default hereunder, a separate action or actions may be brought and prosecuted against Guarantor, whether not Tenant is joined therein or a separate action or actions are brought against Tenant. Landlord may maintain successive actions for other defaults. This Guarantee may be enforced by an action against Guarantor, without the necessity of joining in such action any other guarantor of the obligations of Tenant guaranteed hereby. Landlord's rights hereunder shall not be exhausted by exercise of any of the rights or remedies of Landlord or by any such action or by any number of successive actions until and unless all indebtedness and all obligations, the performance and payment of which are hereby guaranteed, have been paid and fully performed.

10. Payments; Attorneys' Fees. All payments, advances, charges, costs and expenses, including reasonable attorneys' fees, made or incurred by Landlord in the enforcement of this Guaranty or due from Guarantor in the collection or performance of the Lease obligations guaranteed hereby, or any portion thereof, shall be paid by Guarantor within 10 days after demand by Landlord, together with interest thereon accruing from and after the lapse of such 10 days at the rate of 10% per annum. Payment shall be made by cashier's check or wire transfer. Attorneys' fees shall include, but not be limited to, all costs, attorneys' fees and expenses incurred by Landlord in connection with any insolvency, bankruptcy, reorganization, arrangement or other similar proceedings involving Guarantor which affect the exercise by Landlord of the rights and remedies of Landlord hereunder. If Guarantor is the prevailing party in any litigation or action to enforce this Guarantee, Landlord shall reimburse Guarantor for all costs, attorneys' fees and expenses incurred by Guarantor in connection with such proceeding.

11. Severability. If any provision or portion thereof of this Guarantee is declared or found by a court of competent jurisdiction to be unenforceable or null and void, such provision or portion thereof shall be deemed stricken and severed from this Guarantee, and the remaining provisions and portions thereof shall continue in full force and effect.

12. Binding Effect; Assignment. This Guarantee shall inure to the benefit of Landlord, its successors and assigns, and shall bind the heirs, executors, administrators, personal representatives, successors and assigns of Guarantor. This Guarantee may be assigned by Landlord but only in connection with Landlord's assignment of Landlord's interest under the Lease and, when so assigned, Guarantor shall be liable to the assignees under this Guarantee without in any manner affecting the liability of Guarantor hereunder. Prior notice from Landlord of assignment or transfer is hereby waived by Guarantor.

13. Amendments. This Guarantee can only be amended in writing. Guarantor cannot be released from Guarantor's obligations hereunder, except by a writing duly executed by Landlord. Notwithstanding the return of this Guarantee to Guarantor by Landlord, or the execution of a release hereof by Landlord, this Guarantee and all obligations of Guarantor hereunder shall remain in effect for all periods of time thereafter during which any payments made by the Tenant with respect to the Lease may be claimed to be avoidable preference under applicable provisions of the federal Bankruptcy Code of 1978, as amended.

14. Miscellaneous. When the context and construction so require, all words used in the singular herein shall be deemed to have been used in the plural, and the masculine shall include the feminine and neuter, and vice versa. The word "person," as used herein, shall include any individual, company, firm, association, partnership, corporation, trust or other legal entity of any kind whatsoever. Each reference to "Guarantor" herein shall mean the undersigned, and each of them, and any combination of them.

15. Governing Law. This Guarantee shall be governed by and construed in accordance with the laws of the State of California.

16. Integration. Except as provided in any other written agreement now or at any time hereafter in force between Landlord and Guarantor, this Guarantee shall constitute the entire agreement of Guarantor with Landlord with respect to the subject matter hereof. All representations, understandings, promises and conditions concerning the subject matter hereof are expressed herein.

17. Authority. If Guarantor is a corporation, limited liability company or other entity, each person executing this Guarantee on behalf of such entity represents and warrants that he or she is duly authorized to execute and deliver this Guarantee on behalf of such entity, and that such person's execution of this Guarantee binds Guarantor to its terms and conditions.

18. Notices. All notices and demands required to be sent to the Landlord or Guarantor under the terms of this Guarantee shall be in writing and may be served (a) by personal delivery, (b) by certified mail, postage prepaid, (c) by overnight courier (i.e., Federal Express), or (d) by receipt-confirmed facsimile transmission, provided a copy is also delivered by personal delivery, mail or courier, to the address(es) and/or facsimile number(s) specified below, or to such other addresses or facsimile number as a party may from time to time designate by notice pursuant to this paragraph. Notices shall be deemed received upon the earlier of (i) if personally delivered, the date of delivery to the address of the person to receive such notice, (ii) if mailed, two days following the date of posting by the U.S. Postal Service, (iii) if by overnight courier, on the business day following the deposit of such notice with such courier, (iv) if by facsimile, upon printed confirmation of facsimile transmission.

Landlord Notice Address:

City of Monterey
Attn: City Manager
580 Pacific Street
Monterey, CA 93940

Guarantor Notice Address

19. Joint and Several Obligations. The obligations of each of the persons signing this Guarantee shall be joint and several. If this Guarantee is unenforceable against any of the Guarantors, such unenforceability shall not affect the obligations of the remaining persons comprising Guarantor or the enforceability of this Guarantee against such remaining Guarantors.

IN WITNESS WHEREOF, the undersigned guarantor, intending to be bound, has executed this Guarantee as of the date first above written.

GUARANTOR:

EXHIBIT ONLY – DO NOT SIGN _____