

DRAFT

1 WASHINGTON AVENUE CORPORATION
DBA SMITH & WOLLENSKY
RESTAURANT

Concession Agreement

**CONCESSION AGREEMENT BETWEEN
CITY OF MIAMI BEACH, FLORIDA AND
1 WASHINGTON AVENUE CORPORATION
FOR MANAGEMENT AND OPERATION OF A FOOD & BEVERAGE CONCESSION**

THIS CONCESSION AGREEMENT (the "Agreement") is made the ____ day of _____, 2021, and shall become effective on the Commencement Date as defined in Section 1.1, between the **CITY OF MIAMI BEACH, FLORIDA**, a municipal corporation organized and existing under the laws of the State of Florida (hereinafter called the "City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and **1 WASHINGTON AVENUE CORPORATION**, a Florida corporation, having its principal place of business at One Washington Avenue, Miami Beach, Florida, 33139 d/b/a Smith & Wollensky Restaurant (hereinafter called "Concessionaire").

This Agreement shall, from and after the Commencement Date, renew/replace that certain Existing Concession Agreement dated October 1, 2009 between the parties thereto ("Existing Concession Agreement").

Each party represents to the other that, to the best of its knowledge, there exist no defaults by either party under the Existing Concession Agreement.

The City hereby grants to the Concessionaire, and the Concessionaire hereby accepts from the City, the rights to maintain, manage, and operate a food and beverage concession within the Concession Area (as hereinafter defined), in accordance with the purpose(s) and for the term(s) stated herein, and subject to all the terms and conditions herein contained.

SECTION 1. TERM.

1.1 This Agreement shall become effective on the date that the Mayor and City Commission adopt a resolution accepting the Certification of the official results of the November 2, 2021 City Referendum (the "Commencement Date"). The term of this Concession Agreement shall commence upon the expiration of the term of the Existing Concession Agreement, on the 7th day of November, 2025, and shall run for a term of nine (9) years. This Agreement will terminate on the 6th day of November, 2034 ("Term").

For purposes of this Agreement, a "Contract Year" shall be defined as that certain period commencing on the 7th day of October, and ending on the 6th day of November.

1.2 Upon the Commencement Date, the City and Concessionaire hereby agree that this Concession Agreement shall supersede and replace the Existing Concession Agreement.

SECTION 2. CONCESSION AREA.

The City hereby grants to Concessionaire the right, during the Term herein, to maintain, manage and operate an outdoor seating area relating to restaurant space located at Smith & Wollensky Restaurant at One Washington Avenue, Miami Beach, Florida, 33139 in the following Concession Area:

2.1 Concession Area:

The City and Concessionaire are parties to the Lease Agreement, dated _____, (the "Lease Agreement") relating to restaurant space located at Smith & Wollensky Restaurant at One Washington Avenue, Miami Beach, Florida, 33139 (the "Demised Premises"). The Concession Area shall consist of the **581** square feet of outdoor space adjacent to the Demised Premises (which is currently addressed in the Existing Concession Agreement between the parties), plus the additional **475** square feet of outdoor space located adjacent to and to the west of the existing Concession Area, plus the additional **360** square feet of outdoor space located adjacent to and to the east of the Demised Premises, for a total of **1,416** square feet (the "Concession Area"); which Concession Area is further delineated in "**Exhibit 2.1**", attached hereto and incorporated herein.

Concessionaire shall have the right to place up to a maximum of seventy-_____ chairs (with associated tables) and five (5) umbrellas (collectively, "Concession Area Furniture") within the Concession Area, subject to approval of the type of Concession Area Furniture and site plan by the City, in its regulatory capacity, including the Planning Department and Public Works Department, and compliance with applicable ADA requirements. The proposed site plan is also delineated in Exhibit 2.1. No material change in the proposed site plan (or in **Exhibit 2.1**) shall be permitted without the prior written consent of the City Manager or her designee, which consent (if given at all) shall be at the City Manager's (or his designee's) sole and reasonable judgment and discretion.

2.2 Concessionaire hereby agrees and acknowledges that the Concession Area shall be open and available to all members of the general public choosing to enjoy Concessionaire's food and beverage services.

SECTION 3. USE(S).

3.1 The Concession Area shall be used by the Concessionaire solely as an outdoor eating, drinking and seating area for the patrons and guests of the Demised Premises subject to the Lease Agreement. **The Concessionaire shall have the right to operate in the Concession Area when the Demised Premises are open for business (and, conversely, shall be closed when the Demised Premises are closed).**

- 3.2 **Concessionaire and the tenant of the Demised Premises shall at all times throughout the Term of this Agreement be one and the same and cannot exist independently of each other. Concessionaire acknowledges and agrees that its use of the Concession Area shall be, and remain at all times throughout the Term, an ancillary use to the Demised Premises.**
- 3.3 Concessionaire is hereby authorized to conduct the following kind(s) of businesses and provide the following kind(s) of services within the Concession Area, all at its sole expense and responsibility:
- 3.4 Food and Beverage Service.
- 3.4.1. Concessionaire shall offer for sale within the Concession Area, such food and beverages which, at a minimum, are consistent with the type and quality of food and beverages prepared and sold at Smith & Wollensky Restaurant. However, actual cooking and heating within or on the Concession Area shall not be allowed.
- 3.4.2. All food and beverages sold or otherwise offered within the Concession Area shall be subject to any and all terms and conditions governing food and beverage service under the Lease Agreement and shall be dispensed only from the Smith & Wollensky Restaurant building.
- 3.4.3. The City hereby allows Concessionaire the right to serve and sell alcoholic beverages within the Concession Area, but only for consumption within the Concession Area, and further subject to Concessionaire's compliance, at all times, with whatever restrictions and/or regulations are (or may be) imposed by the State of Florida, Miami-Dade County, and/or the City, with respect to the dispensing and sale of alcoholic beverages (including, without limitation, alcoholic beverage license requirements). Notwithstanding the preceding sentence, all alcoholic beverages shall be dispensed only from the Smith & Wollensky Restaurant building, and Concessionaire shall not be permitted to erect or maintain upon the Concession Area, any permanent or temporary structure and/or area (i.e. bars, mini bars, etc.) for the dispensing or sale of alcoholic beverages.
- 3.4.4. In addition to Concessionaire's general maintenance obligations, as set forth in Section 10 hereof, the Concession Area, and the immediately surrounding twenty-five (25) foot adjacent areas, shall at all times be maintained in a clean and sanitary manner; provided however that any obligations to pressure clean the area shall be as set forth in Section 10.2 hereof.
- 3.4.5. Food and beverage service shall be offered daily to patrons .

- 3.4.6. Concessionaire agrees not to place any speakers, or any other device used to amplify sound, in, on or around the Concession Area. Furthermore, Concessionaire shall in no manner use the Concession Area, or the Smith & Wollensky Restaurant building, as an outdoor entertainment or open-air entertainment establishment, and hereby acknowledges that such uses are prohibited (whether as main or accessory uses). Concessionaire shall, at all times, adhere to the City of Miami Beach Noise Ordinance, as same may be amended from time to time.
- 3.4.7. Concessionaire shall, to the reasonable satisfaction of the City Manager or her designee, maintain the cutwalk free from obstructions at all times during its operations on the Concession Area, by implementing all of the following measures:
- 3.4.7.1. Identify a queuing area for patrons and provide (at its sole cost and expense) staff to use reasonable efforts to maintain the cutwalk clear of patrons waiting for seating;
 - 3.4.7.2. Provide signage advising patrons that they should remain clear of the cutwalk; and
 - 3.4.7.3. Provide stanchions and/or other appropriate barrier(s) to demarcate an area where patrons can wait for a table.

3.5 City Business Tax Receipts.

Concessionaire shall obtain, at its sole expense and responsibility, any business tax receipts required by the City for the proposed use(s) contemplated herein. To the extent required by City law (as same may be amended from time to time), business tax receipts shall be obtained for each proposed use within a particular Concession Area.

- 3.6 The number of seats in the Concession Area shall be included in the overall seating count of the Demised Premises. There shall be no bar counter of any kind as part of the Concession Area and all food served shall be prepared within the interior kitchen of the Demised Premises. All tables, chairs, and umbrellas will be removed and stored each night at close of business. Any exception to this requirement shall be at the sole and absolute discretion of the City Manager or his designee. Concessionaire shall further maintain the Concession Area and abide by the conditions set forth in **Exhibit 3.2** (the "Additional Requirements"), attached hereto and incorporated herein.

- 3.6.1. Removal of Concessionaire's Property during Emergency Situations. The City Manager or his/her designee may direct or require the Concessionaire to immediately remove, relocate and/or store all or part of the Concession Area Furniture or equipment located thereon for public safety considerations in emergency situations, including, without limitation, a

threatened tropical storm or hurricane. Upon written and/or verbal notification by the City Manager of a tropical storm/hurricane warning or alert, or other major weather event that may adversely impact the City, or upon the designation by the United States National Weather Service or National Hurricane Center of a tropical storm/hurricane warning or alert, whichever occurs first, the Concessionaire shall, within no more than two hours of same, remove and store all of Concessionaire's Property to secure Concessionaire's Property in response to the threatened storm or other emergency, and shall take all other measures which may be necessary for the protection of the public with respect thereto. The notification by the City Manager of a hurricane or other major weather event, or the issuance of a hurricane warning, shall constitute a public emergency situation. The failure of the City to direct the Concessionaire to remove or safety store Concessionaire's Property shall not relieve the Concessionaire of its obligation to remove and store Concessionaire's Property in response to a threatened storm event as outlined herein.

Should Concessionaire fail to remove Concessionaire's Property within said two (2) hour period, or in the event the City Manager or his/her designee determines, at his/her sole discretion, that Concessionaire's removal, storage and other efforts are otherwise not satisfactory, Concessionaire shall thereafter be assessed a fee of \$50.00 per hour, until such time as all of Concessionaire's Property have been removed to the City Manager's satisfaction. In addition, the City Manager, without any obligation to do so, may immediately proceed to remove, relocate, and/or store the Concessionaire's Property that has otherwise not been removed by the Concessionaire, at the Concessionaire's sole cost and expense, with payment to the City for all such costs due within thirty (30) days of City's invoice to Concessionaire.

Concessionaire shall be solely responsible for any damage to City property or other property resulting from Concessionaire's failure to remove and store Concessionaire's property, or otherwise implement appropriate measures in response to a threatened storm or hurricane.

Concessionaire's failure to comply with this section shall constitute a default under this Agreement. The remedies identified herein for Concessionaire's failure to comply with this section are cumulative, and in addition to, all remedies that may be available to the City at law and in equity.

- 3.7 **Concessionaire hereby warrants and represents to City that Concessionaire is the owner of the restaurant operating at the Demised Premises and shall, throughout the Term of the Lease Agreement, remain as the owner of said restaurant, unless any change in ownership, transfer or assignment is approved by the City Commission, in writing, prior to such change taking place in**

accordance with the Lease Agreement. Change of ownership for purposes hereof shall include, without limitation, a sale, corporate restructuring, exchange, assignment, transfer or other disposition by tenant of all or a portion of tenant's interest in the restaurant, whether by operation of law or otherwise.

- 3.8 Concessionaire agrees not to place any speakers, or any other device used to amplify sound, in or around the Concession Area. Concessionaire further agrees to not attach any televisions, screens, speakers, or any other device used to amplify sound, to the exterior of the Demised Premises. Furthermore, Concessionaire shall in no manner use the Concession Area, or Concessionaire's restaurant at the Demised Premises, as an outdoor entertainment or open-air entertainment establishment, and hereby acknowledges that such uses are prohibited (whether as main or accessory uses).
- 3.9 Concessionaire shall be permitted to apply to the City of Miami Beach for one (1) special event permit for the sole and express purpose of hosting an opening event for the restaurant. At no time thereafter, throughout the remaining term of the Lease Agreement, shall the Concessionaire be permitted to submit an application for a special event to be held on the Concession Area.
- 3.10 It is understood and agreed that the Concession Area shall be used by the Concessionaire during the term of this Agreement only for the uses contemplated herein, and for no other purpose or use whatsoever. Concessionaire will not make or permit any use of the Concession Area that, directly or indirectly, is forbidden by public law, ordinance or government regulation, or that may be dangerous to life, limb or property. Concessionaire may not commit waste on the Concession Area, use the Concession Area for any illegal purpose, or commit a nuisance on the Concession Area. In the event that the Concessionaire uses the Concession Area for any purpose not expressly permitted herein, then the City may declare this Agreement in default pursuant to Section 13, or without notice to Concessionaire, restrain such improper use by injunction or other legal action.
- 3.11 **By executing this Agreement, Concessionaire hereby agrees to this condition, and further voluntarily and knowingly waives and releases any and all rights now or hereinafter conferred upon Concessionaire pursuant to Florida Statutes including, without limitation, the procedures set forth in Chapter 83, Florida Statutes' for removal in nonresidential tenancies; the Miami-Dade; and the Miami Beach Code (respectively); to the extent this and applicable law(s) would have the effect of limiting or modifying the City's rights to terminate this Agreement pursuant to this Subsection.**

SECTION 4. CONCESSION FEES.

4.1 Minimum Guarantee (MG):

In consideration of the City's granting of the rights provided in this Agreement, as of the Commencement Date, Concessionaire agrees to pay the City the **GREATER OF** a Minimum Guaranteed Annual Concession Fee ("MG") of Four Hundred Thousand Dollars (\$400,000.00), subject to an annual 2.5% escalator or ten percent (10%) of gross receipts ("Percentage Rent"). The MG shall be payable in monthly installments of Thirty-Three Thousand Three Hundred and Thirty-Three Dollars and 33/100 cents (\$33,333.33) ("Monthly Minimum Guarantee" or "MMG"). The MMG shall be due and payable in advance on the first day of each month throughout the Term of this Agreement.

4.2 Percentage of Gross (PG) vs. MG:

In the event the Percentage Rent for any month exceeds the MMG for said month, Tenant shall pay to City the difference between Percentage Rent and the Minimum Guarantee on or before the 15th of the subsequent month..

The term "gross receipts" is understood to mean all income, whether collected or accrued, derived by Concessionaire under this Agreement, or any licensee, sub-concessionaire, or sub-tenant, as Concessionaire, from all business conducted upon or from the Concession Area, including but not limited to, receipts from sale of food, beverages, and alcoholic beverages. The term "gross receipts" shall exclude amounts of any Federal, State, or City sales tax, or other tax, governmental imposition, assessment, charge or expense of any kind, collected by the Concessionaire from customers and required by law to be remitted to the taxing or other governmental authority and shall exclude _____. Within fifteen (15) days after each month of the term hereof, Tenant shall deliver to Landlord a written monthly statement of the gross receipts for such month certified by Tenant to be true, accurate, and complete.

4.2.1 Cap on Rent.

Maximum Cap

Notwithstanding anything to the contrary under the Lease Agreement or this Agreement, in the first four Lease Years under the Lease Agreement, the sum of the total payment by Tenant under the Lease Agreement and Concessionaire under this Agreement, in the aggregate, shall be capped as follows:

\$1,250,000 Lease Year 2022
\$1,500,000 Lease Year 2023
\$1,750,000 Lease Year 2024

\$2,000,000 Lease Year 2025

4.3 Interest for Late Payment.

Any payment which Concessionaire is required to make to the City which is not paid on or before the respective date provided for in this Agreement shall be subject to a late charge of Fifty and 00/100 (\$50.00), plus interest at the rate of eighteen (18%) percent per annum, or the maximum amount allowable under Florida law, whichever is greater, from the due date of payment until such time as payment is actually received by the City.

4.4 Sales and Use Tax.

It is also understood that the required Florida State Sales and Use Tax shall be added to Concessionaire's payments and forwarded to the City as part of said payments. It is the City's intent that it is to receive all payments due from Concessionaire as net of such Florida State Sales and Use Tax.

4.5 Payment Remittances. All payments due to the City hereunder shall be sent to the following address:

City of Miami Beach
Attention: _____
1700 Convention Center Dr., Floor _____
Miami Beach, Florida 33139

SECTION 5. MAINTENANCE AND EXAMINATION OF RECORDS.

Concessionaire shall maintain current, accurate, and complete financial records, on an accrual basis, related to its operations pursuant to this Agreement. Systems and procedures used to maintain these records shall include a system of internal controls; all accounting records shall be maintained in accordance with generally accepted accounting principles; and shall be open to inspection, copying, and audit by the City Manager or his designee upon reasonable verbal or written notice, during normal hours of operation. Concessionaire shall maintain all such records at its principal office, currently located at One Washington Avenue, Miami Beach, Florida, 33139, or, if moved to another location, all such records shall be relocated, at Concessionaire's sole expense, to a location in Miami Beach, within ten (10) days from notice of request for inspection from the City. Such records and accounts shall include, at a minimum, a breakdown of gross receipts, expenses, and profit and loss statements. Concessionaire shall maintain accurate receipt-printing cash registers (or a like alternative) for the Concession Area which will record and show the payment for every sale made or service provided in such Area. Concessionaire records shall also be maintained for a period of three (3) years following expiration (or other termination) of this Agreement (regardless of whether such termination results from the expiration of the Term or for any other reason).

A monthly report of gross receipts must be submitted to the City Finance Department's Revenue Manager, no later than thirty (30) days after the close of each month during the Term herein.

Concessionaire shall submit to the City Finance Department's Revenue Manager, within sixty (60) days of the end of each Contract Year, an annual statement of gross receipts, in a form consistent with generally accepted accounting principles. Additionally, within one hundred twenty (120) days of the end of each Contract Year, a report applying agreed-upon procedures shall be submitted to the City Finance Department's Revenue Manager, such statement shall be accompanied by a report from an independent CPA firm which shall perform certain agreed upon procedures, as described in Exhibit 5, attached hereto.

Additionally, upon the request of City Manager or City Manager's designee ("Contract Manager"), Concessionaire shall submit a monthly (or at such other interval as requested by City) maintenance records reflecting routine maintenance performed on the Concession Area.

SECTION 6. INSPECTION AND AUDIT.

The City Manager or his designee shall be entitled to audit Concessionaire's records once a year throughout the Term, and three (3) times within the three (3) year period following expiration (or other termination) of this Agreement. The City shall be responsible for paying all costs associated with such audit(s), unless the audit(s) reveals a deficiency of five (5%) percent or more in Concessionaire's statement of gross receipts for any year or years audited, in which case Concessionaire shall pay to the City, within thirty (30) days of the City deeming the audit final, the cost of the audit and a sum equal to the amount of the deficiency revealed by the audit, plus interest. These audits are in addition to periodic City audits of Resort Tax collections and payments (which are performed separately).

It is Concessionaire's intent to stay informed of comments and suggestions by the City regarding Concessionaire's performance under the Agreement. Within thirty (30) days after the end of each Contract Year, Concessionaire and the City may meet to review Concessionaire's performance under the Agreement for the previous contract year. At the meeting, Concessionaire and the City may discuss quality, operational, maintenance and any other issues regarding Concessionaire's performance under the Agreement.

Nothing contained within this Section shall preclude the City's audit rights for Resort Tax collection purposes.

SECTION 7. TAXES, ASSESSMENTS, AND UTILITIES.

Concessionaire agrees and shall pay, before delinquency, all taxes and assessments of any kind (including, without limitation, ad valorem taxes, if assessed, and/or Resort Taxes) levied or assessed upon Concessionaire and/or the Concession Area including, without limitation, any such taxes and/or assessments that may be levied and/or assessed against Concessionaire and/or the Concession Area by reason of this Agreement, or by reason of the business or other operations and/or activities of Concessionaire upon or in connection with the Concession Area.

Concessionaire will have the right, at its own expense, to contest the amount or validity, in whole or in part, of any tax and/or assessment by appropriate proceedings, which

Concessionaire shall conduct diligently and continuously, in good faith. Concessionaire may refrain from paying a tax to the extent it is contesting the imposition of same in a manner that is in accordance with law; provided, however, if, as a result of such contest, additional delinquency charges become due, Concessionaire shall be responsible for such delinquency charges, in addition to payment of the contested tax (if so ordered).

The Concessionaire Area is not serviced by utilities provided by Landlord. Concessionaire shall be solely responsible for and shall promptly pay when due all charges for utility service(s) provided to the Concession Area (including all hook-up fees and impact fees) for gas, electricity, water, sewer, cable, telephone, trash collection, etc., if applicable.

In addition to other rights and remedies hereinafter reserved to the City, upon the failure of Concessionaire to pay for such utility services when due, the City may elect to pay same and Concessionaire shall promptly reimburse the City upon demand. In no event shall the City be liable, whether to Concessionaire or to third parties, for an interruption or failure in the supply of any utilities services to the Concession Area.

SECTION 8. EMPLOYEES AND INDEPENDENT CONTRACTORS.

8.1 Concessionaire shall select, train, employ (or otherwise hire or retain) such number of employees and/or independent contractors as is necessary and appropriate for Concessionaire to satisfy its responsibilities hereunder, and as necessary to maintain the same levels of service as exist in similar first-class concession facilities and operations. Concessionaire's employees and/or independent contractors shall be employees and/or independent contractors of Concessionaire and not of the City, and Concessionaire shall be solely responsible for their supervision and daily direction and control. Concessionaire shall be solely responsible for, and have the sole authority to hire, terminate and discipline any and all personnel and/or contractors employed or retained by Concessionaire.

8.2 Concessionaire and its employees and/or independent contractors shall wear identification badges and uniforms approved by the City during all hours of operation. The S&W Restaurant uniforms currently worn by Concessionaire's employees shall satisfy the preceding requirement. All employees and/or independent contractors shall observe all the graces of personal grooming. Concessionaire shall hire people to work in its operation who are neat, clean, well groomed, and comport themselves in a professional and courteous manner.

Concessionaire shall have an experienced manager or managers overseeing the concession operations at all times.

8.3 Concessionaire shall use good faith reasonable efforts to hire employees and/or contractors from among the unemployed workers in the City of Miami Beach.

SECTION 9. HOURS OF OPERATION.

Concessionaire may operate only during hours of "active operation" of the adjacent Smith & Wollensky Restaurant building, weather or events of force majeure permitting (the term "active operation" being defined as when the full kitchen is in operation and a full restaurant menu is being served). Concessionaire's hours of minimum operation shall be subject to inclement weather:

Sunday through Saturday: 11:00 AM to 10:00 PM;

Maximum daily hours of operation shall be until 12:00 Midnight.

Any change in the hours of operation including, without limitation, any request by Concessionaire for an increase or decrease in same, shall be subject to the prior written approval of the City Manager or his designee, which approval, if granted at all, shall be at the City Manager's sole option and discretion.

SECTION 10. IMPROVEMENTS, MAINTENANCE, REPAIR AND OPERATION.

Concessionaire accepts the use of the Concession Area in its "**AS IS**" "**WHERE IS**" condition. Concessionaire assumes sole responsibility and expense for maintenance of the Concession Area (including all furniture, fixtures, equipment and any other improvements thereon). This shall include, without limitation, daily (i.e. 365 days) removal of litter, garbage and debris. Concessionaire shall also be responsible for all garbage disposal generated by its operations.

10.1 Improvements.

10.1.1. Any improvements to the Concession Area shall be at Concessionaire's sole expense and responsibility; provided, however, that any plans for such improvements shall be submitted to the City Manager or her designee for prior written approval. Upon termination and/or expiration of this Agreement, all personal property and non-permanent trade fixtures may be removed by Concessionaire without causing damage to the Concession Area.

All permanent (fixed) improvements to the Concession Area shall remain the property of the City upon termination and/or expiration of this Agreement, except as provided in Subsection 10.1.2.

Concessionaire will permit no liens to attach to the Concession Area arising from, connected with, or related to, the design, construction, and installation of any improvements.

Construction of any approved improvements shall be diligently prosecuted to completion and accomplished through the use of licensed, reputable contractors who are acceptable to the City Manager or her

designee. In addition to obtaining the prior approval of the City Manager or her designee (acting on behalf of the City, in a proprietary capacity), Concessionaire shall also be solely responsible for obtaining, at its sole cost and expense, any and all permits, licenses, and/or regulatory approvals; such regulatory approvals which may include, without limitation, land use board and/or the approvals of other required regulatory agencies having jurisdiction) required for the construction of improvements.

10.1.2. Notwithstanding Subsection 10.1.1 hereof, upon termination and/or expiration of this Agreement, except directed otherwise by the City, the Concessionaire shall immediately remove any permanent improvements made to the Concession Area by Concessionaire during the Term, at Concessionaire's sole expense and responsibility. In such event, Concessionaire shall also restore the Concession Area to its original condition prior to the improvements being made, reasonable wear and tear excepted.

10.1.3. The above requirements for submission of plans and the use of specific contractors shall not apply to improvements (which term, for purposes of this Subsection 10.1.3 only, shall also include improvements necessary for Concessionaire's ongoing maintenance and repair of the Concession Area) which do not exceed Five Hundred (\$500.00) Dollars; provided that the work is not structural, and provided further that it is permitted by applicable law.

10.2 Garbage Receptacles.

With respect to litter, garbage and debris removal, Concessionaire shall provide, at its sole expense, a sufficient number of trash receptacles for its own use and for the use of its patrons. Determination of the "number" of receptacles shall at all times be within the City Manager or or City Manager's designee's sole discretion. Disposal of the contents of said receptacles (and removal of litter, garbage and debris within the Concession Area), shall be done on a daily (i.e. 365 days) basis. Any costs for removal of the contents of said trash receptacles by the City, because of the Concessionaire's failure to do so, will be assessed to, and become the responsibility of, the Concessionaire.

The dumping or disposal of any refuse, discards, trash or garbage, generated by, or as a result of Concessionaire's operations, into any of the City's trash dumpster shall be prohibited.

Concessionaire shall clean and maintain the portion of the cutwalk between the Smith & Wollensky Restaurant building and the Concession Area, which shall include, without limitation, daily cleaning, litter control, and pressure cleaning (as per the minimum specifications provided by the City in

Exhibit 10.2 hereto).

In addition to the Concessionaire's general maintenance obligations for the Concession Area, the Concessionaire shall maintain, at all times, the immediately surrounding twenty-five (25) foot adjacent areas, in a clean and sanitary manner, and in a manner consistent with the maintenance standards set forth for the cutwalk and her adjacent park areas. Additionally, if Concessionaire fails to maintain or make any repairs, restoration and/or replacement within the Concession Area, Concessionaire shall be subject to the fine schedule set forth in Exhibit "G" of the Lease Agreement.

10.3

Maintenance/Repair.

Concessionaire shall maintain, at its sole expense and responsibility, all furniture, fixtures, and equipment (FFE) and any other improvements (whether permanent or not) required to operate the concession. In the event any FFE and/or other improvement(s) is lost, stolen, or damaged, it shall be replaced or repaired promptly, at the sole expense of Concessionaire. City is responsible for maintenance and repairs to maintain Concession Area in its original condition or better.

- 10.3.1. All damage or injury of any kind to the Concession Area, and/or to any improvements and/or FFE thereon, except damage caused by the willful misconduct or gross negligence of the City, shall be the sole obligation of Concessionaire, and shall be repaired, restored and/or replaced promptly by Concessionaire, at its sole expense, to the satisfaction of the City Manager or his designee.
- 10.3.2. All of the aforesaid repairs, restoration and replacement shall be in quality and class equal to or better than the original work (or FFE, as the case may be) and shall be done in good and workmanlike manner.
- 10.3.3. If Concessionaire fails to make any repairs, restoration and/or replacement, the same may be made by the City, at the expense of Concessionaire, and all sums spent and expenses incurred by the City shall be collectable by the City and shall be paid by Concessionaire within ten (10) days after receipt of a bill or statement thereof. Notwithstanding that the City may elect to make such repairs, restoration, and/or replacement, the City shall have no obligation and/or affirmative duty to do so. Additionally, if Concessionaire fails to maintain or make any repairs, restoration and/or replacement within the Concession Area, Concessionaire shall be subject to the fine schedule set forth in Exhibit "G" of the Lease Agreement.
- 10.3.4. It shall be Concessionaire's sole obligation to ensure that any renovations, repairs and/or improvements made by Concessionaire to the Concession Area comply with all applicable permitting, zoning,

building codes and life safety codes of governmental authorities having jurisdiction.

10.4 No Dangerous Materials.

Except for items used in the ordinary course of business and in lawful quantities, Concessionaire agrees not to use or permit in the Concession Area the storage and/or use of gasoline, fuel oils, diesel, illuminating oils, oil lamps, combustible powered electricity producing generators, turpentine, benzene, naphtha, propane, natural gas, or other similar substances, combustible materials, or explosives of any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida. Any such substances or materials found within the Concession Area shall be immediately removed. Any actual cooking and heating within or on the Concession Area shall be prohibited.

In consideration of a separate and specific consideration of Ten (\$10.00) Dollars and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify and hold the City harmless from any loss, damage, cost, or expense of the City, including, without limitation, reasonable attorney's fees, incurred as a result of, arising from, or connected with the placement by Concessionaire of any "hazardous substance" or "petroleum products" on, under, in or upon the Concession Area as those terms are defined by applicable Federal and State statutes, or any environmental rules and environmental regulations promulgated thereunder. The provisions of this subsection 10.4 shall survive the termination or earlier expiration of this Agreement.

10.5 Security.

Concessionaire shall be responsible for and provide such reasonable security measures as may be required to protect the Concession Area and any improvements and FFE thereon. Under no circumstances shall the City be responsible for any stolen or damaged FFE; damage to or loss of any improvements; or any stolen, lost, or damaged personal property of Concessionaire's employees, contractors, patrons, guests, invitees, and/or any other third parties.

10.6 Inspection.

Concessionaire agrees that the Concession Area (and operations thereon) may be inspected at any time by the City Manager or his designee, or by any other municipal, County or State officer, or other agency having responsibility and/or jurisdiction for inspection of such operations. Concessionaire hereby waives all claims against the City for compensation for loss or damage sustained by reason of any interference with the concession operations, whether by the City or by any public agency or official, in enforcing their respective duties, or enforcing compliance with

any applicable laws, or ordinances, or regulations. The City Manager shall make reasonable efforts to Minimize any discrepancy of business being conducted in the Concession Area.

SECTION 11. Tenant's Insurance Requirements. [PENDING REVIEW BY S&W'S RISK MANAGER and CITY'S RISK MANAGER]

- 11.1 Prior to occupying the Concession Area and throughout the Term of the Agreement (including renewal periods), Tenant shall, at its sole cost and expense, comply with all insurance requirements of the City. It is agreed by the parties that Tenant shall not occupy the Demised Premises until proof of the following insurance coverage have been reviewed and approved by the City's Risk Manager. All insurance policies required below shall be issued by companies authorized to do business under the laws of the State of Florida. Provider shall indicate that insurance coverage has been obtained which meets the requirements as outlined below by submitting original certificates of insurance to the City's Risk Manager and Asset Manager respectively:
- 11.1.1. Worker's Compensation for all employees of the provider as required by Florida Statute 440 and Employer's Liability coverage in accordance with the Florida Statutory requirements.
 - 11.1.2. Commercial General Liability on a comprehensive basis in an amount not less than \$1,000,000 combined single limit per occurrence, for bodily injury and property damage. City of Miami Beach must be shown as an additional insured with respect to this coverage.
 - 11.1.3. Additionally, Tenant will be insured for the following coverage:
 - 11.1.3.1. Business interruption insurance sufficient to insure Tenant for no less than one (1) full year of loss of business, with the City named thereon as loss payee to the extent permitted by applicable law.
 - 11.1.4. Intentionally Omitted
 - 11.1.5. All-Risk property and casualty insurance, written at a minimum of eighty (80%) percent of replacement cost value and with replacement cost endorsement, covering all leasehold improvements installed in the Demised Premises by or on behalf of Tenant and including without limitation all of Tenant's personal property in the Demised Premises (including, without limitation, inventory, trade fixtures, floor coverings, furniture, and other property removable by Tenant under the provisions of this Agreement).

- 11.2 The insurance coverage required shall include those classifications, as listed in standard liability insurance manuals, which most nearly reflect the operations of the provider.
- 11.3 Any insurance coverage required above must include a waiver of subrogation in favor of the City.
- 11.4 The company must be rated no less than "A" as to management, and no less than "Class VII" as to financial strength, by the latest edition of Best's Insurance Guide, published by A.M. Best Company, Oldwick, New Jersey, or its equivalent, subject to the approval of the City Risk Management Division.

CERTIFICATE HOLDER MUST READ:

C/O Insurance Tracking Services, Inc. (ITS)
P.O. Box 20270
Long Beach, CA 90801

Updated COI must be submitted to ITS via email with the following:

1. Email address: miamibeach.contracts@instracking.com
2. Copy Andrew Bejel at AndrewBejel@miamibeachfl.gov and Febe Perez at febeperez@miamibeachfl.gov on the submittal to ITS

- 11.5 Compliance with the foregoing requirements shall not relieve the vendor of his liability and obligation under this section or under any other section of this Agreement.
- 11.6 City reserves the right to impose additional reasonable insurance requirements as the City may deem necessary or in accordance with common practice.
- 11.7 The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days written notice to City and then subject to the prior written approval of the City's Risk Manager. Should Tenant fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by TENANT to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If Tenant does not repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) until paid, and such failure shall be deemed an event of default hereunder.

- 11.8 Waiver of Subrogation.
Concessionaire hereby grants to City of Miami Beach a waiver of any right to subrogation which any insurer of the Tenant may acquire against the City by virtue of the payment of any loss under such insurance. Concessionaire agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the City has received a waiver of subrogation endorsement from the insurer.

SECTION 12. INDEMNITY AND LIMITATION OF LIABILITY.

- 12.1 In consideration of a separate and specific consideration of Ten (\$10.00) Dollars and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its officers, employees, contractors, agents or servants from and against any claim, demand or cause of action of whatsoever kind or nature arising out of (1) wholly or in part from the negligent acts, errors, omissions or other misconduct of Concessionaire, its officers, director, members, employees, agents, contractors, subcontractors, or any other person or entity acting under Concessionaire's control or supervision; (2) Concessionaire's breach of the terms of this Agreement or its representations and warranties herein; (3) the use of the Concession Area; or (4) in the event of any lawsuit, action or proceeding challenging the validity, execution or effectiveness of the Concession Agreement, any tort or other claim related to any of the foregoing, or any such challenge relating to any approval required under the County Charter, City Code and/or the City Charter ("Lawsuit"). Concessionaire shall pay all such claims and losses and shall pay all such costs and judgments which may issue from any lawsuit arising from such claims and losses, and shall pay all costs and attorneys' fees expended by the City in the defense of such claims and losses, including appeals.
- 12.2 In addition, and in consideration of a separate and specific consideration of Ten (\$10.00) Dollars and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its officers, employees, contractors, agents or servants from and against any claim, demand or cause of action of whatever kind or nature arising out of any misconduct of Concessionaire, its officers, employees, contractors, subconcessionaire(s), agents or servants not included in Subsection 12.1 herein and for which the City, its officers, employees, contractors, subconcessionaire(s), agents or servants are alleged to be liable.
- 12.3 Subsections 12.1 and 12.2 shall survive the termination or expiration of this Agreement. Subsections 12.1 and 12.2 shall not apply, however, to any such liability, that arises as a result of the willful misconduct or gross

negligence of the City, its officers, employees, contractors, agents or servants.

12.4 Intentionally Omitted

12.5 Force Majeure.

Neither party shall be obligated to perform hereunder and neither party shall be deemed to be in default if performance is prevented by:

- a. Any act or chain of related acts resulting in destruction, vandalism or theft which render a significant portion of the Concession Areas unusable at any one point in time and which is not caused by negligence of Concessionaire;
- b. Earthquake; hurricane; flood; act of God; direct act of terrorism; or civil commotion, pandemics, which renders a significant portion of the Concession Areas unusable; and
- c. Any law, ordinance, rule, regulation or order of any public or military authority stemming from the existence of economic or energy controls, hostilities, or war which renders a significant portion of the Concession Areas unusable.
- d. In the event of a labor dispute which results in a strike, picket or boycott affecting at least fifty (50%) percent of the Concession Areas, Concessionaire shall not thereby be deemed to be in default or to have breached any part of this Agreement, unless such dispute shall have been caused by illegal labor practices or violations by Concessionaire of applicable collective bargaining Agreements (and there has been a final determination of such fact which is not cured by Concessionaire within thirty (30) days).

12.6 City desires to enter into this Agreement placing the operation and management of the Concession Area(s) in the hands of a private management entity only if so doing the City can place a limit on its liability for any cause of action for breach of this Agreement, so that its liability for any such breach never exceeds the sum of Ten Thousand (\$10,000.00) Dollars. Concessionaire hereby expresses its willingness to enter into this Agreement Ten Thousand (\$10,000.00) Dollars limitation on recovery for any action for breach of contract. Accordingly, and in consideration of the separate consideration of Ten Thousand (\$10,000.00) Dollars, the receipt of which is hereby acknowledged, the City shall not be liable to Concessionaire for damages to Concessionaire in an amount in excess of Ten Thousand (\$10,000.00) Dollars, for any action for breach of contract arising out of the performance or on-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this

paragraph or elsewhere in this Agreement is in any way intended to be a waiver of limitation placed upon the City's liability as set forth in Florida Statutes, Section 768.28.

12.7

12.8

Waiver of Loss from Hazards.

Concessionaire hereby expressly waives all claims against the City for loss or damage sustained by the Concessionaire resulting from an event of Force Majeure (as defined herein), and the Concessionaire hereby expressly waives all rights, claims, and demands against the City and forever releases and discharges the City from all demands, claims, actions and causes of action arising from any of the aforesaid causes.

SECTION 13. DEFAULT AND TERMINATION.

Subsections 13.1 through 13.4 shall constitute events of default under this Agreement. An event of default by Concessionaire shall entitle the City to exercise any and all remedies described as the City's remedies under this Agreement, including but not limited to those set forth in Subsection 13.5. An event of default by the City shall entitle Concessionaire to exercise any and all remedies described as Concessionaire's remedies under this Agreement, including but not limited to those set forth in Subsection 13.6.

13.1

Bankruptcy.

If either the City or Concessionaire shall be adjudged bankrupt or insolvent, or if any receiver or trustee of all or any part of the business property of either party shall be appointed, or if any receiver of all or any part of the business property shall be appointed and shall not be discharged within sixty (60) days after appointment, or if either party shall make an assignment of its property for the benefit of creditors, or shall file a voluntary petition in bankruptcy, or insolvency, or shall apply for reorganization or arrangement with its creditors under the bankruptcy or insolvency laws now in force or hereinafter enacted, Federal, State, or otherwise, or if such petitions shall be filed against either party and shall not be dismissed within sixty (60) days after such filing, then the other party may immediately, or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.2

Default in Payment.

If any payment and accumulated penalties are not received within fifteen (15) days after the payment due date, and such failure continues three (3) days after written notice thereof, then the City may, without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.3

Non-Monetary Default.

In the event that Concessionaire or the City fails to perform or observe any of the covenants, terms or provisions under this Agreement, and such failure continues thirty (30) days after written notice thereof from the other party hereto, such non-defaulting party may immediately or at any time thereafter, and without further demand or notice, terminate this Agreement. In the event that a default is not reasonably susceptible to being cured within such period, the defaulting party shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default, but in no event shall such extended cure period exceed ninety (90) days from the date of written notice thereof. In the event Concessionaire cures any default pursuant to this subsection, it shall promptly provide the City with written notice of same.

13.4 Default Under Lease Agreement.

In the event that Concessionaire is in default under the Lease Agreement then the City may, without further demand or notice, terminate this Concession Agreement without being prejudiced as to any remedies which may be available to it for breach of contract. In the event that the Concessionaire is in default under the Concession Agreement, the City may, without further demand or notice, place Concessionaire in default under the Lease Agreement, and may, without being prejudiced as to any remedies which the City may have available, terminate the Lease Agreement.

13.5 City's Remedies for Concessionaire's Default.

If any of the events of default, as set forth in this Section, shall occur, the City may, after notice (if required) and the expiration of cure periods, as provided above, at its sole option and discretion, institute such proceedings as in its opinion are necessary to cure such default(s) and to compensate the City for damages resulting from such default(s), including but not limited to the right to give to Concessionaire a notice of termination of this Agreement. If such notice is given, the Term of this Agreement shall terminate upon the date specified in such notice from the City to Concessionaire. On the date so specified, Concessionaire shall then quit and surrender the Concession Area to the City pursuant to the provisions of Subsection 13.8. Upon the termination of this Agreement by the City, all rights and interest of Concessionaire in and to the Concession Area and to this Agreement, and every part thereof, shall cease and terminate and the City may, in addition to any other rights and remedies it may have, retain all sums paid to it by Concessionaire under this Agreement.

In addition to the rights set forth above, the City shall have the rights to pursue any and all of the following:

- a. the right to injunction or other similar relief available to it under

Florida law against Concessionaire; and/or

- b. the right to maintain any and all actions at law or suits in equity or other proper proceedings to obtain damages resulting from Concessionaire's default.

13.6 Concessionaire's Remedies for City's Default.

If an event of default, as set forth in this Section, by the City shall occur, Concessionaire may, after the expiration of the cure period, terminate this Agreement upon written notice to the City and/or pursue all of its available rights in law or in equity. Said termination shall become effective upon receipt of the written notice of termination by the City. On the date specified in the notice, Concessionaire shall quit and surrender the Concession Area to the City pursuant to the provisions of Subsection 13.8.

13.7 Intentionally Omitted.

13.8 Surrender of Concession Area.

At the expiration of this Agreement, or earlier termination in accordance with the terms of this Agreement, Concessionaire shall surrender the Concession Area in the same condition as the Concession Area was prior to the Commencement Date of this Agreement, reasonable wear and tear excepted. Concessionaire shall remove all its personal property, upon forty-eight (48) hours written notice from the City Manager or his designee unless a longer time period is agreed to by the City. Concessionaire's obligation to observe or perform this covenant shall survive the expiration or other termination of this Agreement. Continued occupancy of the Concession Area after termination of the Agreement shall constitute trespass by the Concessionaire, and may be prosecuted as such. In addition, the Concessionaire shall pay to the City One Thousand (\$1,000.00) Dollars per day as liquidated damages for such trespass and holding over.

SECTION 14. Intentionally Omitted

SECTION 15. Intentionally Omitted

SECTION 16. SPECIAL EVENTS / SPONSORSHIPS.

16.1 City Special Events.

In the event that the City, at its reasonable discretion, deems that it would be in the interest to the City, and there exists no reasonable alternatives, the City reserves the right to displace the Concessionaire for City produced and/or sponsored special events and/or City produced and/or sponsored productions. Additionally, the aforesaid events may also require additional time for load-in and load-out of the event. In such cases, the City may request that Concessionaire cease and desist operations during the term

of, and in the area of, the special event and/or production, and Concessionaire shall cease and desist during such time. If the Concessionaire is not required to close, or the City Manager or his designee determines that Concessionaire may remain open in such a manner as prescribed by the City, that will not interfere with the special event and/or production, Concessionaire shall use its good faith, in either case, in cooperating with the City. If Concessionaire is allowed to remain open during special events and/or productions, Concessionaire may be allowed to have in operation its normal daily complement of equipment and staff. "Normal" shall be defined as equipment and staff that the Concessionaire customarily has available to service its patrons within the Concession Area on a normal business day (during its hours of operation).

16.2

Sponsorships.

The City reserves unto itself all present and future rights to negotiate all forms of endorsement and/or sponsorship agreements based on the marketing value of any City trademark, property, brand, logo and/or reputation. Any and all benefits derived from an endorsement and/or sponsorship agreement based on the marketing value of a City trademark, property, brand, logo and/or reputation, shall belong exclusively to the City. Concessionaire shall be specifically prohibited from entering into, or otherwise creating any, sponsorships and/or endorsements with third parties which are based solely or in any part on the marketing value of a City trademark, property, brand, logo and/or reputation.

SECTION 17. NO IMPROPER USE.

Concessionaire will not use, nor suffer or permit any person to use in any manner whatsoever, the Concession Area for any improper, immoral or offensive purpose, or for any purpose in violation of any Federal, State, County, or municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. Concessionaire will protect, indemnify, and forever save and keep harmless the City, its officers, employees, contractors, agents or servants, from and against damage, penalty, fine, judgment, expense or charge suffered, imposed, assessed or incurred for any violation, or breach of any law, ordinance, rule, order or regulation occasioned by any act, neglect or omission of Concessionaire, or any of its officers, employees, contractors, agents or servants. In the event of any violation by Concessionaire, or if the City shall deem any conduct on the part of Concessionaire to be objectionable or improper, the City Manager or his designee shall have the right to suspend the concession operations should the Concessionaire fail to correct any such violation, conduct, or practice to the satisfaction of the City Manager or his designee within twenty-four (24) hours after receiving written or verbal notice of the nature and extent of such violation, conduct, or practice; such suspension to continue until the violation is cured. Concessionaire further agrees not to commence operations during the

suspension until the violation has been corrected to the satisfaction of the City Manager or his designee.

SECTION 18. Intentionally Omitted

SECTION 19. NOTICES.

All notices from the City to Concessionaire shall be deemed duly served upon receipt, if mailed by registered or certified mail with a return receipt to Concessionaire at the following addresses:

1 Washington Avenue
Miami Beach, Florida 33139

With copies to:

Smith & Wollensky Restaurant Group, Inc.
101 Station Lndg.
Medford, MA 02155

Shutts & Bowen LLP
200 South Biscayne Blvd., Suite 4100
Miami, Florida 33131
Attention: Alexander I. Tachmes, Esq.

All notices from Concessionaire to the City shall be deemed duly served upon receipt, if mailed by registered or certified mail return receipt requested to the City of Miami Beach at the following addresses:

City Manager
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

With copies to:

Office of Real Estate
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

Concessionaire and the City may change the above mailing addresses at any time upon giving the other party written notification. All notices under this Agreement must be in writing.

SECTION 20. LAWS.

20.1 Compliance.
Concessionaire shall comply with all applicable City, County, State, and Federal ordinances, statutes, rules and regulations (including but not limited to all applicable environmental City, County, State, and Federal ordinances, statutes, rules and regulations, as same may be amended from time to time.

20.2 No Discrimination.
Concessionaire hereby agrees hereby agrees to comply with City of Miami Beach Human Rights Ordinance, as codified in Chapter 62 of the City Code, as may be amended from time to time, prohibiting discrimination in employment, housing, public accommodations, or public services, on the basis of actual or perceived race, color, national origin, religion, sex, intersexuality, sexual orientation, gender identity, familial and marital status, age, ancestry, height, weight, domestic partner status, labor organization membership, familial situation, political affiliation, or disability.

SECTION 21. MISCELLANEOUS.

21.1 No Partnership.
Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between the City and Concessionaire.

21.2 Modifications.
This Agreement cannot be changed or modified except by agreement in writing executed by all parties hereto. Concessionaire acknowledges that no modification to this Agreement may be agreed to by the City unless approved by the Mayor and City Commission except where such authority has been expressly provided herein to the City Manager.

21.3 Complete Agreement.
This Agreement, together with all exhibits incorporated hereto, and the Lease Agreement, constitute all the understandings and agreements of whatsoever nature or kind existing between the parties with respect to Concessionaire's operations, as contemplated herein.

21.4 Headings.
The section, subsection and paragraph headings contained herein are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.

21.5 Binding Effect.
This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

21.6 Clauses.

The illegality or invalidity of any term or any clause of this Agreement shall not affect the validity of the remainder of the Agreement, and the Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein unless the elimination of such provision detrimentally reduces the consideration that either party is to receive under this Agreement or materially affects the continuing operation of this Agreement.

21.7 Severability.

If any provision of this Agreement or any portion of such provision or the application thereof to any person or circumstance shall be held to be invalid or unenforceable, or shall become a violation of any local, State, or Federal laws, then the same as so applied shall no longer be a part of this Agreement but the remainder of the Agreement, such provisions and the application thereof to other persons or circumstances, shall not be affected thereby and this Agreement shall be so modified.

21.8 Right of Entry.

The City, at the direction of the City Manager, shall at all times, have the right to enter into and upon any and all parts of the Concession Area for the purpose of examining the same for any reason relating to the obligations of parties to this Agreement.

21.9 Not a Lease.

It is expressly understood and agreed that no part, parcel, building, structure, equipment or space is leased to Concessionaire; that this Agreement is a concession agreement and not a lease, and that Concessionaire's right to operate, manage, and maintain the concession shall continue only so long as Concessionaire complies with the undertakings, provisions, agreements, stipulations and conditions of this Agreement.

Accordingly, Concessionaire hereby agrees and acknowledges that in the event of termination of this Agreement, whether due to a default by Concessionaire or otherwise, Concessionaire shall surrender and yield unto the City the Concession Area, in accordance with Subsection 13.8 hereof, and the City shall in no way be required to evict and/or otherwise remove Concessionaire from the Concession Area as if this were a tenancy under Chapter 83, Florida Statutes, nor shall Concessionaire be afforded any other rights afforded to nonresidential tenants pursuant to said Chapter (the parties having herein expressly acknowledged that this Agreement is intended to be a concession agreement and is in no way intended to be a lease).

21.10 Signage.

Concessionaire shall provide, at its sole expense and responsibility, any

required signs at its concession. Concessionaire understands that City of Miami Beach regulations strictly prohibit Concessionaire from advertising on any part of the Concession Area Improvements or the Concession Area, and expressly agrees not to conduct any advertising hereunder unless expressly approved in writing by the City, in the City's sole and absolute discretion. . Any signage posted by Concessionaire shall be subject to the prior approval of the City as to size, shape and placement of same.

21.11 Conflict of Interest.

Concessionaire shall perform its services under this Agreement and conduct the concession operation(s) contemplated herein, in a manner so as to show no preference for other concession operations/facilities owned, operated, managed, or otherwise controlled by Concessionaire.

21.12 No Waiver.

21.12.1. It is mutually covenanted and agreed by and between the parties hereto that the failure of either Party to insist upon the strict performance of any of the conditions, covenants, terms or provisions of this Agreement, or to exercise any option herein conferred, will not be considered or construed as a waiver or relinquishment for the future of any such conditions, covenants, terms, provisions or options but the same shall continue and remain in full force and effect.

21.12.2. A waiver of any term expressed herein shall not be implied by any neglect of the City to declare a forfeiture on account of the violation of such term if such violation by continued or repeated subsequently and any express waiver shall not affect any term other than the one specified in such waiver and that one only for the time and in the manner specifically stated.

21.12.3. The receipt of any sum paid by Concessionaire to the City after breach of any condition, covenant, term or provision herein contained shall not be deemed a waiver of such breach, but shall be taken, considered and construed as payment for use and occupation (and not as rent), unless such breach be expressly waived in writing by the City.

21.13 No Third-Party Beneficiary.

Nothing in this Agreement shall confer upon any person or entity, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies by reason of this Agreement.

SECTION 22. Intentionally Omitted

SECTION 23. VENUE.

This Agreement shall be deemed to have been made and shall be construed and

interpreted in accordance with the laws of the State of Florida. This Agreement shall be enforceable in Miami-Dade County, Florida, and if legal action is necessary by either party with respect to the enforcement of any and all the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Miami-Dade County, Florida. **THE CITY AND CONCESSIONAIRE HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT THE CITY AND CONCESSIONAIRE MAY HEREIN AFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CONCESSION AREA.**

SECTION 24. [PROHIBITIONS REGARDING SALE OR USE OF EXPANDED POLYSTYRENE FOOD SERVICE ARTICLES OR PLASTIC STRAWS.]
[OPEN]

Pursuant to Section 82-7 of the City Code, as may be amended from time to time, effective August 2, 2014, the City has prohibited the use of expanded polystyrene food service articles by City Contractors, in connection with any City contract, lease, concession agreement or Special event permit. Additionally, pursuant to Section 82-385 of the City Code, as may be amended from time to time, no polystyrene food service articles will be allowed in the right-of-way, and no polystyrene food service articles can be provided to sidewalk café patrons.

“Expanded polystyrene” is a petroleum byproduct commonly known as Styrofoam. Expanded polystyrene is more particularly defined as blown polystyrene and expanded and extruded foams that are thermoplastic petrochemical materials utilizing a styrene monomer and processed by any number of techniques including, but not limited to, fusion of polymer spheres (expandable bead foam), injection molding, foam molding, and extrusion-blown molding (extruded foam polystyrene).

“Expanded polystyrene food service articles” means plates, bowls, cups, containers, lids, trays, coolers, ice chests, and all similar articles that consist of expanded polystyrene.

Tenant agrees not to sell, use, provide food in, or offer the use of expanded polystyrene food service articles at the Demised Premises or in connection with this Lease Agreement. Tenant shall ensure that all vendors operating in the Demised Premises abide by the restrictions contained in this Section 40. A violation of this section shall be deemed a default under the terms of this Lease Agreement. This section shall not apply to expanded polystyrene food service articles used for prepackaged food that have been filled and sealed prior to receipt by the Tenant or its vendors.

Additionally, Tenant agrees to comply (and ensure compliance by its vendors) with Section 46-92 (c) of the City Code, which states that it is unlawful for any person to carry **any** expanded polystyrene product onto any beach or into any park within the City or for any business to provide plastic straws with the service or delivery of any beverage to patrons on the beach.

SECTION 25. CONFLICT OF INTEREST.

Concessionaire agrees to adhere to and be governed by the Miami-Dade County Ethics and Conflict of Interest laws, as same may be amended from time to time, and by the City of Miami Beach Charter and Code, as same may be amended from time to time, in connection with the performance of the Services.

Concessionaire covenants that it presently has no interest and shall not acquire any interest, direct or indirectly, in any establishment on Miami Beach, other than pursuant to the Lease Agreement, which would conflict in any manner or degree with the performance of the work and services contemplated in this Agreement. The Concessionaire further covenants that in the performance of this Agreement, no person having any such interest shall knowingly be employed by the Concessionaire.

SECTION 26. FLORIDA PUBLIC RECORDS LAW.

26.1 Concessionaire shall comply with Florida Public Records law under Chapter 119, Florida Statutes, as may be amended from time to time.

26.2 The term "public records" shall have the meaning set forth in Section 119.011(12), which means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business of the City.

26.3 Pursuant to Section 119.0701 of the Florida Statutes, if the Concessionaire meets the definition of "Contractor" as defined in Section 119.0701(1)(a), the Concessionaire shall:

26.3.1. Keep and maintain public records required by the City to perform the service;

26.3.2. Upon request from the City's custodian of public records, provide the City with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes or as otherwise provided by law;

26.3.3. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed, except as authorized by law, for the duration of the contract term and following completion of the Agreement if the Concessionaire does not transfer the records to the City;

26.3.4. Upon completion of the Agreement, transfer, at no cost to the City, all public records in possession of the Consultant or keep and maintain

public records required by the City to perform the service. If the Consultant transfers all public records to the City upon completion of the Agreement, the Concessionaire shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Concessionaire keeps and maintains public records upon completion of the Agreement, the Consultant shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City's custodian of public records, in a format that is compatible with the information technology systems of the City.

26.4 REQUEST FOR RECORDS; NONCOMPLIANCE.

- 26.4.1. A request to inspect or copy public records relating to the City's contract for services must be made directly to the City. If the City does not possess the requested records, the City shall immediately notify the Consultant of the request, and the Concessionaire must provide the records to the City or allow the records to be inspected or copied within a reasonable time.
- 26.4.2. Concessionaire's failure to comply with the City's request for records shall constitute a breach of this Agreement, and the City, at its sole discretion, may: (1) unilaterally terminate the Agreement; (2) avail itself of the remedies set forth under the Agreement; and/or (3) avail itself of any available remedies at law or in equity.
- 26.4.3. A Concessionaire who fails to provide the public records to the City within a reasonable time may be subject to penalties under s. 119.10.

26.5 CIVIL ACTION.

- 26.5.1. If a civil action is filed against a Concessionaire to compel production of public records relating to the City's contract for services, the court shall assess and award against the Concessionaire the reasonable costs of enforcement, including reasonable attorneys' fees, if:
 - a. The court determines that the Concessionaire unlawfully refused to comply with the public records request within a reasonable time; and
 - b. At least 8 business days before filing the action, the plaintiff provided written notice of the public records request, including a statement that the Concessionaire has not complied with the request, to the City and to the Concessionaire.
- 26.5.2. A notice complies with subparagraph (1)(b) if it is sent to the City's custodian of public records and to the Consultant at the Concessionaire's address listed on its contract with the City or to the Concessionaire's registered agent. Such notices must be sent by

common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and with evidence of delivery, which may be in an electronic format.

- 26.5.3. A Concessionaire who complies with a public records request within 8 business days after the notice is sent is not liable for the reasonable costs of enforcement.

IF THE CONCESSIONAIRE HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONCESSIONAIRE'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT:

**CITY OF MIAMI BEACH
ATTENTION: RAFAEL E. GRANADO, CITY CLERK
1700 CONVENTION CENTER DRIVE
MIAMI BEACH, FLORIDA 33139
E-MAIL: RAFAELGRANADO@MIAMIBEACHFL.GOV
PHONE: 305-673-7411**

SECTION 27. COMPLIANCE.

Concessionaire shall comply with all applicable City, County, State, and Federal ordinances, statutes, rules and regulations, including but not limited to all applicable environmental City, County, State, and Federal ordinances, statutes, rules and regulations.

SECTION 28. GOVERNING LAW.

This Agreement shall be governed by and construed in accordance with the laws of the State of Florida. Any civil action arising in any way from this Agreement or the activities of the parties under this Agreement shall be brought only in a court of competent jurisdiction located in Miami-Dade County, Florida.

SECTION 29. EQUAL EMPLOYMENT OPPORTUNITY.

Neither Concessionaire nor any affiliate of Concessionaire performing services hereunder, or pursuant hereto, will discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, sexual orientation, and disability (as defined in Title I of ADA). Concessionaire will take affirmative steps to utilize minorities and females in the work force and in correlative business enterprises.

SECTION 30. NO DISCRIMINATION.

Concessionaire agrees that there shall be no discrimination as to as to race, color, national origin, religion, sex, intersexuality, sexual orientation, gender identity, marital and familial status, or age, or handicap, in the operations referred to in this Agreement; and, further, there shall be no discrimination regarding any use, service, maintenance, or operation within the Concession Areas.

All operations and services offered in the Concession Areas shall be made available to the public, subject to the right of the Concessionaire and the City to establish and enforce reasonable rules and regulations to provide for the safety, orderly operation, and security of the Concession Areas and improvements and equipment thereon. Pursuant to Sections 62-90 and 62-91, of Chapter 62, of the Miami Beach City Code entitled "Human Relations", Concessionaire, by executing this Agreement, certifies that it does not discriminate in its membership or policies based on race, color, national origin, religion, sex, intersexuality, sexual orientation, gender identity, marital and familial status, or age, or handicap.

SECTION 31. PROCEDURE FOR APPROVALS AND/OR CONSENTS.

In each instance in which the approval or consent of the City Manager or Contract Manager is allowed or required in this Agreement, it is acknowledged that such authority has been expressly provided herein to the City Manager or Contract Manager by the Mayor and City Commission of the City. In each instance in which the approval or consent of the City Manager or Contract Manager is allowed or required in this Agreement, Concessionaire shall send to the City Manager a written request for approval or consent (the "Approval Request").

The City Manager or Contract Manager shall use reasonable efforts to provide written notice to Concessionaire approving of consent to, or disapproving of the request, within thirty (30) days from the date of Approval Request (or within such other time period as may be expressly set forth for a particular approval or consent under this Agreement). However, the City Manager or Contract Manager's failure to consider such request within this time provided shall not be deemed a waiver, nor shall Concessionaire assume that the request is automatically approved and consented to. The City Manager or Contract Manager shall not unreasonably withhold such approval or consent. This subsection shall not apply to approvals required herein by the Mayor and City Commission.

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed, all as of the day and year first above written, indicating their agreement.

FOR CITY:

CITY OF MIAMI BEACH, FLORIDA

ATTEST:

By: _____
_____, **City Clerk**

Date

_____, **Mayor**

FOR CONCESSIONAIRE:

1 WASHINGTON AVENUE CORPORATION

ATTEST:

By: _____
Witness _____, _____

Print Name

Date

_____, _____

FOR CITY:

ATTEST:

By: _____
Witness _____, _____

Print Name

Date

_____, **City Attorney**

EXHIBIT 2.1
Concession Area

[To be included.]

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EXHIBIT 3.2

Additional Requirements

The Concession Area shall be maintained in a clean, neat and orderly appearance at all times by the Concessionaire. The area of the sidewalk, curb and gutter immediately adjacent to the Concession Area shall be cleared of all debris during hours of operation, and again at the close of each business day, or as may otherwise be determined by the City Manager.

The Concessionaire shall be responsible for cleaning the floor surface on which the outdoor seating is located at the close of each business day. In addition, the following conditions shall apply:

- a. Tables, chairs, umbrellas and any other outdoor cafe furniture shall be maintained in a clean, attractive, and orderly appearance, and shall be maintained and kept in good repair at all times;
- b. All outdoor furniture shall be of high quality, design, materials, and workmanship so as to ensure the safety and convenience of the public;
- c. Only the outdoor cafe furniture specifically shown on the approved site plan shall be allowed on the Concession Area;
- d. All tables, chairs, umbrellas, and any other outdoor furniture shall be readily removable, and shall not be physically attached, chained, or in any other manner affixed to any public structure, street furniture, signage, and/or other public fixture, or to a curb and/or public right-of-way;
- e. The stacking or piling up of chairs shall be prohibited on the Concession Area;
- f. At close of business, all tables, chairs and any other outdoor furniture shall be removed from the Concession Area and stored in a non-visible location from the public right-of-way. Any exception to this requirement shall be at the sole and absolute discretion of the City Manager and/or his/her designee.
- g. No storage of dishes, silverware or other similar restaurant equipment shall be allowed on the Concession Area, or on any other portion of the public right-of-way, or outside the structural confines of the building in which the restaurant is located, during non-business hours;
- h. There shall be no live entertainment or speakers placed on the Concession Area;
- i. No menu board(s) shall be permitted to be displayed on the Concession Area;
- j. No food preparation, food storage, refrigeration apparatus or equipment, or fire apparatus or equipment, shall be allowed on the Concession Area;
- k. No food displays shall be permitted on the Concession Area. No advertising signs or business identification signs shall be permitted, except that the restaurant name and/or its logo may be permitted on umbrellas but such logos and/or lettering may not exceed six inches in height;

- I. Plants shall be properly maintained. Distressed plants shall be promptly replaced. Plant fertilizers which contain material that can stain the sidewalks shall not be allowed;
- m. The City Manager or his/her designee may cause the immediate removal, relocation and/or storage of all or part of any furniture located on the Concession Area in emergency situations or for public safety considerations. Upon written and/or verbal notification by the City Manager of a hurricane or other major weather event, or the issuance of a hurricane warning by Miami-Dade County, whichever occurs first, the Concessionaire shall, within no more than four hours of same, remove and place indoors all tables, chairs and any other outdoor furniture located on the Concession Area. The notification by the City Manager of a hurricane or other major weather event, or the issuance of a hurricane warning, shall constitute a public emergency situation as referenced in this division. The City Manager may remove, relocate, and/or store any outdoor furniture found on the Concession Area that has otherwise not been removed by the Concessionaire pursuant to this subsection. Any and all costs incurred by the City for removal, relocation and/or storage of Concessionaire's furniture shall be the responsibility of the Concessionaire.

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