

RESOLUTION NO. 09-110

**A RESOLUTION OF THE CITY COMMISSION OF THE  
CITY OF KEY WEST, FLORIDA, AUTHORIZING A LEASE  
RENEWAL FOR SOUTHERNMOST BEACH CAFE; PROVIDING  
FOR AN EFFECTIVE DATE**

NOW THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE  
CITY OF KEY WEST, FLORIDA, AS FOLLOWS:

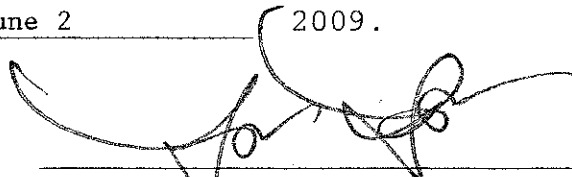
Section 1: That the attached lease agreement for the  
Southernmost Beach Café is approved.

Section 2: That this Resolution shall go into effect  
immediately upon its passage and adoption and authentication by the  
signature of the presiding officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a meeting held  
this 5th day of May 2009.

Authenticated by the presiding officer and Clerk of the  
Commission on June 2, 2009.

Filed with the Clerk June 2 2009.

  
MORGAN MCPHERSON, MAYOR

ATTEST:

  
CHERYL SMITH, CITY CLERK

# EXECUTIVE SUMMARY



**CITY OF KEY WEST  
CITY MANAGERS OFFICE**

**TO: Jim Scholl  
City Commission**

**CC: Mark Finigan, Shawn D. Smith**

**FR: Marilyn Wilbarger, RPA, CCIM**

**DT: April 27, 2009**

**RE: SMB Restaurant, LLC DBA Southernmost Beach Café Lease Renewal**

**ACTION:** This is a request to approve a lease renewal for the property located at 1405 Duval Street in accordance with City Ordinance 05-15, Sec 2-941 which provides for the negotiation of a lease renewal with an existing tenant one year prior to expiration. The negotiations have been completed and the proposed lease renewal is presented for your consideration.

**BACKGROUND:** The lease for the Southernmost Beach Café will expire in January of 2010 and pursuant to City Ordinance we provided public notice and entered into lease renewal negotiations with the current tenant.

There is no change in use anticipated in the lease renewal and the tenant will continue to operate an open air casual beach restaurant with alcoholic beverages which is the permitted use in the current ten year lease. Additionally, pursuant to City of Key West Code of Ordinances, Article II, Division 3, Section 18-88, 1405 Duval is excepted from the open container provision and the lease contemplates that Tenant's patrons may consume alcohol at this location in accordance with this ordinance.

The lease also states that the tenant will not to use any amplified music or other noise making devices that violate the City of Key West's Noise Ordinance and that the tenant will have the right to request special events permits in accordance with City Ordinance governing such events. The beach will remain open to the public and governed by rules for all public beaches in Key West.

The proposed renewal brings the base rental rate up to market and provides for percentage rent in addition to the increased base rent. The new rate is comparable to the base rents of other City owned properties leased to restaurant/ bar tenants. The new agreement also terminates the rent credit for beach and restroom cleaning therefore effectively raises the base rent from \$68,250 to \$150,000 per year. A comparison of the current and proposed lease is attached for your reference.

**FINANCIALS:**

As security for the payment of all amounts due under the lease, the Tenant has posted an irrevocable letter of credit in the amount of \$70,000.00 which may drawn upon by the City Attorney without any additional legal action. This Tenant has an excellent payment history and is not in default of any amounts currently due.

**RECOMMENDATION:**

Staff recommends approval of the action requested.

**ATTACHMENTS:**

Draft Lease

Lease Comparison

<b>Demised Premises:</b>	Existing building containing approximately 4981 square feet, outdoor storage and waiting areas. The beach is a separate parcel and not included in the leased premises.	Entire parcel including beach and building area per the legal description in the lease.
<b>Use:</b>	No change in the existing permitted uses; Operation of a 150 seat open air casual beach restaurant/bar, sale and rental of beach accessories including chairs, umbrellas, snorkel gear, rafts etc. but excluding any motorized watercraft, which are the Tenant's permitted uses in the existing ten year lease and pre-date the commencement of that lease.	Operation of a restaurant, sale and rental of beach accessories
<b>Adjacent Beach:</b>	Beach shall remain open to the public for public purposes during hours established for public beaches in Key West and subject to all rules established for public beaches in Key West.	Beach shall remain open to the public for public purposes
	Per City Ordinance Article II, Division 3, Sec. 18-88 Tenant's patrons may consume alcoholic beverages, after noon, in plastic containers not to exceed 16 ounces, one drink per patron at a time. Tenant may serve alcoholic beverages at special events held on the adjacent beach with permits/licenses.	Tenant may not serve alcohol on the beach.
	Tenant to clean and maintain the beach area and public restrooms daily and Landlord will pay for the cost of the seaweed removal	Tenant to clean and maintain the beach area and public restrooms daily and Landlord will pay for the cost of the seaweed removal
<b>Term:</b>	Ten Years, effective May 1, 2009	Ten years expiring January 2010
<b>Base Rent:</b>	\$150,000 per year in year one, no cleaning credits	Currently \$97,255.70 less \$29,000 annual beach and restroom cleaning credit for a base rent of \$68,255.70
<b>Increase:</b>	5% Annually	Annual CPI
<b>Additional Rent:</b>	Tenant shall pay taxes including ad valorem tax, insurance and maintenance and repair costs (NNNN)	Tenant shall pay taxes including ad valorem tax, insurance and maintenance and repair costs (NNNN)
<b>Percentage Rent:</b>	6.5% in excess of the percentage rent base amount which will be established by dividing the then current base rent by 6.5%	6.5 % of sales over \$1,500,000
<b>Utilities:</b>	Tenant pays for all utility usage	Tenant pays for all utility usage
<b>Improvements:</b>	Tenant accepts the space in its current condition. Any structural improvements contemplated are subject to FEMA restrictions.	Major improvements were completed by the city and the tenant several years ago after hurricane destruction including the addition of ADA public restrooms



THE  
**RANKAUF**  
COMPANY

121 W. Long Lake Road, Third Floor – Suite 310  
Bloomfield Hills, Michigan 48304-2720  
248-645-1600  
Fax: 248 645-8939

May 15, 2009

***VIA FEDEX***

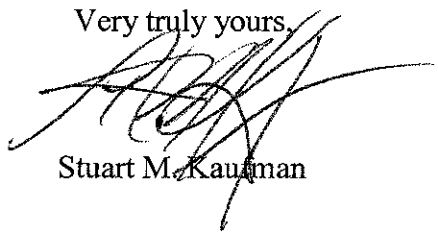
City of Key West  
Attn: Marilyn D. Wilbarger  
525 Angela Street  
Key West, FL 33041

Re: SMB Restaurant LLC

Dear Marilyn:

Enclosed are four copies of the Lease which have been executed by the Tenant per your request.

Very truly yours,



Stuart M. Kaufman

/lh  
Enclosures

City of Key West  
525 Angela Street  
Key West, FL 33041  
Attn: Marilyn Wilbarger

Dear Marilyn

Because the lease between SMB Restaurant LLC as assignee of Island Renovations Inc. (Tenant) and The City of Key West (Landlord) dated February 1, 2000 and covering the premises at 1405 Duval Street, Key West, Fl. (the "Original Lease") is being terminated as of May 1, 2009 which is only three months into the last Lease Year of the Original Lease, Landlord and Tenant have agreed to a method of calculating the Percentage Rent that should be paid for said three month period (the "Prorated Percentage Rent") as follows:

The Prorated Percentage Rent shall be paid in February of 2010 based on the following calculation:

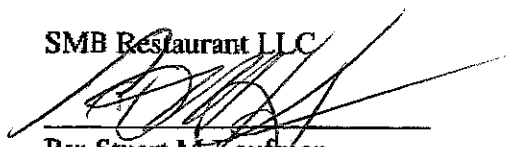
In February of 2010, the parties shall calculate the annual Percentage Rent for the period from February 1, 2009 to January 31, 2010 that would have been paid under the Original Lease had it not been terminated. Tenant shall then pay, prior to the end of February 2010, 3/12<sup>th</sup> of the amount so determined as the Prorated Percentage Rent.

The mathematical formula for the Prorated Percentage Rent calculation is as follows:

$$(((\text{Tenants Gross Sales for the period from February 1, 2009 to January 31, 2010}) - \$1,500,000.00) \times .065) / 12) * 3$$

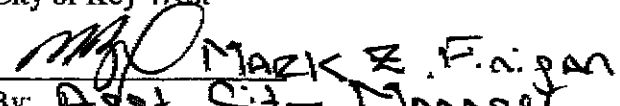
If this letter accurately sets forth our agreement, please so indicate by executing and returning the enclosed counter counterpart hereof.

SMB Restaurant LLC

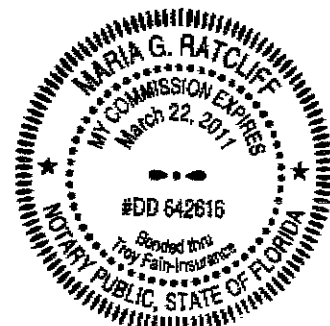
  
By: Stuart M. Kauffman  
Its: Managing Member


Confirmed and Agreed by:

City of Key West

  
By: MARK E. Fajon  
Asst. City Manager  
Its: 5-13-09

≤ P11





# BRANCH BANKING AND TRUST COMPANY

ADDRESS: 1010 KENNEDY DRIVE KEY WEST, FL 34040-4134

PHONE NUMBER: 305-292-3806

CONTACT NAME: JAMES W HALL

## IRREVOCABLE STANDBY LETTER OF CREDIT

LETTER OF CREDIT NO. 9660970859 00002

DATE 05/21/2009

ADVISING BANK

APPLICANT

SMB RESTAURANT LLC  
1405 DUVAL ST  
KEY WEST, FL 33040-3133

BENEFICIARY

AMOUNT

City of Key West  
525 Angela Street

\$150,000.00

KEY WEST, FL 33040-0000

EXPIRY DATE  
05/21/2010

(FOR PRESENTATION  
AT OUR COUNTERS)

GENTLEMEN:

WE HEREBY ESTABLISH OUR IRREVOCABLE STANDBY LETTER OF CREDIT IN YOUR FAVOR

AVAILABLE BY YOUR DRAFT(S) Sight

DRAWN ON: "BRANCH BANKING & TRUST CO."

DRAFT(S) MUST BE MARKED - "DRAWN UNDER BRANCH BANKING AND TRUST COMPANY CREDIT NO. 9660970859 00002"

WHICH MUST BE ACCOMPANIED BY THIS LETTER AND THE FOLLOWING DOCUMENTATION:

Conditions for the City to draw upon this credit are:

1. That at the time of presentment, the city shall execute a draft that refers to this letter of credit and;
2. The draft presented by the City shall be payable solely to the City in the amount claimed by the City as due to the City for damages, costs, and/or attorneys' fees arising from default or non-payment pursuant to that certain lease agreement dated May 1, 2009, by and between the City of Key West, as Lessor, and SMB Restaurant, LLC, as Lessee; and
3. The City shall present along with this letter of credit and with the City's draft, the City's written certificate describing the default and/or non-payment for which the City makes draw against this letter of credit, which certificate shall be signed by the City Attorney and the City Manager, and which certificate shall state the specific amount of damages, interest, costs, penalties, and attorneys' fees of City, with regard to the lease agreement referred to herein above; and
4. No person or entity other than the City may make claim or present a draw under this letter of credit. No person or entity other than City is an intended beneficiary with rights to enforce this letter of credit. Issuing bank shall be entitled to assume as true the statement of default or non-payment in the certificate presented to Bank with any draws on this letter of credit; and
5. The City's presentment pursuant to this letter of credit shall not affect the City's right to pursue any and all remedies against Lessee contained in the lease agreement referred to herein above, including eviction; and
6. It is a condition of this letter of credit that it will be automatically extended up to June 30, 2010 unless we (BB&T) send written notification at least 30 days prior to the expiration date hereof that we (BB&T) elect not to extend this letter of credit for such additional period.

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**Lease Agreement**

between

**CITY OF KEY WEST**

as Landlord

and

**SMB RESTAURANT, LLC**

as Tenant

Dated AS of MAY 1, 2009



THIS LEASE is made as of the 1st day of May, 2009 by and between the LANDLORD and TENANT identified below:

**1. INFORMATION PROVISIONS:**

1.1 LANDLORD'S NAME & MAILING ADDRESS:

CITY OF KEY WEST  
525 ANGELA STREET  
KEY WEST, FL 33040

1.2 TENANT'S NAME & MAILING ADDRESS:

SMB Restaurant, LLC  
121 West Long Lake Road, 3<sup>rd</sup> Floor  
Bloomfield Hills, MI 48304

TENANT'S TRADE NAME: **Southernmost Beach Cafe**

1.3 GUARANTOR (S) AND ADDRESS: The Rankauf Company, LLC, 121 West Long Lake Road, 3<sup>rd</sup> Floor, Bloomfield Hills, MI 48304

1.4 DEMISED PREMISES (Section 2): as per EXHIBIT "A" located at 1405 Duval Street (hereinafter referred to as the "Property").

NET USABLE SQUARE FEET CONSISTING OF A 4981 SQUARE FOOT BUILDING, AN OUTDOOR COVERED STORAGE AREA, AND WAITING AREA AS CROSSHATCHED ON EXHIBIT "A"

EXPANSION/RIGHT OF FIRST REFUSAL: None

1.5 TERM (Section 3.): TEN (10) YEARS

1.5.1 COMMENCEMENT DATE: May 1, 2009 as acknowledged by TENANT'S written statement

1.5.2 RIGHT TO TERMINATE: None

1.5.3 RIGHT TO RENEW: Per Key West Code of Ordinances Sec.2-941. Leases or as amended

1.6 MINIMUM RENT FOR TERM (Section 4): The base rent and base rent increases for the term and any renewals thereof as per EXHIBIT "B" attached hereto and incorporated herein.

1.6.1 ADDITIONAL RENT: (Section 4.4 (e): Tenant shall pay Real Estate Taxes, Insurance, Sales, Use or Excise Taxes together with Administrative fees and any and all other sums of money or charges required to be paid by TENANT pursuant to the provisions of this lease.

1.6.2 RENT PAYMENT DUE DATE: Payable in advance on the first (1<sup>st</sup>) of each and every month of the term hereof.

1.6.3 LATE CHARGE: 15% of the amount in arrears if received after the fifth day of each and every month together with an administrative fee of \$50.00 for processing late payments.

- 1.6.4 PERCENTAGE RENT: Six and One Half Percent 6.5% of TENANT'S Gross Sales in excess of the "Percentage Rent Base Amount" as per EXHIBIT "B".
- 1.6.5 HOLD OVER RENT: 150% of the Minimum Base rent during the last year of the expiring term.
- 1.6.6 RENT CONCESSIONS: None
- 1.7 SECURITY DEPOSIT (Section 5): Tenant shall maintain an irrevocable letter of credit in the amount of \$150,000 throughout the term of this lease and until such time as the tenant has vacated the Demise Premises and the LANDLORD has determined that the TENANT has no outstanding amounts due under this lease.
- 1.8 PERMITTED USE (Section 6): The principal business is the operation of a 150 seat open air casual beach restaurant with accessory alcohol sales. Additionally, the sale and rental of beach accessories such as chairs, umbrellas, snorkel gear, inflatable rafts but excluding any motorized watercraft is permitted. TENANT may hold events on the beach that are not subject to special events permits and do not materially interfere with the public access and use of the beach. TENANT shall have the right to hold five (5) special events per year. The maximum of five (5) special events pursuant to City Ordinance is applicable to both the demised premises and the adjacent public beach. Tenant shall clean and maintain the beach and public restrooms daily however TENANT shall have no obligation for beach sand re-nourishment.
- 1.9 INSURANCE: (Section 9) \$1,000,000 commercial liability minimum per occurrence, all all risk property insurance, including property damage, hazard and theft coverage and workers compensation coverage as required by the provisions of Florida statute.
- 1.10 ASSIGNMENT OR SUBLETTING: (Section 10) Permitted with LANDLORD'S approval
- 1.11 UTILITIES: (Section 17) TENANT shall pay for all utilities including garbage, electricity, gas, water and sewer serving the Demised Premises and the public restrooms.

INITIALS: LANDLORD \_\_\_\_\_

TENANT \_\_\_\_\_

WITNESSETH:

That the LANDLORD and the TENANT, for and in consideration of the keeping by the parties of their respective obligations hereinafter contained, as well as for one dollar (\$1.00) and other good and valuable consideration by each of the parties unto the other, in hand paid simultaneously with the execution and delivery of these presents, the receipt of which is hereby acknowledged, have agreed as follows:

**2. DEMISED PREMISES** - Upon the terms and conditions hereinafter set forth, and in consideration of the payment from time to time by the TENANT of the rents hereinafter set forth, and in consideration of the performance continuously by the TENANT of each and every one of the covenants and agreements hereinafter contained by the TENANT to be kept and performed, the LANDLORD does hereby lease, let, and demise unto the TENANT, and the TENANT does hereby

lease of and from the LANDLORD, the following Demised Premises situated, lying, and being in Monroe County, Florida: That portion of the Property outlined and/or crosshatched on Exhibit "A" which depicts the Net Usable Square Feet of the Demised Premises. The Net Usable Square Feet is defined as all interior floor space, any second floor space, storage, covered dining areas and commercially used outdoor areas or any other area set aside for the exclusive use and economic benefit of the Tenant and containing the approximate dimensions and area: It is agreed that the Net Usable Square Feet for the purpose of any calculations which are based on Net Usable Square Feet is as stated in Section 1.4. LANDLORD reserves the right to re-measure the Demised Premises from time to time, measured in accordance with the applicable published ANSI standards for measurement performed by a professional engineering firm, and to adjust the TENANT'S Net Usable Square Feet if applicable. TENANT accepts the Demised Premises in an "as is", "where is" condition and acknowledges that LANDLORD has no obligations for any construction or improvements in connection with TENANT'S occupancy of the Demised Premises. **TENANT also acknowledges that any additional improvements to the Demised Premises are subject to applicable FEMA regulations regarding the same.**

Expansion/Right of First Refusal –None

**3. TERM** - The term of this Lease shall be for ten (10) years which shall commence on May 1, 2009 and shall end at midnight on April 30, 2019 unless sooner terminated as provided for herein. Upon occupancy TENANT shall furnish LANDLORD a written statement stating the TENANT has accepted the Demised Premises for occupancy and setting forth the actual commencement and expiration dates of the Lease. TENANT'S written statement shall become attached to and incorporated into this lease Exhibit "D". In the absence of TENANT'S written statement the lease term shall remain as stated above A Lease Year is the twelve-month period beginning on the commencement date of each year and ending at the conclusion of the same date one year later. If possession of the Demised Premises shall for any reason not be delivered to Tenant on the Commencement Date, this Lease shall nevertheless continue in full force and effect, and no liability whatsoever shall arise against LANDLORD out of any delay other than the abatement of rent.

Right to Terminate –None

Right to Renew – Per Key West Code of Ordinances Sec.2-941 Leases

**4. RENT** - All rentals provided for herein shall be payable in advance, without prior demand therefore and without deductions or setoffs for any reason whatsoever on the first day of each and every month of the term hereof.

**4.1 Late Charges.** Any monthly rental not received by the fifth day of the month shall incur a late fee equal to fifteen percent 15% of the amount in arrears. In addition, all payments received after the due date shall incur a \$50.00 administrative fee to cover the costs of collecting and processing late payments. LANDLORD shall have no obligation to accept less than the full amount of all installments of rental, additional rental or other amounts due hereunder and interest thereon which are due and owing by TENANT to LANDLORD. If LANDLORD accepts less than the full amount owing, LANDLORD may apply the sums received toward such TENANT'S obligations, as LANDLORD shall determine in its sole discretion, without waiving LANDLORD'S remedies for default.

**4.2 Interest on Rent.** Rent and additional rent not paid within fifteen (15) days of when due shall bear interest from the date due until paid at the highest rate permitted by law.

4.3 **Obligation to Survive.** TENANT'S obligation to pay rent that is accrued and unpaid hereunder shall survive the expiration or termination of the Lease.

4.4 The rent reserved under this Lease for the term hereof shall be and consist of:

(a) Beginning with the commencement date and throughout the term of this Lease, TENANT agrees to pay to the LANDLORD as and for minimum rent for the Demised Premises the annual amount, in equal monthly installments, in advance, on the first day of each and every calendar month, as per EXHIBIT "B". In the event the rent commencement date is other than the first day of a calendar month, the rent for the partial first calendar month of the term will be prorated on a daily basis and payable on the commencement date.

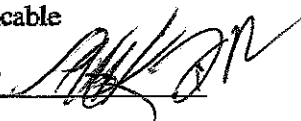
(b) Simultaneously with each such payment, TENANT agrees to pay to LANDLORD any sales, use or excise tax imposed or levied against rent or any other charge or payment required hereunder to be made by TENANT which tax has been imposed or levied by any governmental agency having jurisdiction thereof, this shall include any new taxes imposed during the term of this Lease which are in addition to or in substitution for any such tax which is presently imposed.

Commencing with the 1st day of the Term, TENANT agrees to pay, as Additional Rent, the Real Estate Tax Expense which shall include all real estate taxes and assessments both general and special imposed by federal, state or local governmental authority or any other taxing authority having jurisdiction over the Property against the land, buildings, store rooms, and all other improvements together with any and all expenses incurred by LANDLORD in negotiations, appealing or contesting such taxes and assessments Ad valorem real property taxes for each calendar year hereunder shall be paid by the TENANT directly to the taxing authority in the month of November of that calendar year and proof of payment of same shall be delivered to LANDLORD promptly after payment.

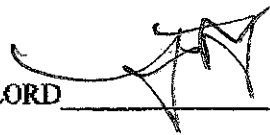
Should any governmental taxing authority acting under any present or future law, ordinance or regulation, levy, assess or impose a tax, excise and/or assessment (other than an income or franchise tax) upon or against the rentals payable by TENANT to LANDLORD, whether by way of substitution for, or in addition to, any existing tax on land and buildings or otherwise, or any other substitute tax, the proceeds of which are to be used to fund the same governmental functions as were funded by ad valorem taxes, TENANT shall be responsible for the amount thereof, as the case may be, as additional rent, the same shall be payable in the manner provided for in the preceding paragraphs. Substitute taxes as referred to above in this Section shall include, without limitation, any surtax on parking spaces.

Initial here if applicable

TENANT



LANDLORD



(d) In addition to the foregoing rent, TENANT agrees to pay LANDLORD as Percentage Rent a sum equal to six and one half percent (6.5%) multiplied by an annual Gross Sales per Lease Year in excess of the Percentage Rent Base Amount. The Percentage Rent Base Amount is calculated by dividing the current annual Base Rent by six and half percent (6.5%). Within twenty (20) days following the end of each month of each Lease Year, TENANT shall forward to LANDLORD a statement of Gross Sales together with an accurate and complete copy of the State of Florida Department of Revenue, Sales and Use Return Form DR-15 (or such forms as the State of Florida shall hereafter substitute for said form) showing the full amount of TENANT'S Gross Receipts

derived from the Demised Premises during the previous month. The statement of Gross Sales must be in affidavit form. TENANT is subject to a fifty-dollar (\$50.00) late submission penalty should TENANT not furnish to LANDLORD copies of Form DR-15 by the twentieth (20th) day of each month. Failure of Tenant to timely submit any monthly report shall entitle LANDLORD to estimate Gross Sales based upon available data (with a reconciliation upon receipt of the final report), and TENANT shall be obligated to pay percentage rent on such estimated Gross Sales. If by the end of any such preceding month the Gross Sales in the Demised Premises during such Lease Year shall exceed the Percentage Base Rent Amount, TENANT shall pay to LANDLORD, at the time of delivery of said Statement, an amount equal to the Percentage Rent times the Gross Sales exceeding the Percentage Rent Base Amount, less the Percentage Rent, if any, previously paid by TENANT to LANDLORD during that Lease Year. TENANT shall also furnish to LANDLORD within thirty (30) days after the expiration of each full Lease Year, a complete statement, certified by an independent certified public accountant, showing in all reasonable detail the amount of Gross Sales made by TENANT from the Demised Premises during the preceding Lease Year.

"Gross Sales" shall mean the amount of sales of all merchandise or services sold or rendered at or from the Demised Premises by TENANT or any sub-TENANT, licensee, etc. TENANT may deduct from Gross Sales: (i) any refunds to customers, provided they have been included in Gross Sales; and (ii) the amount of any sales tax levied upon retail sales and payable over to the appropriate governmental authority. TENANT agrees to keep, at its principal office, records in accordance with generally accepted accounting practices, in which said Gross Sales shall be recorded. Such records shall be open for inspection by LANDLORD or its agents, including accountants retained for that purpose, during reasonable business hours for the Term and for at least 3 years thereafter. If any audit shows that the amount of Gross Sales on the statement was understated by more than 1% for any year, then TENANT (in addition to paying the Percentage Rent due for such understatement) shall pay to LANDLORD the reasonable cost of the audit within ten (10) days after TENANT'S receipt of LANDLORD'S invoice. If such understatement is willful and/or fraudulent, LANDLORD shall have the option, upon ten (10) days notice to TENANT, to terminate this Lease on the date specified in such notice and Tenant shall remain liable for all rent and other charges under this lease for the full term hereof.

(e) **Additional Rent.** Any and all other sums of money or charges required to be paid by Tenant pursuant to the provisions of this Lease, whether or not the same be so designated, shall be considered as "**Additional Rent**", and shall be payable and recoverable in the same manner as Rent. However, such Additional Rent shall be due upon demand and failure to pay such additional rent within seven (7) days shall be deemed a material breach of this lease. If Landlord shall make any expenditure for which Tenant is liable under this Lease and for which Tenant has not paid, the amount thereof shall be deemed Additional Rent due and payable by as indicated above. The LANDLORD shall have the same remedies for TENANT'S failure to pay said additional rental the same as for non-payment of rent. LANDLORD, at its election, shall have the right to pay or do any act which requires the expenditure of any sums of money by reason of the failure or neglect of TENANT to perform any of the provisions of this Lease, and in the event LANDLORD shall, at its election, pay such sums or do such acts requiring the expenditure of monies, TENANT agrees to pay LANDLORD, upon demand, all such sums, and the sums so paid by LANDLORD and any expenses incurred by LANDLORD in the payment of such sums together with interest thereon at the highest rate permitted by law from their due date through the date they are paid by TENANT shall be deemed additional rent and shall be payable and collectible as such. Rent shall be made payable to the LANDLORD as stated in Section 1.1 hereof.

(f) **Holding Over.** It is agreed that in the event of TENANT holding over after the termination of this lease, thereafter the tenancy shall be from month to month in the absence of a written agreement

to the contrary; the TENANT shall pay to LANDLORD a monthly occupancy charge equal to One Hundred Fifty (150%) Percent of the monthly rental for the last lease year for each month from the termination or expiration of this Lease until the Demised Premises are delivered to the LANDLORD in the condition required herein, and LANDLORD'S right to damages for such illegal occupancy shall survive. In addition, TENANT shall pay all other charges payable by TENANT under this Lease

(g) Rent Concessions. None

5. **SECURITY - TENANT will maintain an irrevocable letter of credit for the benefit of the LANDLORD and in accordance with the LANDLORD'S requirements for such letter of credit, in a sum equal to \$150,000.00 USD throughout the term of this lease and until such time as the tenant has vacated the Demise Premises and the LANDLORD has determined that the TENANT has no outstanding amounts due under this lease, the receipt of which is hereby acknowledged as security for the payment by TENANT of the rents herein agreed to be paid by TENANT and for the faithful performance by TENANT of the terms, conditions and covenants of this Lease. It is agreed that LANDLORD, at LANDLORD'S option, may at any time apply said sum or any part thereof toward the payment of the rents and any other sum payable by TENANT under this Lease, and/or toward the performance of each and every covenant under this Lease, but such covenants and TENANT'S liability under this Lease shall thereby be discharged only pro tanto; that TENANT shall remain liable for any amounts that such sum shall be insufficient to pay; that LANDLORD may exhaust any or all rights and remedies against TENANT before resorting to said sum, but nothing herein contained shall require or be deemed to require LANDLORD to do so.**

6. **USE OF THE DEMISED PREMISES -TENANT shall use the Demised Premises for the purposes of:**

The principal business is the operation of a 150 seat open air casual beach restaurant with accessory alcohol sales. Restaurant sales, excluding alcohol, must generate at least 51% of the revenue and the sale of food must occur during all hours the restaurant is open for business.

Sale and rental of beach accessories including chairs, umbrellas, snorkel gear, inflatable rafts but excluding any motorized watercraft

It is the intent of the parties that the beach and restrooms shall remain open to the public for public purposes during hours established for public beaches in Key West and subject to all rules established for public beaches in Key West with any exceptions provided for by specific ordinance.

TENANT may hold events on the beach that are not subject to special events permits and do not materially interfere with the public access and use of the beach. TENANT shall have the right to hold five (5) special events per year. The maximum of five (5) special events pursuant to City Ordinance is applicable to both the demised premises and the adjacent public beach. TENANT shall notify LANDLORD of its intended date of use and seek permits and/or licenses necessary in accordance with City Ordinance governing special events. TENANT may serve alcoholic beverages at special events held on the adjacent beach in accordance with the requirements of the special event permit.

TENANT will clean and maintain the beach area and public restrooms daily however TENANT shall have no obligation for beach sand re-nourishment.

TENANT further agrees:

(a) To operate 100% of the Demised Premises for the entire term of this lease for a minimum of

eight (8) hours per day, seven days per week pursuant to the highest reasonable standards of its business category, with sufficient personnel to service its trade.

(b) With respect to the Property, not to display any merchandise, solicit business or distribute advertising material beyond the Demised Premises, nor in any manner use any other areas for purposes other than for their intended common use and not to obstruct any part thereof.

(c) Not to display any banners, pennants, searchlights, window signs, balloons, or similar temporary advertising media on the exterior of the Demised Premises.

(d) Not to commit waste in the Demised Premises or Common Areas and to keep the Demised Premises and immediate adjacent areas including, without limitation, adjacent sidewalks, in a safe, neat, clean and orderly condition and to maintain and repair any lighting or signs under any canopy immediately in front of the Demised Premises.

(e) Not to use the Demised Premises or permit the same to be used in any manner which violates any law, ordinance or constitutes a nuisance; for lodging purposes; that may injure the reputation of the Property or annoy, inconvenience or damage its patrons or other TENANT'S; or that would constitute an extra-hazardous use or violate any insurance policy of TENANT, LANDLORD or any other TENANT in the Property or increase the cost thereof.

(f) To keep all garbage, refuse and solid waste inside the Demised Premises in the kind of containers specified by LANDLORD, or to place the same outside the Demised Premises, prepared for collection, in the manner and at the times and places designated by LANDLORD or the appropriate disposal company. TENANT agrees not to burn or permit any burning of garbage or refuse on the Demised Premises or any part of the Property. TENANT further agrees that, upon LANDLORD'S instruction, TENANT shall separate garbage for recycling and deposit the separate garbage in the receptacle designated by LANDLORD. TENANT further agrees to make every effort to recycle all glass, metal, paper and plastic refuse and solid waste. **TENANT agrees to collect the seaweed and debris from the beach and deposit in a refuse container and LANDLORD will pay for the cost of the disposal thereof.**

(g) TENANT shall contract directly with the pertinent governmental authority or disposal company and shall be responsible for all fees and costs of removal and disposal of solid waste, garbage, and refuse, including but not limited to, impact fees and dumpster rental, with the exception of seaweed and beach debris. TENANT shall indemnify, save harmless and defend LANDLORD from and against any loss, claim, injury, damage or expense arising out of or related to the generation, storage, or removal or disposal of TENANT'S garbage, refuse or solid waste.

(h) To use its best efforts to cause all trucks serving the Demised Premises to load and unload from the hours of 7:00 a.m. to 11:00 a.m. and not to permit such trucks to service through the front entrance of the Demised Premises except when no other entrance is available.

(i) To take no action that would: (i) violate LANDLORD'S contracts if any, affecting the Property or (ii) cause any work stoppage, picketing or cause any manner or interference with LANDLORD or, occupants, customers or any person lawfully in and upon the Property.

(j) Not to use amplified music or any other noise making machinery or devices that are in violation of the City of Key West Noise ordinance.

(k) To abide by and observe all reasonable rules and regulations established from time to time by

LANDLORD and LANDLORD'S insurance carrier with respect to the operation of the Property and it's Common Areas. Rules and regulation are attached and incorporated herein as EXHIBIT "C".

(l) Not to conduct any auction, fire, bankruptcy or selling-out sale on or about the Demised Premises except in strict compliance with City Code Chapter 18.

(m) TENANT shall not (either with or without negligence) cause or permit the escape, disposal or release of any biologically or chemically active or other hazardous substances or materials which TENANT or it agents brought onto the Property. TENANT shall not allow storage or use of such materials or substances in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such substances or materials, nor allow to be brought into the Demised Premised or the Property any such materials or substances except to use in the ordinary course of TENANT'S business, and then only after written notice is given to LANDLORD of the identity of such substances or materials. Without limitation, hazardous substances and materials shall include those described in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601 et seq., the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6901 et seq., any applicable state or local law and the regulations adopted under these acts. In addition, TENANT shall execute affidavits, representations and the like from time to time at LANDLORD'S request concerning TENANT'S best knowledge and belief regarding the presence of hazardous substances or materials in the Demised Premises. In all events, TENANT shall indemnify LANDLORD in the manner elsewhere provided for in this Lease against any liability resulting from any release of hazardous substances or materials in the Demised Premises or Property by TENANT or it agents, while TENANT is in possession or caused by TENANT or persons acting under TENANT which is due to hazardous substances that TENANT or its agents brought onto the Demised Premises or Property.

7. **COVENANT OF QUIET POSSESSION** - So long as TENANT pays all of the rent and charges due herein, TENANT shall peaceably and quietly have, hold, and enjoy the Demised Premises throughout the term of this Lease without interference or hindrance by LANDLORD or any person claiming by, through, or under LANDLORD.

8. **INDEMNIFICATION** - TENANT does hereby agree to indemnify, defend and save LANDLORD harmless from and against any and all liability for any injury to or death of any person or persons or damage to property (including adjoining property for environmental damage) in any way arising out of or connected with the conditions, use or occupancy of the Demised Premises, or in any way arising out of the activities of TENANT, its agents, employees, licensees or invitees on the Demised Premises and/or the adjacent public beach and from reasonable attorney's fees, incurred by LANDLORD in connection therewith, excepting, however, liability caused by LANDLORD'S gross negligence in it's failure to perform any of LANDLORD'S covenants, obligations or agreements of this Lease.

9. **TENANT'S INSURANCE** - TENANT covenants and agrees with LANDLORD that TENANT shall:

(a) At TENANTS sole cost and expense, during the entire Term hereof, procure, pay for and keep in full force and effect; (i) an occurrence form commercial general liability policy, covering the Demised Premises and the operations of Tenant and any person conducting business in, on or about the Demised Premises or TENANT'S permitted uses on the adjacent public beach in which the limits with respect to liability and property damage shall not be less than One Million (\$1,000,00.00) Dollars per occurrence (ii) all risk property insurance, including property damage, hazard and theft coverage, written at replacement cost value and a replacement cost endorsement insuring the



Property, TENANT'S improvements and betterments, fixtures, furnishings, equipment and any other property belonging to TENANT; and (iii) workers compensation coverage as required by the provisions of Florida statute. Any consignment agreement used by TENANT must provide that consignor acknowledge that the LANDLORD does not have any liability whatsoever for any damage which may be done to items left in the Demised Premises on consignment. The TENANT must provide the LANDLORD with a copy of any consignment agreement used by TENANT regarding Demised Premises. LANDLORD shall not be responsible for damage to any property belonging to TENANT or consignor. TENANT completely indemnifies the LANDLORD with regard to any claims made by any consignor for any reason. From time to time during this Lease, at LANDLORD'S request, TENANT shall (i) procure, pay for and keep in full force and effect such other insurance as LANDLORD shall require and (ii) increase the limits of such insurance as LANDLORD may reasonably require.

(b) All policies of insurance required to be carried by TENANT pursuant to this lease shall be written by responsible insurance companies authorized to do business in Florida with an AM Best rating of A-VI or better. Any such insurance required to be carried by TENANT hereunder may be furnished by TENANT under any blanket policy carried by it or under a separate policy therefore. A copy of each paid up policy evidencing such insurance or a certificate of the insurer, certifying that such policy has been issued, providing the coverage required by this Lease and containing provisions specified herein, shall be delivered to LANDLORD prior to the commencement of the Term of this Lease and, upon renewals, but not less than sixty (60) days prior to the expiration of such coverage. In the event TENANT shall fail to procure such insurance, LANDLORD may, at its option, procure the same for the account of TENANT, and the cost thereof shall be paid to LANDLORD as an additional charge upon receipt by TENANT of bills therefore, together with an administrative fee equal to fifteen (15%) percent to cover the cost of the LANDLORD'S efforts to procure such policy.

(c) Each policy evidencing insurance required to be carried by TENANT pursuant to this Lease shall contain the following provisions and/or clauses: (i) a provision that such policy and the coverage evidenced thereby shall be primary and non-contributing with respect to any policies carried by LANDLORD; (ii) a provision naming LANDLORD and any other parties in interest as designated by LANDLORD as an additional insured (except with respect to worker's compensation insurance); and (iii) a provision that the insurer will not cancel, materially change or fail to renew the coverage provided by such policy without first giving LANDLORD thirty (30) days prior written notice.

Any general liability or other policy insuring the LANDLORD does not provide any contributing or excess coverage for TENANT. The policies TENANT procures for TENANT'S exposure are the only coverage available to TENANT.

**10. ASSIGNMENT AND HYPOTHECATION** - This Lease is not transferable or assignable and may not be hypothecated nor sublet without the prior written consent of the LANDLORD which may be withheld and shall be at the sole discretion of the LANDLORD.

Any assignment or sub-letting, even with LANDLORD'S consent shall not relieve TENANT from liability for payment of Rent or from the obligation to keep and be bound by the agreements of this Lease. The acceptance of Rent from any other person shall not be deemed to be a waiver of any of the agreements of this Lease or to be consent to the assignment for the benefit of creditors or by operation of law and shall not be effective to transfer any rights to any assignee without prior consent of LANDLORD. In the event TENANT wishes to assign this Lease and LANDLORD consents to such assignment, LANDLORD may charge a reasonable fee, not to exceed \$500.00 to help offset any costs LANDLORD may have in preparing such assignment, or in examining the information, financial statements, operating history, references, etc., necessary to effectuate same. Any

assignment, transfer, hypothecation, mortgage, or subletting without LANDLORD'S written consent shall give LANDLORD the right to terminate this Lease and to re-enter and repossess the Demised Premises and the LANDLORD'S right to damages shall survive.

If the TENANT is a corporation, then a sale or transfer of a controlling interest in the corporation by sale of stock or otherwise shall constitute an assignment for purposes of this provision.

**11. SUBORDINATION** - This Lease, and all rights of TENANT hereunder, are and shall be subject and subordinate to all mortgages, bond indentures and any other financing instrument (hereinafter referred to as security agreements) which may now or hereafter affect the Demised Premises and to each and every advance made or hereafter to be made under such security agreements and to all renewals, modifications, replacements and extensions of such security agreements and spreaders and consolidations of such security agreements. This paragraph shall be self operative and no further instrument of subordination shall be required to make it effective, however, TENANT shall promptly execute and deliver any instrument reasonably requested to evidence such subordination.

If the holder of any such security instrument shall succeed to the rights of LANDLORD under this Lease, then at the request of such party so succeeding to the LANDLORD'S rights and upon such successor LANDLORD'S written agreement to accept TENANT'S attornment, TENANT shall attorn to such successor LANDLORD and will execute such instruments as may be necessary or appropriate to evidence such attornment. Upon such attornment, this Lease shall continue in full force and effect as if it were a direct Lease between the successor LANDLORD and TENANT upon all the terms, conditions, and covenants as are set forth in this Lease and shall be applicable after such attornment.

TENANT shall deliver to LANDLORD or the holder of any such security instrument or auditors, or prospective purchaser or the owner of the fee, when requested by LANDLORD, a certificate to the effect that this Lease is in full force and that LANDLORD is not in default therein, or stating specifically any exceptions thereto. Failure to give such a certificate within ten business days after written request shall be conclusive evidence that the Lease is in full force and effect and LANDLORD is not in default and in such event, TENANT shall be stopped from asserting any defaults known to TENANT at that time.

## **12. CONDEMNATION**

(a) It is further understood and agreed that if at any time during the continuance of this Lease the legal title to the Demised real estate or the improvements or buildings located thereon or any portion thereof be taken or appropriated or condemned by reason of eminent domain, there shall be such division of the proceeds and awards in such condemnation proceedings and such abatement of the fixed rent and other adjustments made as shall be just and equitable under the circumstances. If the LANDLORD and the TENANT are unable to agree upon what division of the condemnation award, abatement of fixed rent, or other adjustments are just and equitable within thirty (30) days after such award has been made, then the matters in dispute shall, by appropriate proceedings, be submitted to a court having jurisdiction of the subject matter of such controversy for its decision and determination of the matters in dispute. If the legal title to the entire Demised Premises be wholly taken by condemnation, or if the portion taken will prevent the Demised Premises from being used for the purpose the TENANT intends, this Lease shall be canceled.

(b) In general, it is the intent and agreement of the parties that upon condemnation, the parties hereto shall share in the condemnation award to the extent that they would be entitled to receive compensation and damages under the Florida law for the depreciation, damage, or destruction of their interests by the exercise of the right of eminent domain. In no event shall TENANT be permitted to

receive a share based on the value of the land or buildings, and/or improvements.

### 13. TENANT'S DEFAULT

(a) If the TENANT shall fail to pay any of the taxes or assessments herein provided for; or in case of the sale of or forfeiture of the Demised Premises or any part thereof during the demised term for non-payment of any tax or assessment; or in case the TENANT shall fail to keep insured the building or improvements which are now or which may at any time hereafter be upon the Demised Premises, as herein provided for; or shall fail to spend insurance money, as herein provided for; or if the TENANT shall fail to perform any of the covenants of this Lease by it to be kept and performed; then, in any of such events, except in the event of non payment of rent, upon ten (10) business days written notice, within which the TENANT may cure, and upon its failure to cure, it shall and may be lawful for the LANDLORD, at its election, to declare the demised term ended and to re-enter upon said Demised Premises, building, and improvements situated thereon, or any part hereof, either with or without process of law, the TENANT hereby waiving any demand for possession of the Demised Premises and any and all buildings and improvements then situated thereon. In the event of nonpayment of rent, LANDLORD may assert its right of notice and eviction pursuant to Chapter 83, Florida Statutes.

(b) Or, the LANDLORD may have such other remedies as the law and this instrument afford, and the TENANT covenants and agrees that upon the termination of said demised term, at such election of the said LANDLORD, or in any other way, TENANT will surrender and deliver up the Demised Premises and property (real and personal) peaceably to the LANDLORD, its agent, or attorneys, immediately upon the termination of the said demised term. If the TENANT, its agents, attorneys, or shall hold the Demised Premises or any part thereof, one (1) day after the same should be surrendered according to the terms of this Lease, it shall be deemed guilty of forcible detainer of the Demised Premises under the statute and shall be subject to eviction or removal, forcibly or otherwise, with or without process of law.

**(c) BANKRUPTCY OF TENANT. IN THE EVENT TENANT FILES ANY FORM OF BANKRUPTCY, LANDLORD SHALL BE ENTITLED TO IMMEDIATE TERMINATION OF THE AUTOMATIC STAY PROVISIONS OF 11 U.S.C. §362. GRANTING THE LANDLORD COMPLETE RELIEF AND ALLOWING THE LANDLORD TO EXERCISE ALL OF HIS LEGAL AND EQUITABLE RIGHTS AND REMEDIES, INCLUDING, WITHOUT LIMITATION, THE RIGHT TO TERMINATE THIS LEASE AND DISPOSSESS TENANT FROM THE DEMISED PREMISES IN ACCORDANCE WITH FLORIDA LAW. ADDITIONALLY, TENANT AGREES NOT TO DIRECTLY OR INDIRECTLY OPPOSE OR OTHERWISE DEFEND AGAINST THE LANDLORD'S EFFORT TO GAIN RELIEF FROM ANY AUTOMATIC STAY. THE LANDLORD SHALL BE ENTITLED AS AFORESAID TO THE LIFTING OF THE AUTOMATIC STAY WITHOUT THE NECESSITY OF AN EVIDENTIARY HEARING AND WITHOUT THE NECESSITY OR REQUIREMENT OF THE LANDLORD TO ESTABLISH OR PROVE THE VALUE OF THE LEASEHOLD, THE LACK OF ADEQUATE PROTECTION OF HIS INTEREST IN THE LEASEHOLD, OR THE LACK OF EQUITY IN THE SAME. TENANT SPECIFICALLY AGREES AND ACKNOWLEDGES THAT THE LIFTING OF THE AUTOMATIC STAY HEREUNDER BY THE APPROPRIATE BANKRUPTCY COURT SHALL BE DEEMED TO BE "FOR CAUSE" PURSUANT TO SECTION 362(D)(1).**

(d) Where the alleged default consists of some alleged violation of any term of this Lease, other than the payments of money, including rent, the LANDLORD may not declare this Lease in default until such violation shall have continued for ten (10) days after the LANDLORD shall have given the

TENANT written notice of such violation, and TENANT shall not have undertaken, during said ten (10) day notice period, to cure said violation by vigorous and affirmative action, provided, however, that nothing herein contained shall be construed as precluding the LANDLORD from having such remedy as may be and become necessary in order to preserve the LANDLORD'S right and interest of the LANDLORD in the Demised Premises and in this Lease, even before the expiration of the grace or notice periods provided for in this paragraph, if, under particular circumstances then existing, the allowance of such grace or the giving of such notice would prejudice or endanger the rights and estate of the LANDLORD in this Lease and in the Demised Premises. With respect to the payment of the insurance premiums, the same must be paid at least fifteen (15) days prior to the time when the policies would lapse for the failure to pay premiums thereon, and evidence of such payment given to the LANDLORD without any written notice being required to be served upon the TENANT in connection therewith.

(e) All default and grace periods shall be deemed to run concurrently and not consecutively.

(f) It is mutually covenanted and agreed that the various rights, powers, options, elections, privileges, and remedies of the LANDLORD contained in this Lease shall be construed as cumulative and no one of them shall be construed as being exclusive of the other or exclusive of any rights or priorities allowed by law.

(g) It is further covenanted and agreed by and between the parties hereto that the right given to the LANDLORD in this Lease to collect the rent that may be due under the terms of this Lease by any proceeding under same, or the right to collect any additional rent, money, or payments due under the terms of this Lease by any proceedings under same, or the right given the LANDLORD to enforce any of the terms and provisions of this Lease shall not in any way affect the right of such LANDLORD to declare this Lease void and the terms ended hereby, as herein provided, when default is made in the payment of said rent or when default is made by the TENANT in any of the terms and provisions of this Lease.

(h) If at any time, by reason of the failure of the TENANT to keep and perform any covenant or agreement which, under the terms of this Lease, the TENANT is bound and obligated to keep and perform, it becomes necessary for LANDLORD to employ an attorney to protect the rights and interests of the LANDLORD in the property demised or to enforce the Lease or proceed under it in any particular, then in any of such events, the TENANT will owe and will pay unto LANDLORD all costs of Court and reasonable attorneys fees incurred or expended by the LANDLORD in taking such actions, including actions taken in all trial and appellate courts.

14. **TENANT'S REPAIRS** - The TENANT covenants and agrees with the LANDLORD that during the continuance of this Lease, the TENANT shall be solely responsible for maintaining the Demised Premises in a clean, sanitary and safe condition in accordance with the laws of the State of Florida and in accordance with all directions, rules and regulations of all inspectors, governmental departments and agencies having jurisdiction over the Demised Premises to ensure a good state of repair of the Demised Premises and all furnishings, including any special equipment brought, placed, or installed upon the Demised Premises by TENANT; nor will the TENANT suffer or permit any strip, waste, or neglect of any building or such personal property to be committed; and the TENANT will repair, replace, and renovate the said real and personal property as often as it may be necessary in order to keep the building or buildings and the personal property which is subject to the LANDLORD'S lien, in good repair and condition. In the event that improvements or repairs are contemplated prior to or at the beginning of or during TENANT'S occupancy, then this provision shall apply to the condition of the property as of the last repair, improvement or renovation.

In the event that LANDLORD shall deem it necessary or be required by any governmental authority to repair, alter, remove, reconstruct or improve any part of the Demised Premises or of the property (unless the same result from TENANT'S act, neglect, default or mode of operation, in which event LANDLORD shall make all such repairs, alterations or improvements at TENANT'S sole cost and expense), then the same shall be made by LANDLORD with reasonable dispatch, and should the making of such repairs, alterations and improvements cause any interference with TENANT'S use of the Demised Premises, such interference shall not relieve TENANT from the performance of its obligations hereunder nor shall such interference be deemed an actual or constructive eviction or partial eviction or result in abatement of rental.

## **15. ALTERATIONS**

TENANT shall not make any alterations, additions or improvements to the Demised Premises (whether or not the same may be structural in nature) without LANDLORD'S prior written consent. All alterations, additions, or improvements made to the Demised Premises, except movable furniture and equipment installed at TENANT'S expense, shall be the property of the LANDLORD and remain upon and be surrendered with the Demised Premises at the expiration of the term of this Lease; provided, however, that LANDLORD may require TENANT to remove any additions made at TENANT'S request to the Demised Premises and to repair any damage caused by such removal, and provide further, that if TENANT has not removed its property and equipment within ten (10) days after the expiration or termination of this Lease, LANDLORD may elect to retain the same as abandoned property.

In the event TENANT shall request LANDLORD'S permission, and LANDLORD shall permit TENANT to perform any alterations, additions, improvements or repairs to the Demised Premises, TENANT shall (i) submit its plans and specifications to LANDLORD for its approval prior to the commencement of any construction, (ii) obtain all necessary permits prior to the commencement of any construction, (iii) only use contractors approved by LANDLORD, (iv) not permit any construction liens to be placed or remain on the Demised Premises. In the event a construction lien shall be filed against the Demised Premises as a result of work undertaken by TENANT, TENANT shall within ten (10) days of receiving notice of such lien, discharge the lien of record either by payment of the indebtedness to the lien claimant or by filing a bond as security therefore. All such work made by or on behalf of TENANT shall be performed in such manner as LANDLORD may designate and in accordance with all applicable laws and regulations of governmental authorities having jurisdiction over the same. All such work by TENANT or its contractors shall not interfere with, impede or delay any work by LANDLORD or its contractors, tenants or TENANT'S contractors. All contractors engaged by TENANT shall be licensed contractors, possessing good labor relations, and capable of performing quality workmanship.

## **16. EQUIPMENT, FIXTURES AND SIGNS**

(a) All furnishings, fixtures, trade fixtures, equipment, and signs used on the Demised Premises by TENANT but provided by LANDLORD, will, at all times, be, and remain, the property of LANDLORD. Provided that this Lease is in good standing and subject to the LANDLORD'S lien for rent, TENANT will have the right to remove any furniture or fixtures provided by TENANT, or any part thereof, from the Demised Premises during the term of this Lease, at the expiration thereof, or within a reasonable time thereafter, provided, however, that TENANT, in so doing, does not cause any irreparable damage to the Demised Premises, and provided further, that TENANT will pay or reimburse LANDLORD for the reasonable expense of repairing damage caused by such removal.

(b) All TENANT signs shall be approved by the LANDLORD and must meet all applicable

codes. The exact location, style, text, and color(s) of the sign shall be agreed upon by the LANDLORD, in writing, prior to TENANT'S installation. LANDLORD'S approval shall not be unreasonably withheld or delayed.

## **17. ADDITIONAL COVENANTS OF THE TENANT**

(a) The TENANT shall pay for all utilities associated with the use of the Demised Premises including, but not limited to, water, electricity, sewer, gas and waste, (if applicable). In the event that a separate bill for the Demised Premises is not available for one or more of the utility services required by the Demised Premises, then the TENANT shall pay a pro-rated share of that particular utility bill based on a calculation of the ratio of the square footage of the Demised Premises and the total square footage of the area covered by that particular utility expense. In the event that the TENANT shall be billed for a pro-rated share, the LANDLORD shall provide TENANT a utility bill each month and TENANT shall pay the amount due to LANDLORD within ten (10) days of its receipt.

(b) The TENANT covenants and agrees with the LANDLORD that no damage or destruction to any building or improvement by fire, windstorm, or any other casualty shall be deemed to entitle the TENANT to surrender possession of the Demised Premises or to terminate this Lease or to violate any of its provisions or to cause any abatement or rebate in the rent then due or thereafter becoming due under the terms hereof, unless otherwise specifically provided for herein. If the Lease be canceled for the TENANT'S default at any time while there remains outstanding any obligation from any insurance company to pay for the damage or any part thereof, then the claim against the insurance company shall, upon the cancellation of the within-Lease, be deemed immediately to become absolute and unconditional property of the LANDLORD. In the event of destruction to the Demised Premises by casualty or hazard, LANDLORD will have the option of canceling the Lease, or repairing the building, and in the event that the LANDLORD elects to repair the building, an appropriate abatement of rent will occur.

(c) The TENANT shall be responsible for the HVAC and all air conditioning systems together with the plumbing and electrical system.

(d) The TENANT shall be responsible for maintaining the roof and exterior of the building

(e) The TENANT covenants and agrees with the LANDLORD that nothing in this Lease contained shall ever be construed as empowering the TENANT to encumber or cause the LANDLORD to encumber the title or interest of the LANDLORD.

(f) The TENANT covenants and agrees with the LANDLORD that, at the termination of this Lease, the TENANT will peaceably and quietly deliver unto the LANDLORD, possession of the Demised Premises and all buildings and improvements located thereon, as well as the TENANT'S interest in all fixtures and equipment appertaining thereto.

(g) The TENANT agrees not to make any internal changes or exterior changes or alterations without written approval of the LANDLORD. This provision does not apply to TENANT'S trade fixtures and/or other non-permanent fixtures on the interior of the Demised Premises.

(h) TENANT agrees to maintain the exterior landscaping including any new landscaping installed with LANDLORD'S approval, in areas adjacent to the Demised Premises or in an effort to enhance the adjacent beach area, at TENANT'S sole cost and expense. LANDLORD agrees to trim the trees located on the public beach and remove coconuts on an annual basis.

**18. LANDLORD'S RIGHT OF ENTRY** - The LANDLORD or its agents shall have the right to enter upon the Demised Premises at all reasonable times to examine the condition and use thereof, provided only that such right shall be exercised in such manner as not to interfere with the TENANT in the conduct of the TENANT'S business on said Demised Premises. If the said Demised Premises are damaged by fire, windstorm, or by any other casualty which caused the Demised Premises to be exposed to the elements, then the LANDLORD may enter upon the Demised Premises to make emergency repairs. LANDLORD may enter upon the Demised Premises to make renovations and repairs of a non-emergency nature by giving reasonable notice to the TENANT, and in such a manner as to minimize any inconvenience to both parties.

**19. TENANT'S ACCEPTANCE** - The TENANT accepts the Demised Premises and improvements thereon in an as is condition and all improvements and additions shall be at the sole expense of the TENANT except as may be otherwise provided for in this Lease.

**20. MISCELLANEOUS PROVISIONS** - It is mutually covenanted and agreed by and between the parties as follows:

(a) That no waiver of a breach of any of the covenants in this Lease contained shall be construed to be a waiver of all succeeding breach of the same covenant.

(b) That time is of the essence in every particular and particularly where the obligation to pay money is involved.

(c) That all arrearages in the payment of rent or in the repayment to the LANDLORD of any sums which the LANDLORD may have paid in order to cure a default of the TENANT (as elsewhere herein provided for), shall bear interest from the date when due and payable at the highest rate permitted by law until paid.

(d) That no modification, release, discharge, or waiver of any provision hereof shall be of any force, effect, or value unless in writing and signed by the persons who are then LANDLORD and TENANT.

(e) That all covenants, promises, conditions, and obligations contained herein or implied by law, or covenants running with the land, shall attach to and be binding upon the heirs, executors, administrators, successors, legal representatives, and assigns of each of the parties to this Lease.

(f) That this instrument contains the entire agreement between the parties as of this date, and that the execution hereof has not been induced by either of the parties by representations, promises or understandings not expressed herein, and that there are not collateral agreements, stipulations, promises, or understandings whatsoever between the respective parties in any way touching the subject matter of this instrument which are not expressly contained in this instrument.

(g) That when either of the parties desire to give notice to the other or others in connection with and according to the terms of this Lease, such notice shall be deemed given when it shall have been deposited in the U.S. Registered or Certified mail with sufficient postage pre-paid thereon to carry it to its addressed destination. Said notice shall be addressed as follows:

AS TO LANDLORD: PROPERTY MANAGEMENT  
CITY OF KEY WEST  
525 ANGELA STREET

KEY WEST, FL 33040

AS TO TENANT: MATTHEW BABICH  
SMB RESTAURANT, LLC  
1319 DUVAL STREET  
KEY WEST, FL 33040

WITH A COPY TO: STUART KAUFMAN  
THE RANKAUF COMPANY  
121 WEST LONG LAKE ROAD, 3<sup>RD</sup> FLOOR  
BLOOMFIELD HILLS, MI 48304

When the parties on either side (LANDLORD or TENANT) consists of more than one person, notice or default by one of the persons on that side shall constitute notice or default by all of the persons on that side.

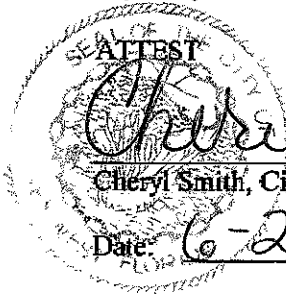
(h) This Lease and the provisions thereof shall be governed by and construed and enforced in accordance with the laws of the State of Florida.

(i) If the TENANT or TENANTS are signing in a capacity other than as individuals, then the LANDLORD may require personal guarantees from individuals as the LANDLORD deems necessary.

(j) LANDLORD may delegate its decision-making authority regarding any provision of this Lease to an Advisory Board.



IN WITNESS WHEREOF, the parties hereto have caused the foregoing Lease to be executed on the day and year first above written.



Cheryl Smith  
Cheryl Smith, City Clerk

Date: 6-2-09

LANDLORD: CITY OF KEY WEST

Morgan McPherson  
Morgan McPherson, Mayor

Date: 6-2-09

TENANT: SMB RESTAURANT LLC

[Signature]  
WITNESS

Date: 5-14-09

Himelby Rosen  
WITNESS

Date: 5-14-09

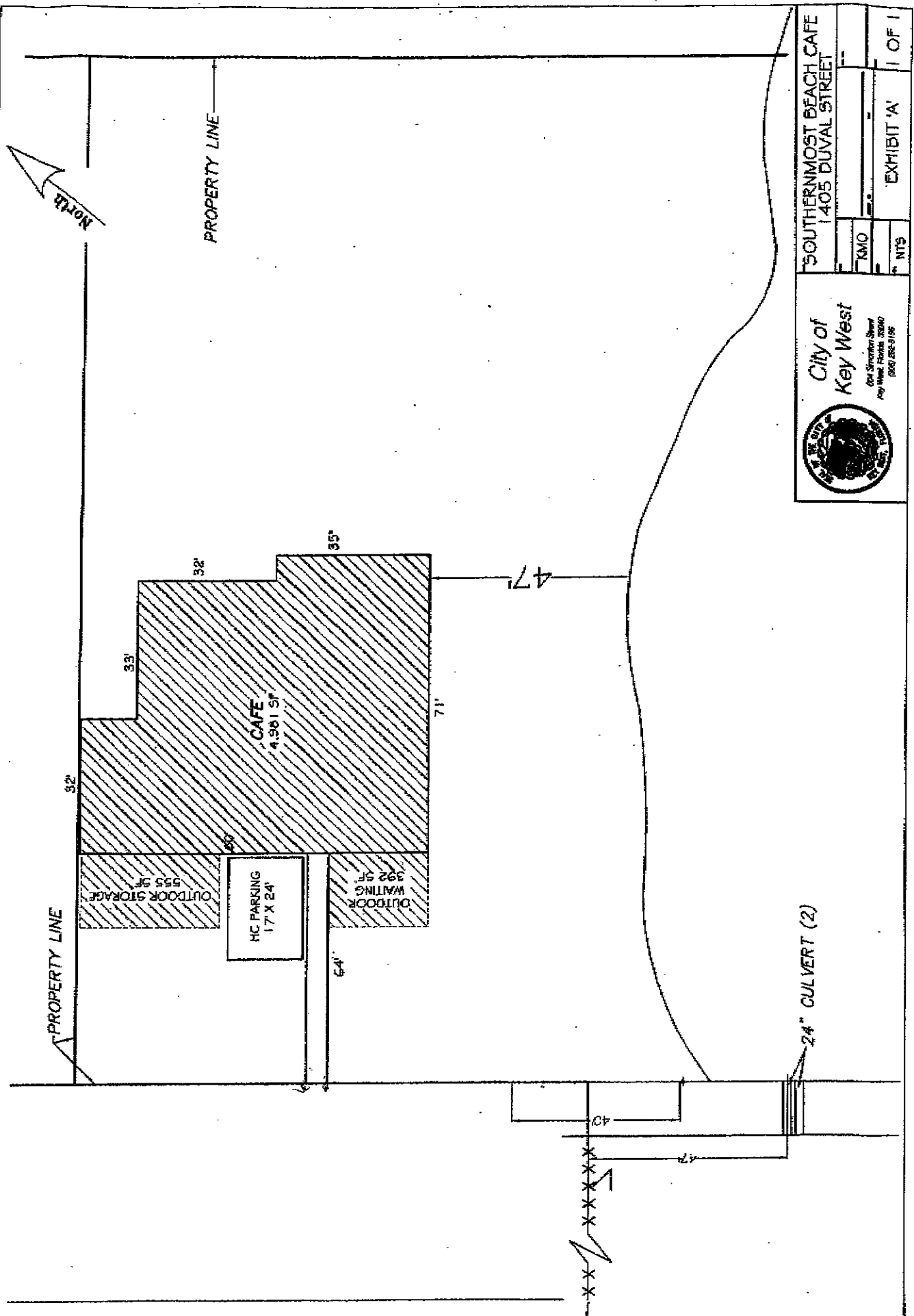
[Signature]  
Stuart M. Kaufman, Manager Member

Date: 5-14-09

[Signature]  
Dale G. Rands, Manager Member

Date: 5-14-09

**EXHIBIT "A" Demised Premises, Site Plan**



**Southernmost Beach Cafe**  
405 Duval Street

**City of Key West**  
Our Southern Shores  
Key West, Florida 33560  
(305) 282-3155

KMO  
NTS

EXHIBIT 'A' | OF 1

**EXHIBIT "B" Rent Schedule**

*R.R.*

**EXHIBIT "B"**

Tenant: SMB Restaurant LLC  
 Location: 1405 Duval  
 Contact: Matthew Babich

Building Square Feet 4981  
 Term 10 years effective 5/1/09

YEAR #	Period Beginning	Base Rent per sq. ft.	Base Rent		Sales Tax	Total Rent With Tax	TOTAL RENT	Percentage Rent Base Amount
			Annual	Monthly				
1	May 1, 2009	\$30.11	\$150,000.00	\$12,500.00	\$937.50	\$13,437.50	\$161,250.00	\$2,307,692.31
2	May 1, 2010	\$31.62	\$157,500.00	\$13,125.00	\$984.36	\$14,109.36	\$169,312.60	\$2,423,076.92
3	May 1, 2011	\$33.20	\$165,375.00	\$13,781.25	\$1,033.69	\$14,814.64	\$177,778.13	\$2,644,230.77
4	May 1, 2012	\$34.86	\$173,643.75	\$14,470.31	\$1,088.27	\$15,558.58	\$186,667.03	\$2,871,442.31
5	May 1, 2013	\$36.60	\$182,325.94	\$15,193.83	\$1,138.54	\$16,333.37	\$196,000.38	\$2,805,014.42
6	May 1, 2014	\$38.43	\$191,442.23	\$15,953.52	\$1,196.51	\$17,150.03	\$205,800.40	\$2,945,266.14
7	May 1, 2015	\$40.36	\$201,014.35	\$16,751.20	\$1,258.34	\$18,007.54	\$216,090.42	\$3,092,528.40
8	May 1, 2016	\$42.37	\$211,065.06	\$17,588.76	\$1,319.16	\$18,907.91	\$226,894.94	\$3,247,154.82
9	May 1, 2017	\$44.49	\$221,618.32	\$18,468.19	\$1,385.11	\$19,853.31	\$238,239.69	\$3,409,512.56
10	May 1, 2018	\$46.72	\$232,699.23	\$19,391.60	\$1,454.37	\$20,846.97	\$250,161.67	\$3,579,988.19

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**EXHIBIT "C" Rules and Regulations**

1. Except as permitted hereunder, TENANT shall not use any area outside of the Demised Premises as shown on Exhibit A or any portion of any public area or any parking areas for or any other purpose whatsoever including but not limited to the storage of goods, inventory, equipment, materials, whether or not said area is inside a building or outdoors.

BR

**EXHIBIT "D"**

TENANT'S written notice of acceptance of the Demised Premises and setting forth the commencement and expiration dates of the lease.

FR