



**CITY OF MARTINEZ**

**CITY COUNCIL AGENDA  
December 17, 2008**

**TO:** Mayor and City Council

**FROM:** Phil Vince, City Manger  
Joann Tool, Deputy Community and Economic Development Director –  
Recreation, Community Services & Marina

**SUBJECT:** Willows Theatre Loan Request

**DATE:** December 8, 2008

**RECOMMENDATION:**

- (1) Adopt a resolution that grants the Willows Theatre Company \$60,000 and loans the Willows Theatre Company an additional \$40,000 for a total of \$100,000 according to the terms and conditions outlined in the Loan Agreement and 3<sup>rd</sup> Amendments to the Bisio and Kenney Building Leases.
- (2) Authorize the City Manager to sign the Loan Agreement in the amount of \$100,000 with the Willows Theatre Company

**BACKGROUND:**

In November the Willows Theatre Company came before the City Council to request immediate financial aid from the City to help reconcile its debts so that the theatre company can continue to provide quality live entertainment for Martinez residents. The Willows requested that the City Council consider approving a combination grant/loan financial package in the amount of \$100,000.

The City Council indicated that in light of the economic stimulus and long term vision for the Willows in downtown Martinez, it is in the City’s interest to assist the theatre company. The Council discussed granting and/or loaning the Willows the requested \$100,000. The Council directed staff and the JMFC Ad Hoc Committee to develop a grant/loan combination and draft a loan agreement that would be considered at the December 17<sup>th</sup> Council meeting.

The JMFC Committee met on December 10, and recommended allocating \$100,000 to the Willows Theatre Company in the form of a grant for \$60,000 and loan for \$40,000. This action will help retire the expenses outlined in the attached Grant/Loan Budget that was submitted by the Willows on November 20, 2008. Both the grant and loan will be disbursed under one loan agreement.

The Grant/Loan document requires that: (1) upon execution the Willows will provide the City with a business plan that includes the Borrower's projected operations, capital expenditures, revenues, assets, debts and liabilities for current and future years; (2) pay the outstanding debt and preexisting financial obligations as submitted by the Willows on November 20, 2008; (3) continue to utilize the joint bank account for these funds as was used for the construction loan; and, (4) accept the 3<sup>rd</sup> Amendments to the Bisio and Kenney Building leases that provide the City remedies in case of default by the Willows.

**FISCAL IMPACT:**

Funds allocated for the grant/loan are coming from the earlier legal settlement with Texaco in the amount of \$100,000.

**ACTION:**

(1) Motion approving the resolution to grant the Willows Theatre Company one time funding of \$100,000 in the form of a grant of \$60,000 and loan of \$40,000 under the specific requirements of the Loan Agreement; and

(2) Motion authorizing the City Manager to sign the Loan Agreement for \$100,000 with the Willows Theatre Company.

**ATTACHMENT:**

- 1) Resolution
- 2) Loan Agreement
- 2) 3<sup>rd</sup> Amendment to the Bisio Lease
- 3) 3<sup>rd</sup> Amendment to the Kenney Building Lease

**APPROVED BY:**



City Manager

**RESOLUTION NO. -08**

**APPROVING ONE TIME FUNDING FOR WILLOWS THEATRE**

**WHEREAS**, the recent request from the Willows for one time funding of \$100,000 (\$40,000 loan and \$60,000 grant) to pay off vendors has been thoroughly considered by the JFMC Ad Hoc Committee; and

**WHEREAS**, the Committee realizes this request comes at a difficult financial time for the City, but also recognizes the \$1.7 million dollar investment the City has made to the performing arts since 2001, has resulted in over 100,000 patrons attending dramatic arts in the City of Martinez; and

**WHEREAS**, the economic benefits that accrue from theater and the arts demonstrates that the City has benefited with 74 added jobs and the addition of \$118,000 in direct sales tax to the City's coffers and the intangible benefits that accrue to Martinez with the increase in quality of life for all the residents.

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Martinez that the one time funding of \$100,000 to Willows Theatre is hereby approved pursuant to the attached agreement.

**BE IT FURTHER RESOLVED** that the funds are allocated from the Texaco Settlement fund.

\* \* \* \* \*

**I HEREBY CERTIFY** that the foregoing is a true and correct copy of a resolution duly adopted by the City Council of the City of Martinez at a Regular Meeting of said Council held on the 17<sup>th</sup> day of December, 2008, by the following vote:

AYES:

NOES:

ABSENT:

RICHARD G. HERNANDEZ, CITY CLERK  
CITY OF MARTINEZ

## LOAN AGREEMENT

This Loan Agreement (“Agreement”) is made and entered into as of December 17, 2008 (“Effective Date”), between The Benefactors Incorporated, a non-profit corporation, doing business as The Willows Theatre Company (“Borrower”), and City of Martinez, a municipal corporation (“Lender”).

### Recitals

A. Borrower subleases from Lender the real property located at 636 Ward Street, Martinez, CA and leases from Lender a building located at the John Muir Amphitheater site known as the Kenney-Conco Production Facility (“hereinafter collectively referred to as “Premises”), which properties Borrower uses in the production of live theater.

B. In December 2006 and March 2008 Lender made construction loans to Borrower for improvements to be made to the Premises in order for Borrower to provide live theater performances within the City. Borrower has now completed making the improvements to the Premises necessary to continue to provide live theater performances in accordance with the terms of the lease and sublease and all amendments thereto.

C. Borrower has requested Lender to disburse to Borrower the amount of one hundred thousand dollars (\$100,000) to pay Borrower’s operating expenses (as specifically described by this Agreement) and the costs of its completed improvements and repairs to the Premises, in order to continue to provide live theater performances at the Premises in accordance with the terms of the lease and sublease and all amendments thereto.

D. Lender has agreed to disburse to Borrower the amount requested in the following proportion: The sum of sixty thousand dollars (\$60,000) as a grant without repayment to the Lender and the sum of forty thousand dollars (\$40,000) as a loan to be repaid to Lender. All disbursements, expenditures, and repayments are being made subject to the terms of this Agreement.

NOW, THEREFORE, for good and valuable consideration the receipt and adequacy of which are acknowledged, the parties agree as follows:

### Article 1. Defined Terms.

(a) As used in this Agreement, the following terms will have the following meanings:

“*Business Day*” means any day other than Saturday, Sunday, or public holiday or the equivalent for banks generally under the laws of California. Whenever any payment to be made under this Agreement is stated to be due on a day other than a Business Day, that payment may be made on the next succeeding Business Day,

and that extension of time will be included in the computation of payment of interest in the event payment is not timely made.

“*Default Rate*” means ten percent (10%) per annum.

“*Event of Default*” is defined in Section 6.1.

“*Construction Account*” is defined in Section 4.1.

“*Fixtures*” means all fixtures located on or within the Improvements or now or later installed in or used in connection with any of the Improvements, including, but not limited to, all partitions, screens, awnings, motors, engines, boilers, furnaces, pipes, plumbing, elevators, cleaning and sprinkler systems, fire extinguishing apparatus and equipment, water tanks, heating, ventilating, air conditioning and air cooling equipment, built-in refrigerators, and gas and electric machinery, appurtenances, and equipment, whether permanently affixed to the Premises or to the Improvements

“*Governmental Authority*” means the United States of America, California, the County of Contra Costa, the Lender, or other political subdivision, agency, department, commission, board, bureau, or instrumentality of any of them.

“*Governmental Requirement*” means any law, ordinance, order, rule, regulation, or requirement of a Governmental Authority.

“*Grant*” is defined by Section 2.1.

“*Grant Proceeds*” means funds disbursed by Lender in the amount of \$60,000 without right of repayment and subject to the terms of this Agreement.

“*Improvements*” means all buildings, improvements, and appurtenances on the Premises, and all improvements, additions, and replacements, and other buildings and improvements, at any time later constructed or placed on the Premises.

“*Loan*” is defined in Section 2.2.

“*Loan Documents*” means this Loan Agreement, Third Amendment to the Kenney Lease and the Third Amendment to the Bisio Sublease, all of which have been entered into on the date of this Agreement.

“*Loan Proceeds*” means funds disbursed by Lender in the amount of \$40,000 to be repaid to the Lender in accordance with the terms of this Agreement.

“*Person*” means any natural person, corporation, firm, partnership, association, trust, government, governmental agency, or any other entity, whether acting in an individual, fiduciary, or other capacity.

“*Personalty*” means all of Borrower's interest in all accounts, contract rights, and general intangibles (specifically including any insurance proceeds and condemnation awards) arising out of the ownership, development, or operation of the Premises, and all furniture, furnishings, equipment, machinery, construction materials and supplies, leasehold interests in personal property, and all other personal property (other than Fixtures) now or later located about the Premises, together with all present and future attachments, accessions, replacements, substitutions, and additions, and the cash and noncash proceeds.

“*Potential Default*” means an event that would constitute an Event of Default but for any requirement of notice to be given or period of grace or time to elapse.

## **Article 2. Making of Grant and Loan.**

### **Section 2.1 Grant.**

Lender agrees to grant to Borrower the amount of sixty thousand dollars (\$60,000) (hereinafter referred to as “Grant”), without right of repayment to pay those expenditures and preexisting financial obligations described by Article 3, subject to the terms, conditions, representations, warranties and covenants in this agreement.

### **Section 2.2 Loan.**

Lender agrees to lend to Borrower, and Borrower agrees to borrow from Lender, the sum of forty thousand dollars (\$40,000.00) (hereinafter referred to as “Loan”), to pay those expenditures and preexisting financial obligations described by Article 3, subject to the terms, conditions, representations, warranties, and covenants in this Agreement.

### **Section 2.3 Disbursements.**

Lender agrees to disburse the Grant Proceeds and Loan Proceeds in the manner and subject to the limitations in this Agreement. Except in the Event of a Default, no interest will accrue on disbursed Loan Proceeds.

### **Section 2.4 Repayment of Loan**

Borrower shall repay the entire amount of the Loan to Lender by December 1, 2010. Provided that the Borrower repays the entire amount of the Loan by the due date, Lender agrees that Borrower shall not owe any additional amounts in interest. If the Loan is not repaid in full by December 1, 2010, this shall constitute an Event of Default thereby entitling the Lender to utilize any of the remedies identified in Article 7, including the right to terminate the Kenney Building Lease Agreement and the Bisio Sublease Agreement. Provided further that if the Kenney Building Lease Agreement and the Bisio Sublease Agreement terminate prior to December 10, 2010, the remaining amount of the Loan shall become immediately due and payable to the Lender.

## **Section 2.5 Business Plan.**

Upon execution of this Agreement, Borrower shall prepare and submit to Lender a business plan that includes the Borrower's projected operations, capital expenditures, revenues, assets, debts and liabilities for current and future years.

## **Article 3. Uses of Grant and Loan Proceeds.**

### **Section 3.1 Use of Proceeds.**

Borrower shall use all Grant Proceeds and Loan Proceeds to pay the following expenses and outstanding financial obligations in substantially the sums set forth below:

(a) Expense Budget	
(1) Pre-Paid royalties for 2009 productions in Martinez	\$27,000
(2) Printing costs for marketing the 2009 season at the Cabaret	\$20,000
(3) Postage costs for marketing the 2009 season at the Cabaret	\$9,000
(4) Newspaper advertising	\$12,000
(5) Radio advertising for 2009 season	\$7,500
(6) Email advertising	\$2,000
(7) Telemarketing	\$2,000
<u>Total</u>	<u>80,000</u>
(b) Preexisting Financial Obligations	
(1) JB Services	\$4,000
(2) Industrial Lumber	\$10,000
(3) Dawson Electric	\$2,000
(4) Far West Sanitation	\$1,000
(5) Home Depot	\$3,000
<u>Total</u>	<u>\$20,000</u>

## **Article 4. Disbursement Procedures.**

### **Section 4.1 Construction Account.**

All Grant and Loan Proceeds shall be disbursed through the Construction Account established in Section 4.1 of the March 13, 2008 Construction Loan Agreement between Borrower and Lender ("Construction Account"). Any funds disbursed through the March 13, 2008 Construction Loan Agreement that are retained in the Construction Account on the Effective Date of this Agreement shall be transferred to a separate account prior to the Lender's disbursement of funds under this section. Borrower shall not act in any way that will impede, abridge, limit or alter the Lender's rights to monitor the Construction Account while the account continues to exist. Borrower shall make no disbursements from the Construction Account except for payment of the items listed in Section 3.1. In addition to the provisions of Section 4.2(g), Lender shall keep and maintain all receipts and other records of funds deposited into the Construction Account and disbursements from the

Construction Account and shall make all records fully available and open to review and inspection of Lender upon request. Lender shall provide Grant Proceeds and Loan Proceeds to Borrower by depositing said funds into the Construction Account.

#### **Section 4.2 Records of Disbursement of Funds in Account.**

Borrower shall keep and maintain at all times at Borrower's address stated herein, or such other place as Lender may approve in writing, complete and accurate books of accounts and records adequate to reflect correctly the amount of Construction Account funds and disbursements, along with copies of all written contracts, receipts, invoices, or other pertinent documents relating to the items listed in Article 2. Said books, records, and accounts shall be kept and maintained in accordance with generally accepted accounting principles and shall be kept and maintained for at least three years after expiration of the accounting year to which they pertain. Notwithstanding the foregoing, if any books, records, or supporting documentation kept and maintained by Lender are the subject of an audit requested by Lender or an unresolved controversy involving Lender, Borrower shall keep and maintain them until the audit or controversy is terminated. Lender shall, through its duly authorized agents or representatives, have the right to examine and audit said books of account and records at any and all reasonable times for the purposes of determining compliance with this Agreement.

#### **Section 4.3 Conditions Precedent to Disbursement.**

The obligation of Lender to make any disbursements pursuant to the terms of this Agreement will be subject to the following conditions precedent:

- (a) No Event of Default or Potential Default will have occurred and be continuing.
- (b) The conditions described within Section 2.5 of this Agreement.
- (c) The conditions described within Section 4.1 of this Agreement.

#### **Section 4.4 Borrower's Approval.**

Regardless of anything to the contrary, any disbursements pursuant to Section 4.1 on disbursement requests approved by Lender will conclusively be deemed proper disbursements as between the parties.

#### **Article 5. Borrower's Representations and Warranties.**

As a material inducement to Lender to enter into this Agreement and to make the Loan to Borrower, Borrower and each signatory who signs on its behalf unconditionally represents and warrants to Lender as follows:

- (a) Borrower is duly formed and validly existing under the laws of the State of California, is qualified to do business in California, and has full power to consummate the transactions contemplated.
- (b) Borrower has full authority to execute this Agreement and all of the other Loan Documents, to undertake and consummate the contemplated transactions, and to pay, perform, and observe all of their conditions, covenants, agreements, and obligations.

(c) This Agreement and each of the other Loan Documents constitutes a legal and binding obligation of, and is valid and enforceable against, each party other than Lender, in accordance with the terms of each.

(d) There are no actions, suits, or proceedings pending or, to the best knowledge of Borrower, threatened against or affecting Borrower, the Premises, or any part of it, or involving the validity or enforceability of this Agreement or the validity or enforceability of any of the other Loan Documents, at law or in equity, or before or by any Governmental Authority. Borrower is not in default with respect to any order, writ, injunction, decree, or demand of any court or other Governmental Authority.

(e) There is no default on the part of Borrower under this Agreement or any of the other Loan Documents or any agreement previously entered into between Lender and Borrower (specifically including but not necessarily limited to Construction Loan Agreements, Leases and Subleases and amendments thereto), and no event has occurred and is continuing which with notice or the passage of time or both would constitute an Event of Default thereunder.

(f) All Personalty is vested solely in Borrower, free of all claims, liens, and encumbrances, and the security interest of Lender in the Personalty is a first lien.

(g) All reports, documents, instruments, information, and forms of evidence delivered to Lender concerning the Grant or Loan or required by this Agreement or any of the other Loan Documents are accurate, correct, and sufficiently complete to give Lender true and accurate knowledge of their subject matter, and do not contain any untrue statement of a material fact or omit any material fact necessary to make them not misleading.

## **Article 6. Default.**

### **Section 6.1 Events of Default.**

At the option of Lender, each of the following events will constitute a default (each an "Event of Default"):

(a) Default under the Leases. The default or breach by the Borrower under the Bisio Sublease and/or Kenney Lease.

(b) Governmental Requirements. Borrower's failure to comply with any Governmental Requirements.

(c) Expiration of Permits. Borrower's neglect, failure, or refusal to keep in full force any permit, license, consent, or approval with respect to the construction, occupancy, or use of the Improvements.

(d) Attachment. The attachment, levy, execution, or other judicial seizure of any portion of the Premises or Improvements, or any substantial portion of the other assets of Borrower, that is not released, expunged, bonded, discharged, or dismissed within thirty (30) days after the attachment, levy, execution, or seizure.

(e) Breach of Agreement. Any material breach, including failure to timely satisfy Section 2.4 of this Agreement by Borrower.

(f) General Assignment. Any general assignment of assets by Borrower for the benefit of its creditors.

(g) Borrower Dissolution. The dissolution of the Borrower or the termination, suspension, for any reason, of Borrower's rights and powers to do business in the State of California.

## **Article 7. Remedies.**

### **Section 7.1 Option to Act.**

On the occurrence of any Event of Default, in addition to its other rights in this Agreement or in any of the other Contract Documents, at law, or in equity, Lender may, without prior demand, exercise any one or more of the following rights and remedies:

(a) Termination of Disbursements. Terminate its obligation to make disbursements.

(b) Acceleration. Declare all sums owing to Lender with respect to this Agreement and the other Loan Documents immediately due.

(c) Continuation of Disbursements. Make any disbursements after the happening of any one or more of the Events of Default, without waiving its right to demand repayment of the Loan and all other sums owing to Lender with respect to the other Loan Documents or any other rights or remedies and without liability to make any other or further disbursements, regardless of Lender's previous exercise of any rights and remedies.

(d) Legal and Equitable Remedies. Proceed as authorized at law or in equity with respect to the Event of Default.

(e) Disbursement by Lender. Make any payment from undisbursed Loan Proceeds or other funds of Lender.

(f) Lease Remedies. Any Event of Default under this Agreement shall also constitute a default and/or breach of the Kenney Building Lease Agreement and the Bisio Sublease and Lender may declare either or both of those leases terminated and Lender may pursue its remedies under either or both of those leases for immediate possession.

### **Section 7.2 Repayment of Funds Advanced.**

If Lender spends its funds in exercising or enforcing any of its rights or remedies under any of the Loan Documents, the amount of funds spent will be payable to Lender on demand, together with interest at the Default Rate from the date the funds were spent until repaid.

### **Section 7.3 Rights Cumulative, No Waiver.**

All of Lender's rights and remedies provided in this Agreement or in any of the other Loan Documents are cumulative and may be exercised by Lender at any time. Lender's exercise of any right or remedy will not constitute a cure of any Event of Default unless all sums then due to Lender under the Loan Documents are repaid and Borrower has cured all other Events of Default. No waiver will be implied from Lender's failure to take, or delay in taking, any action concerning any Event of Default or from any previous waiver of any similar or unrelated Event of Default. Any waiver under any of the Loan Documents must be in writing and will be limited to its specific terms.

### **Section 7.4 Disclaimer.**

Whether Lender elects to employ any of the remedies available to it in connection with an Event of Default, Lender will not be liable for:

- (a) the payment of any expense incurred in connection with the exercise of any remedy available to Lender, or
- (b) the performance or nonperformance of any other obligation of Borrower.

### **Section 7.5 Grant of Power.**

Borrower irrevocably appoints Lender as its attorney-in-fact, with full power and authority, including the power of substitution, exercisable on the occurrence of an Event of Default, to act for Borrower in its name, place, and stead as provided in this Agreement:

(a) Possession and Completion. To take possession of the Premises and Improvements, remove all employees, contractors, and agents of Borrower, and to market or lease the Premises and Improvements.

(b) Employment of Others. To employ any contractors, subcontractors, suppliers, architects, inspectors, consultants, property managers, and other agents that Lender, in its sole discretion, deems proper for the protection of Lender's interests.

(c) Compromise Claims. To pay, settle, or compromise all bills and claims then existing or later arising against Borrower that Lender, in its sole discretion, deems proper for the protection of Lender's interests.

(d) Legal Proceedings. To prosecute and defend all actions and proceedings in connection with the Premises or Improvements.

(e) Other Acts. To execute, acknowledge, and deliver all other instruments and documents in the name of Borrower that are necessary or desirable, to exercise Borrower's rights under all contracts concerning the Premises or Improvements, and to do all other acts with respect to the Premises or Improvements that Borrower might do on its own behalf, in each case as Lender in its reasonable discretion deems proper.

## **Article 8. Miscellaneous.**

### **Section 8.1 No Waiver.**

No failure or delay on the part of Lender in exercising any right or remedy under the Loan Documents will operate as a waiver nor will Lender be estopped to exercise any right or remedy at any future time because of any failure or delay. No express waiver will affect any matter other than the matter expressly waived and that waiver will be operative only for the time and to the extent stated. Waivers of any covenant, term, or condition in this Agreement will not be construed to waive any subsequent breach of the same covenant, term, or condition.

**Section 8.2 No Third Parties Benefitted.**

This Agreement is made and entered into for the sole protection and benefit of the parties and their permitted successors and assigns, and no other Person will have any right of action or any rights to funds at any time on deposit in the Construction Account, if established.

**Section 8.3 Notices.**

Notices to be given under this Agreement shall be in writing and shall be delivered in person, by facsimile, by email and/or by overnight mail. If delivered by facsimile or email, they must be accompanied by simultaneous delivery of notice by overnight mail, in which case the notice shall be deemed delivered and received on the day the notice was sent by email or facsimile. Notices shall be delivered to the following addresses and said addresses may be changed by employing the methods of delivering notice specified above.

To the Lender:

City Manager  
City of Martinez  
525 Henrietta Street  
Martinez, CA 94553  
FAX 925-229-5012  
Email: [pvince@cityofmartinez.org](mailto:pvince@cityofmartinez.org)

With Copy to:

Jeffrey A. Walter  
City Attorney  
670 W. Napa St., Suite F  
Sonoma, CA 95476  
FAX 707-996-9603  
Email: [jwalter@walterpistole.com](mailto:jwalter@walterpistole.com)

To the Borrower:

Willows Theatre Company  
ATTN: Richard Elliott, Artistic Director  
1425 Gasoline Alley  
Concord, CA 94520  
FAX 925-798-1824

#### **Section 8.4 Authority to File Notices.**

Borrower irrevocably appoints Lender as its agent (the agency being coupled with an interest) to file for record any notices of completion, cessation of labor, or any other notice that Lender deems necessary or desirable to protect its interests under this Agreement or under the Loan Documents.

#### **Section 8.5 Actions.**

Lender will have the right to commence, appear in, or defend any action or proceeding purporting to affect the rights, duties, or liabilities of the parties hereunder, or the disbursement of any funds under this Agreement. In connection with that, Lender may incur and pay costs and expenses, including, without limitation, reasonable attorneys' fees. Borrower agrees to pay to Lender on demand all these expenses, and Lender is authorized to disburse funds from the Construction Account for that purpose. This Section does not apply to actions or proceedings between the parties.

#### **Section 8.6 Assignment.**

The terms of this Agreement will be binding on and inure to the benefit of successors and assigns of the parties. However, Borrower will not assign this Agreement or any interest it may have in the monies due or, except as otherwise provided, convey or encumber the Premises or any Personalty or Fixtures now or later on the Premises without the prior written consent of Lender.

#### **Section 8.7 Time.**

Time is of the essence.

#### **Section 8.8 Borrower's Responsibilities.**

Borrower will, at Borrower's expense, defend, indemnify, save, and hold Lender harmless against all claims, demands, losses, expenses, damages (general, punitive, or otherwise), and causes of action (whether legal or equitable) asserted by any Person arising out of the use of the Grant Proceeds and/or Loan Proceeds. Borrower will pay Lender on demand all claims, judgments, damages, losses, or expenses (including attorneys' fees and expenses) incurred by Lender as a result of any legal action arising out of the use of the Grant Proceeds and/or Loan Proceeds. The provisions of this Section will survive the termination of this Agreement and the repayment of the Loan.

#### **Section 8.9 Survival of Warranties and Covenants.**

The warranties, representations, conditions, covenants, and agreements in this Agreement and in the other Loan Documents will survive the making of the Loan and will continue in full force until the Indebtedness has been paid in full. Nothing in this Section 8.9 is intended to limit any other provision of the Loan Documents that by their stated terms survive the repayment of the Indebtedness or the termination of any Loan Document.

### **Section 8.10 Amendment.**

The Loan Documents and the terms of each of them may not be modified, waived, discharged, or terminated except by a written instrument signed by the party against whom enforcement of the modification, waiver, discharge, or termination is asserted.

### **Section 8.11 Termination.**

Except as otherwise provided in the Loan Documents, all rights and obligations under this Agreement will terminate (except as to any accrued obligations) effective on the payment of all Indebtedness owing by Borrower to Lender. The termination of the Kenney Lease or the Bisio Sublease shall not effect a termination of this Agreement.

### **Section 8.13 Counterparts.**

This Agreement may be executed in any number of counterparts and by different parties in separate counterparts, each of which when executed and delivered will be deemed an original and all of which counterparts taken together will constitute one and the same instrument.

### **Section 8.14 Indemnity.**

Borrower agrees to defend, indemnify, and hold Lender harmless from all losses, damages, liabilities, claims, actions, judgments, costs, and reasonable attorneys' fees that Lender may reasonably incur as a direct or indirect consequence of:

- (a) the making of the Grant and/or Loan,
- (b) Borrower's failure to perform any obligations as and when required by this Agreement or any of the other Loan Documents,
- (c) the failure at any time of any of Borrower's representations or warranties to be true and correct, or
- (d) any act or omission by Borrower, any contractor, subcontractor, engineer, architect, or other Person with respect to the Premises, the Improvements, or any portion of them.

Borrower will pay immediately on Lender's demand any amounts owing under this indemnity, together with interest at the Default Rate from the date Lender makes a payment or incurs a loss. Borrower's duty to indemnify Lender will survive the Borrower's full payment of the Loan.

### **Section 8.15 Approvals.**

All consents and approvals required of Lender or permitted by any provision of this Agreement shall be in writing.

### **Section 8.16 Further Assurances.**

At Lender's request, and Borrower's expense, Borrower shall execute, acknowledge and deliver all other instruments and perform all other acts necessary, desirable, or proper to carry out the purposes of this Agreement.

**Section 8.17 Integration.**

This Agreement constitutes the entire Agreement between Lender and Borrower with respect to the matters covered by this Agreement and supersede all prior negotiations.

**Section 8.18 Severability.**

If any term, provision, covenant or condition is held by a court of competent jurisdiction to be invalid, void or unenforceable, all terms, provisions, covenants and conditions held not invalid, void, or unenforceable will continue in full force and effect and will in no way be affected, impaired or invalidated.

**Section 8.19 Consistency**

Except as specifically set forth by the Loan Documents, nothing in this Agreement is intended to modify, alter, supplant, supersede, or affect any term of any agreement, lease, or sublease previously entered into between the Borrower and Lender. This Agreement is intended to be read consistently, and not in conflict, with all other Loan Documents.

Executed by the parties on the date first set forth above.

**BORROWER:**

The Benefactors Incorporated, a non-profit corporation, doing business as The Willows Theatre Company

By: \_\_\_\_\_  
Title: \_\_\_\_\_

**LENDER:**  
City of Martinez

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_

## THIRD AMENDMENT TO SUBLEASE AGREEMENT

### [BISIO BUILDING]

THIS AMENDMENT AGREEMENT (“Amendment to the Sublease”) is entered into as of December 17, 2008 (“Effective Date”), by and between the City of Martinez, a municipal corporation (“City”), and The Benefactors Incorporated, a non-profit corporation, doing business as The Willows Theatre Company (“Willows”).

#### RECITALS

WHEREAS, by Sublease Agreement dated December 22, 2004, the City agreed to sublease certain premises located at 636 Ward Street, Martinez, CA (“premises”) to the Willows for the purpose of renovating said premises into a theater and conducting therein at least 100 live performances per calendar year;

WHEREAS, by a First Amendment to the Sublease Agreement the Sublease was amended on December 1, 2006, to incorporate the terms of a construction loan agreement of even date;

WHEREAS, by a Second Amendment to Lease Agreement the Sublease was amended on March 13, 2008, to incorporate the terms of another construction loan agreement of even date

WHEREAS, the Willows has requested a grant and loan from the City in the amount of \$100,000 to pay certain operating expenses and pay for certain existing improvements in order to continue to provide performances at the Premises in accordance with the terms of the Sublease Agreement, First Amendment to Sublease Agreement, and Second Amendment to Lease Agreement (hereinafter collectively referred to as “Sublease”);

WHEREAS, the City has agreed to grant said grant and loan under the terms and conditions set forth by a Loan Agreement (hereinafter referred to as “December 2008 Loan Agreement”) entered into on this date as well as those set forth below, which said terms and conditions are incorporated into this Amendment to the Sublease:

THEREFORE, THE PARTIES AGREE AS FOLLOWS:

#### AGREEMENT

I. The Sublease is amended as follows:

A. The first sentence of paragraph 11 is amended and replaced to read as follows:

Upon termination of this Agreement by lapse of time or otherwise, the Willows shall: (aa) immediately vacate the premises; (bb) immediately cease operations in or use of the premises; (cc) have already removed from the specified location all of its display signs, counters and other equipment, furnishings and trade fixtures (collectively, the “Willows Equipment”), as

may exist on the premises, and (dd) have already repaired any damage to the theater premises caused thereby; provided, however, that should said termination result from the Willows' failure to (i) timely comply with its obligations under the Loan Agreement, including but not limited to repaying the Loan (as defined in the Loan Agreement) and/or the Construction Loan (as defined in the Construction Loan Agreement) and/or the Loan (as defined in the December 2008 Loan Agreement), (ii) timely commence conducting live performances, and/or (iii) provide the number of live performances required under paragraph 6, then upon termination of this Sublease (xx) the Willows Equipment shall become the property of the City subject to the provisions of paragraph 12(b) and (yy) to the extent that the Personalty (as defined in the Loan Agreement) subject to the provisions of paragraph 12(b), the Fixtures (as defined in the Loan Agreement) and the Improvements (as defined in the Loan Agreement) are not the property of the City upon their installation, placement in the premises or creation, then they too shall become the property of the City. To the extent determined necessary by the City, the Willows shall execute those instruments reasonably required by the City to vest all right, title and ownership of said property in the City.

B. Paragraph 12(b) is amended to read as follows:

(b) Notwithstanding paragraph 12(a) to the contrary, in the event said termination results from the Willows' failure to (i) timely comply with its obligations under the Loan Agreement, or its obligations under the Construction Loan Agreement, or its obligations under the December 2008 Loan Agreement, including but not limited to repaying the Loan (as defined in the Loan Agreement), or repaying the Loan (as defined in the Construction Loan Agreement), or repaying the Loan (as defined in the December 2008 Loan Agreement), (ii) timely commence conducting live performances, and/or (iii) provide the number of live performances required under paragraph 6, then the City shall not be required to purchase the Willows Equipment for any sum, and, instead, that portion of the Willows Equipment that has the same fair market value as the amount of the Loan (as defined in the Loan Agreement) that remains unpaid or outstanding on the date of termination shall be deemed to be the sole property of the City and the Willows shall be conclusively deemed to have transferred any and all right, title and interest in same to the City. The Willows shall execute those instruments reasonably required by the City to effect said transfer. The determination of that portion of the Willows Equipment that shall become the sole property of the City pursuant to this paragraph shall proceed as follows: 1) the City and the Willows shall each obtain an evaluation of the fair market value of the Willows Equipment from a person or entity that is not affiliated with either party and is a competent source for the valuation of theatre equipment; 2) the parties shall exchange their evaluations and attempt to come to a resolution if the evaluations differ; 3) if the parties cannot reach an agreement the persons or entities making the evaluations shall collectively select a third party evaluator that is not affiliated with either party and is a competent source for the valuation of theatre equipment; 4) the third party evaluator shall hear and consider both parties' evaluations and make a determination on the Willows Equipment to be surrendered to the City pursuant to the terms of this paragraph, which shall be binding upon both parties.

C. Paragraph 21(a)(vii) is added to read as follows:

(vii) City shall have the right to terminate this Sublease in its entirety upon the Willows' breach of the Loan Agreement or the Construction Loan Agreement or the December 2008 Loan Agreement or an Event of Default (as defined in the Loan Agreement or the Construction Loan Agreement or the December 2008 Loan Agreement).

D. The last sentence in Paragraph 21(c) is amended to read as follows:

The receipt of the termination notice or actual termination of this Sublease shall not relieve the Willows of the fulfillment of its remaining obligations under this Sublease or its obligations under the Loan Agreement, or its obligations under the Construction Loan Agreement, or its obligations under the December 2008 Loan Agreement.

II. The Sublease shall remain in full force and effect, amended as set forth above.

IN WITNESS WHEREOF the parties hereto affix their signatures hereto on the date first mentioned above.

CITY OF MARTINEZ

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_

THE BENEFACTORS INCORPORATED, A NON-PROFIT CORPORATION,  
DOING BUSINESS AS THE WILLOWS THEATRE COMPANY

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_

## THIRD AMENDMENT TO LEASE AGREEMENT

### [KENNEY BUILDING]

THIS AMENDMENT AGREEMENT (“Amendment to the Lease”) is entered into as of December 17, 2008 (“Effective Date”), by and between the City of Martinez, a municipal corporation (“City”), and The Benefactors Incorporated, a non-profit corporation, doing business as The Willows Theatre Company (“Willows”).

#### RECITALS

WHEREAS, by Lease Agreement dated May 4, 2005, the City agreed to lease the Phil Kenney Family Production Facility (“Facility”) located at the John Muir Amphitheater (“JMA”) site, Court Street, Martinez, CA to the Willows for the purposes set forth in Section 5 of the Lease;

WHEREAS, the Lease Agreement was been amended once by an undated Amendment;

WHEREAS, by a Second Amendment to Lease Agreement, the Lease Agreement was amended again on December 1, 2006;

WHEREAS, by another “Second Amendment to Lease Agreement” the Lease Agreement was amended again on March 13, 2008 (The original Lease Agreement and all prior Amendments shall collectively be referred to herein as the “Lease”);

WHEREAS, the Willows has requested a grant and loan from the City in the amount of \$100,000 to pay certain operating expenses and pay for certain existing improvements in order to continue to provide performances at the Facility in accordance with the terms of the Lease; and

WHEREAS, the City has agreed to grant said grant and loan under the terms and conditions set forth by a Loan Agreement (“December 2008 Loan Agreement”) entered into on this date as well as those set forth below, which said terms and conditions are incorporated into this Amendment to the Lease:

THEREFORE, THE PARTIES AGREE AS FOLLOWS:

#### AGREEMENT

- I. The Lease is amended as follows:
  - A. Section 2(D) is amended to read as follows:

Upon the expiration or termination of this lease agreement, the Willows shall: (i) immediately vacate the Facility; (ii) immediately cease operations in or use of the Facility; (iii) promptly remove all structures, personal property, goods, chattel and fixtures belonging to the Willows (“Willows’ Property”) and (iv) promptly repair any damage to the Facility caused

thereby; provided, however, that should said termination result from the Willows' failure to timely comply with (a) its obligations under the Loan Agreement or its obligations under the Construction Loan Agreement, or its obligations under the December 2008 Loan Agreement, including but not limited to repaying the Loan (as defined in the Loan Agreement), repaying the Loan (as defined in the Construction Loan Agreement), or repaying the Loan (as defined in the December 2008 Loan Agreement) and/or (b) Section 5(b), upon said termination, the Willows' Property (except for personal property and trade fixtures not affixed to the Facility) shall become the property of the City. To the extent determined necessary by the City, the Willows shall execute those instruments reasonably required by the City to vest all right, title and ownership of said property in the City. In the event the Willows does not remove all of its structures, personal property, goods, chattel or fixtures after written notice from the City Manager to do so, the City, at its option, may deem such property to be abandoned and the City may either retain such property or have such property removed. If the City chooses to have such property removed, all of the costs of removal shall be the sole obligation of the Willows.

The receipt of the termination notice or actual termination of this Lease shall not relieve the Willows of the fulfillment of its remaining obligations under this Lease or its obligations under the Loan Agreement or the Construction Loan Agreement or the December 2008 Loan Agreement.

B. New subsections 3(A)(8) and 3(A)(9) are added to read:

8. The Willows' failure to timely comply with any of its obligations under the Loan Agreement, including but not limited to timely repaying the Loan (as defined in the December 2008 Loan Agreement); or

9. An occurrence of an Event of Default (as defined in the December 2008 Loan Agreement) or Willows' breach of the December 2008 Loan Agreement.

II. The Lease shall remain in full force and effect, amended as set forth above.

IN WITNESS WHEREOF the parties hereto affix their signatures hereto on the date first mentioned above.

CITY OF MARTINEZ

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_

THE BENEFACTORS INCORPORATED, A NON-PROFIT CORPORATION,  
DOING BUSINESS AS THE WILLOWS THEATRE COMPANY

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_