



**CITY OF MARTINEZ**

**CITY COUNCIL AGENDA  
May 2, 2012**

**TO:** Mayor and City Council  
**FROM:** Phil Vince, City Manager  
**SUBJECT:** Agreement with Supplies and Solutions Regarding Sales Tax Revenue Sharing  
**DATE:** April 26, 2012

**RECOMMENDATION:**

Adopt a resolution approving an Agreement relating to the sharing of sales tax revenues with Supplies and Solutions (S&S) for a specified term, to consolidate all distribution and point of sale sales activities within the City limits of Martinez.

**BACKGROUND**

S&S has been the City's top sales tax generator since their company moved to Martinez in August 2009. The company has expanded their business operations and gross sales by over twenty million dollars in the past 33 months. S&S has informed the City that it plans to consolidate all warehousing activities in Martinez, which will have a big impact on increased sales tax in the future.

S&S facility has always been a significant sales tax generator for the City, providing approximately \$700,000 of sales tax revenue to the City in FY 2011/12. S&S has requested that the City enter into an agreement to rebate to their company a share of sales tax revenue over the course of several years to help offset the cost of their relocation and eventual purchase or lease costs of a 50,000 square foot warehouse building based upon a formula that is beneficial to both parties.

Prior to considering an agreement of this nature, staff researched the City's past practices and the past and current practices of our neighboring jurisdictions relative to incentive-based agreements. The City of Martinez has considered tax sharing arrangements previously as a means of retaining existing large scale businesses within the City.

Neighboring cities have likewise entered into tax sharing arrangements as an economic incentive for significant sales tax generating business to remain or relocate. Notably, the City of Benicia has used certain economic incentives to retain an existing major sales tax generator such as Bio-Rad laboratories.

Criteria that neighboring cities have considered and which may be relevant in evaluating any proposal in Martinez may include:

- Limit the use of development incentives to strategic uses.  
Development incentives may be used to close a deal with a company

that is considering and serious about moving to the City, but not as an opening *offer* to attract a company's attention. Also, fiscal incentives may be appropriate to retain existing strategic firms in the community. Development incentives should not be used for all business or in any instances that may be limited by federal, state or local law.

- Return on Investment. Development incentives amount to a community investment in obtaining or retaining business within the community. Accordingly, the City should establish a target rate of return in order for any business to be eligible for such incentives. The target rate should be no less than the opportunity cost of these public resources (i.e., the rate of return on other higher alternative uses). Projects that do not meet or exceed this target return rate should not be eligible to receive incentives.
- Establish legally binding agreements which include accountability mechanisms. There should be a mechanism to insure that the business will actually deliver the promised benefits (e.g., investment, revenue, jobs, etc.) in return for local development incentives.
- Consider adding caps or sunset provisions to all tax incentives. This would provide a process for a review of incentive effectiveness and efficiencies over time.
- General Plan consistency. Private firm operations must be consistent with the General Plan and other associated land use documents including zoning, design guidelines and other applicable regulations. This will ensure company operations are consistent with community development.

The proposed Agreement with S&S is designed to ensure at least a minimum amount of sales tax revenue generation to the City of Martinez from S&S operations in each and every year, based upon a percentage share of sales tax revenue actually paid to the City. The City will never be in a position of receiving any less than \$700,000 of net sales tax revenue from S&S.

The tax sharing arrangement will terminate at the end of 20 years, unless renewed by the parties, at which time the City will again receive 100% of the sales tax revenue associated with S&S. S&S will be committing to remain in Martinez for the 20 year term of the Agreement and has further committed to a plan to expand its business operations and almost 100% of point of sale activities while present in Martinez.

### **FISCAL IMPACT:**

The actual sales tax sharing agreement between both parties for a specified term has no net adverse fiscal impact to the City of Martinez. The sharing of sales tax revenues incentivizes Supplies and Solutions to recover a portion of their relocation costs and for the City to restore a percentage of its sales tax base.

Since S&S moved its operations to the City of Martinez in August 2009, their business has grown by an additional \$20 million in gross sales. This translates to an additional \$200,000 in net sales tax revenue to the City in only 33 months. Further, S&S has developed a business plan that shows their total business operations expanding well over the \$100 million dollar mark in the next five or more years, thus the net sales tax increase to the City could reach as much as \$1 million dollars by the end of 2015. To be sure, S&S will more than likely double the sales tax generated to the City in a short seven year period. All percentage breakdowns can be found in the proposed agreement between the two parties, which is attached to the staff report.

**ACTION:**

Adopt a resolution approving an Agreement relating to the sharing of sales tax revenues with Supplies and Solutions, (S&S) for a specified term, enabling S&S to recover a portion of their relocation costs, and expansion costs for leasing or constructing a new warehouse in the City of Martinez, and authorizing the City Manager to execute the Agreement in a form approved by the City Attorney.

Attachments:

1. Resolution
2. Participation Agreement

RESOLUTION NO. -12

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARTINEZ APPROVING AN AGREEMENT RELATING TO THE SHARING OF SALES TAX REVENUE WITH SUPPLIES AND SOLUTIONS FOR A SPECIFIED TERM, ENABLING SUPPLIES AND SOLUTIONS TO RECOVER A PORTION OF THEIR BUSINESS EXPANSION AND RELOCATION COSTS, AND AUTHORIZING THE CITY MANAGER TO EXECUTE SAME

**WHEREAS**, Supplies and Solutions (S&S) has been in business in Martinez for almost three years located at 530 Shell Avenue and has been a significant community partner for the City providing jobs, and significant sales tax revenue to the City; and

**WHEREAS**, S&S currently provides significant employment opportunities to Martinez and Contra Costa County residents; and

**WHEREAS**, the S&S facility located at 530 Shell Avenue has been a significant sales tax generator for the City, providing \$700,000 of net sales tax revenue to the City in FY 2011/2012, representing 20% of the City's sales tax revenue in that year: and

**WHEREAS**, current and long term loss of the sales tax revenue generated by S&S to the City of Martinez will result in a significant impact to the City's General Fund which would result in an impact to City provided services and amenities which could negatively impact the quality of life of the citizens of Martinez; and

**WHEREAS**, S&S plans to relocate their major warehouse facility at a future date to Martinez and further proposes to share the sales tax generated from its operation to help offset its relocation costs and expenses; and

**WHEREAS**, the Agreement contemplated is consistent with the City's General Plan; and

**WHEREAS**, keeping S&S point of sale activities and future expansion in Martinez and the implementation of this agreement will increase revenue to the City's General Fund, provide job opportunities to County residents and will keep a significant community partner in the City of Martinez.

**NOW, THEREFORE, BE IT RESOLVED THAT** the City Council of the City of Martinez hereby authorizes the City Manager to execute an agreement with Supplies and Solutions on the sharing of sales tax revenues for a period of 20 years enabling S&S to recover a portion of their relocation costs relating to relocation of their business operations back to Martinez in a form acceptable to the City Manager and City Attorney.

\* \* \* \* \*

**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 2nd day of May 2012, by the following vote:

AYES:

NOES:

ABSENT:

RICHARD G. HERNANDEZ, CITY CLERK  
CITY OF MARTINEZ

## **LOCATION AGREEMENT AND OPERATIONS COVENANT**

THIS LOCATION AGREEMENT AND OPERATIONS COVENANT (this "Agreement") is made and entered into as of this 26<sup>th</sup> day of April, 2012, (the "Reference Date") by and among the City of Martinez, a municipal corporation ("City"), and Supplies and Solutions a California Corporation, ("S&S") and Steve Tomkovicz and Tracy Tomkovicz (hereafter collectively referred to as Tomkovicz, with reference to the following:

### **RECITALS**

WHEREAS, S&S is a company involved in the manufacture and distribution of industrial supplies currently located at 501 Shell Avenue, Martinez, California ("Sales Office"); and

WHEREAS, Tomkovicz are the sole partners of S&S; and

WHEREAS, S&S is also looking for expanded industrial space in which to locate additional warehousing facilities ("Expanded Facilities"); and

WHEREAS, S&S is currently expanding its sales and warehouse operations including, but not limited to activities at the sales Sales Office. In addition, S&S plans to locate additional sales and business activities as defined herein within the City which and expects to generate significant additional revenues as a result of said expansion; and

WHEREAS, S&S intends, during the Term hereof, to designate sales transactions from the Expanded Sales to occur at the Sales Office or Alternate Location (defined below), which will result in the generation of significant new local Sales Tax Revenues to the City; and

WHEREAS, S&S currently provides employment opportunities to more than 54 employees in Martinez and will provide additional employment opportunities as a result of the Expanded Sales and Expanded Facilities; and

WHEREAS, there will be a substantial cost to S&S to develop the Expanded Sales and Expanded Facilities, expand its business and ensure that the headquarters and sales office for the expanded business and activities is located in the City of Martinez; and

WHEREAS, the City, in consideration of the new and additional local sales tax revenues, property taxes, employment benefits, and other tangible and intangible benefits to be received by the City arising from the Expanded Sales and business activity of S&S in the City as described herein, desires to provide certain Covenant Payments to S&S related solely to the Expanded Sales to be generated as set forth herein; and

WHEREAS, the Covenant Payments to be remitted by the City to S&S are for the purpose of obtaining an operating covenant by S&S, Tomkovicz and the successors and assigns of each of them, jointly and severally, as set forth herein, to designate the City as the "Point of Sale" for all Expanded Sales for Sales Tax purposes and to thus cause S&S, Tomkovicz and the successors or assigns of each of them, to refrain from establishing any similar or competing business elsewhere during the Term of this Agreement; and that the current and future business expansion and any and all new and increased sales of S&S, that the and the sales and business activities resulting therefrom will be located in the City to benefit the health, safety and welfare of the City and its residents; and

WHEREAS, the operation of the Sales Office, the Expanded Facilities and the Expanded Sales will provide significant public benefits to the City and the residents thereof, representing a significant source of new and additional public revenue for the City, which may be used by the City for the funding of necessary public services and facilities, including, but not limited to public safety and public works activities which benefit all of the residents of the City; and

WHEREAS, the guaranteed operation of the Expanded Sales within the City will foster a business and civic environment which may attract additional businesses and investment in the community due to the synergy associated with business development and the availability of the increased public and private services and economic activity resulting therefrom; and

WHEREAS, this Agreement is consistent with the City's General Plan and with the City's desire to encourage economic development within the City.

**NOW THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. Recitals. Each of the recitals set forth above is true and correct, and is incorporated herein by this reference.

2. Definitions

2.1 Alternate Locations. "**Alternate Locations**" shall mean any real property located within the City limits of the City, as the same exists on the Effective Date of this Agreement or as may, at any time during the Term of this Agreement be annexed to the City regardless of the General Plan land use designation or zoning applicable to such property.

2.2 BOE. "**BOE**" shall mean the State of California Board of Equalization or any successor agency thereof.

2.3 County. "**County**" shall mean the County of Contra Costa, State of California.

2.4 Covenant Payments. "**Covenant Payments**" shall mean those rebate payments made to S&S pursuant to this Agreement and which is particularly set forth in Section 3.2.

2.5 Current Sales. "**Current Sales**" shall mean the annual sales and use transactions of S&S conducted at the Sales Office for which the Point of Sale and resultant Sales Tax Revenues have been reported and paid or are scheduled to be paid to the City as of the Effective Date of this Agreement.

2.6 Effective Date. "**Effective Date**" shall have the meaning set forth in Section 3 hereof.

2.7 Enforced Delay. "**Enforced Delay**" shall mean and refer to delays or defaults in performance due to causes beyond the control of the Party whose performance is required pursuant to this Agreement, including, but not limited to, war, acts of terrorism, insurrection, riot, any form of labor dispute, lockouts, flood,, earthquake, fire, acts of God, acts of a public enemy, referenda, acts of governmental authorities (except that the failure of the City to act as required under this Agreement shall not excuse its performance), moratoria, epidemics, quarantine restrictions; and freight embargoes, delays or inaction, acts or omissions of the lessor or licensor under any Lease to which S&S is a party, interruption in services or utilities to the Premises, lack of access to or from the Premises, acts or omissions of any other tenant of the building in which the Premises is located, fire or other casualty, condemnation, litigation brought against the Premises or a party without that party's consent, remediation of hazardous materials located upon the Premises or any other events which are beyond that Party's reasonable control.

2.8 Expanded Facilities. "**Expanded Facilities**" shall mean any and new, additional, or increased industrial space in which S&S, Tomkovicz or S&S Related Entites conducts, sales, business, warehousing or any other commercial or industrial activity within the City limits of City.

2.9 Expanded Sales. "**Expanded Sales**" shall mean all sales and business activities of S&S expanded or increased from and after the Effective Date of this Agreement regardless of where the person or entity conducting said sales and/or business activities is physically located when such sales or business activity is conducted, located, originated or contracted and regardless of where any product or service is sold, provided, produced, manufactured, or shipped from or to. Expanded sales shall further include all expanded or increased sales and business activity as described in this paragraph and which is conducted by any subsidiary, subsequent, merged, or other related business entity or company to S&S, including, but not limited to any partnership, sole proprietorship, limited liability company, corporation, or other business entity of any type whatsoever, which is controlled by or in which a controlling interest is owned by S&S, any of its officers or members, Steve Tomkovicz and/or Tracy Tomkovicz, either collectively or individually ("S&S Related Entities").

2.10 Fiscal Year. "**Fiscal Year**" shall mean the fiscal year of the City beginning on July 1 and ending on June 30 of each year.

2.11 Operating Quarter. "**Operating Quarter**" shall mean each consecutive three-month period of time commencing as of the first calendar day of the calendar quarter next succeeding the Effective Date hereof, with the first Operating Quarter commencing on the first calendar day of the BOE designated reporting cycle immediately succeeding the Effective Date.

2.12 Party or Parties. "**Party, Parties, party or parties**" shall mean the City and S&S and Steve Tomkovicz and Tracy Tomkovicz, individually and collectively.

2.13 Point of Sale. **“Point of Sale”** shall mean the location where a sale or use transaction occurs and the point at which California State Sales and Use Tax is applied to the transaction.

2.14 Premises. **“Premises”** shall mean individually and collectively, the Sales Office, the Expanded Facilities any and all Alternate Locations.

2.15 Sales Tax Law. **“Sales Tax Law”** shall mean the Bradley-Burns Uniform Local Sales and Use Tax Law (California Revenue and Taxation Code Section 7200, *et seq.*), If the Bradley-Burns Uniform Local Sales and Use Tax Law is further amended, terminated or rescinded, and Sales Tax Revenues are calculated in an alternate manner or are replaced by an alternate revenue stream (i) arising from the retail sale, storage, use or other consumption of tangible personal property by S&S from or on the Premises, or (ii) designated as being a replacement for Sales Tax Revenues previously generated by the retail sale, storage, use or other consumption of tangible personal property on or from the Premises, then **“Sales Tax Revenues”** shall also mean those revenues attributable to S&S and/or any S&S Related Entities, sales, services or business activities on or from the Premises, collected for the City in the alternate manner of calculation, so long as the City receives its portion of such Sales Tax Revenues and has the legal right under State and or Federal Law to retain and control the disposition of substantially all of its portion thereof.

2.16 Sales Tax Reports. **“Sales Tax Reports”** shall mean the statements and quarterly reports (Form BOE-401-A), and any other or supplemental reports, statements or submissions, actually filed or required to be filed by S&S with the BOE relating to or in connection with the collection, remittance and/or calculation of Sales Tax Revenues from the Premises.

2.17 Sales Tax Revenues. **“Sales Tax Revenues”** shall mean the net Sales Tax received by the City from the BOE pursuant to the Application of the Sales Tax Law (as such may hereafter be amended, substituted, replaced, re-numbered, moved or modified by any successor law) attributable to S&S and/or any S&S Related Entities, sales, services or business activities, allocated by the BOE to the City in a particular Fiscal Year. Sales Tax Revenues shall not include: (i) any Sales Tax levied by, collected for or allocated to the State of California, the County, or a district or any entity (including an allocation to a statewide or Countywide pool), other than the City, (ii) any administrative fee charged by the BOE or the County, (iii) any Sales Tax subject to any sharing, rebate, offset or other charge imposed pursuant to any applicable provision of federal, state or local law, rule or regulation, (iv) any Sales Tax (or other funds measured as Sales Tax) required by the State of California to be paid over to another public entity (including the State) or set aside and/or pledged to a specific use other than for deposit into or payment from the City’s general fund. Sales Tax Revenues shall also specifically exclude any other Sales Tax that is imposed within the boundaries of the City and which is intended to fund a specific activity or project rather than to be used by City as general fund revenues without any specific voter approved limitations on such uses. Notwithstanding any provision hereof, for

purposes of this Agreement, Sales Tax Revenues shall be deemed never to exceed a maximum of one percent (1%) of the total taxable sales generated from the Premises.

2.18 Specified Use. **“Specified Use”** shall mean all sales operations and business activities of S&S currently existing at the Premises and any and all Expanded Sales.

2.19 Tier-1 Sales Tax Revenues **“Tier-1 Sales Tax Revenues”** shall mean those Sales Tax Revenues actually paid to the City as a result of the sales and business activities of S&S during the Fiscal Year (accounted for by Operating Quarter) which in the aggregate for the Fiscal Year are to up to Seven Hundred Thousand Dollars (\$700,000.00), i.e., the result of up to Seventy Million Dollars (\$70,000,000.00) in taxable sales or use.

2.20 Tier-2 Sales Tax Revenues. **“Tier-2 Sales Tax Revenues”** shall mean those Sales Tax Revenues actually paid to the City as a result of the sales and business activities of S&S during the Fiscal Year (accounted for by Operating Quarter) which in the aggregate for the Fiscal Year are equal to or in excess of Seven Hundred Thousand and One Dollars (\$700,001.00), i.e., the result of up to Seventy Million and One Hundred Dollars (\$70,000,100.00) in taxable sales or use, but not greater than One Million Dollars (\$1,000,000.00), i.e., the result of up to One Hundred Million Dollars (\$100,000,000.00) in taxable sale or use.

2.21 Tier-3 Sales Tax Revenues. **“Tier-3 Sales Tax Revenues”** shall mean those Sales Tax Revenues actually paid to the City as a result of the sales and business activities of S&S during the Fiscal Year (accounted for by Operating Quarter) which in the aggregate for the Fiscal Year are equal to or in excess of One Million and One Dollars (\$1,000,001.00) i.e., the result of One Hundred Million One Hundred Dollars (\$100,000,100.00) or greater in taxable sale or use.

3. Effective Date. This Agreement is dated as for the Reference Date as set forth above for reference purposes. This agreement shall become binding on the Parties as of the date that each of the Parties have duly approved, executed and delivered this Agreement (the “Effective Date”).

4. Term. The term of this Agreement shall commence as of the date first set forth above and, unless sooner terminated as provided in this Agreement, shall terminate on December 31, 2032.

5. Purpose. The continued development, improvement, use and operation of the Premises as contemplated in this Agreement will assist in the generation of additional sales tax revenues to the City as well as assist in the creation of additional jobs and economic opportunities for the residents of the City. Consequently, the continued development, improvement and use of the Premises as contemplated herein, and the fulfillment generally of this Agreement, are in the vital and best interest of the City and the health, safety and welfare of its residents, and in accordance with the public purposes and provisions of applicable federal, state and local laws and

requirements. The City is hereby purchasing an operating covenant by S&S, Tomkovicz, S&S Related Entities and each of them and their successors and assigns that the current and future expansion of S&S, or any S&S Related Entities or any successors or assigns thereof and the sales and business activities resulting therefrom will be located in the City to benefit the health, safety and welfare of the City and its residents.

6. Representations and Warranties of the City.

6.1 The City represents and warrants that, as of the Reference Date:

6.1.1 To the actual knowledge of the City, the City's entry into this Agreement and the performance of the City's obligations under this Agreement do not violate any contract or agreement to which the City is a party.

6.1.2 To the actual knowledge of the City, the City Council has approved this Agreement and the City Manager has been duly authorized to sign same on behalf of the City.

6.2 The representations and warranties of the City set forth in this Section 6 are material consideration to S&S and the City acknowledges that S&S is relying upon the representations of City set forth in this Section 5 in undertaking the obligations of this Agreement.

6.3 As used in this Agreement, the term "actual knowledge of the City" shall mean, and shall be limited to, the actual current knowledge of Philip Vince, the City Manager of the City as of the Reference Date, without having undertaken any independent inquiry or investigation for the purposes of making such representation or warranty and without any duty of inquiry or investigation.

7. Representation and Warranties of S&S and Tomkovicz.

7.1 S&S and Tomkovicz, each individually and jointly and severally represent and warrant to the City that, as of the Reference Date:

7.1.1 S&S is a privately owned firm, organized and existing in the State of California and in good standing.

7.1.2 The individuals executing this Agreement on behalf of S&S are duly authorized by appropriate action of S&S to execute this Agreement on behalf of S&S.

7.1.3 To the actual knowledge of S&S and Tomkovicz, S&S and Tomkovicz entry into this Agreement and/or the performance of the obligations of each of them under this Agreement do not violate any contract, agreement or other legal obligations of S&S and/or Tomkovicz.

- 7.1.4 To the actual knowledge of S&S and Tomkovicz, there are no pending or anticipated lawsuits or other actions or proceedings which would delay, prevent or impair the timely performance of S&S and/or Tomkovicz obligations under this Agreement.
- 7.1.5 S&S and Tomkovicz have the legal right, power and authority to enter into this Agreement and the execution, delivery and performance of this Agreement have been duly authorized by S&S and Tomkovicz and no other action by S&S and/or Tomkovicz is requisite to the valid and binding execution, delivery and performance of this Agreement.
- 7.2 The representations and warranties of the S&S and Tomkovicz set forth in this Section 7 are material consideration to City and S&S and Tomkovicz acknowledges that City is relying upon the representations of S&S and Tomkovicz set forth in this Section 6 in undertaking the obligations of this Agreement.
- 7.3 As used in this Agreement, the term “actual knowledge of the S&S” shall mean, and shall be limited to, the actual current knowledge of Steve and Tracy Tomkovicz, or either of them.

8. Covenants of S&S. S&S and Tomkovicz, both individually and jointly and severally hereby covenant, warrant, represent, guarantee and agree that at all times during the Term of this Agreement, S&S, and any and all S&S Related Entities shall operate their principal place of business, and the Point of Sale for all Current Sales and all Expanded Sales of S&S and Related Entities at the Premises. S&S and Tomkovicz further covenant, warrant, represent, guarantee and agree that at all times during the Term of this Agreement, neither S&S, its officers, members, shareholders, or employees nor Tomkovicz shall enter into any agreement to provide for or establish, or actually provide for or establish, a new or expand an existing business, facility or operation, at any other location wheresoever located, which facility competes either directly or indirectly with the sales and business activities of S&S or S&S Related Entities conducted at the Premises, or which will conduct activities which are substantially similar to those being conducted by S&S at the Premises and further agree that they shall not move and/or transfer sales and business operations of S&S or S&S Related Entities from the Premises to outside the City of Martinez in such a manner that the Point of Sale for any transaction of S&S or S&S Related Entities is located outside the City. It is expressly understood and agreed between the Parties that the Parties, and each of them, desire to generate the greatest feasible amount of Sales Tax Revenues for the City for the entire Term of this Agreement.

8.1 For the purposes of this Section 8.1, the term “Prohibited Financial Assistance” shall mean any direct or indirect payment, subsidy, rebate or other similar or dissimilar monetary or non- monetary benefit, including without limitation, payment of land subsidies, relocation

expenses, financial incentives, public financings, property or sales tax relief, rebate or sharing, relief from public improvement obligations, and payment for public improvements to or for the benefit of S&S or S&S Related Entities. S&S and Tomkivicz both individually and jointly and severally hereby covenant, warrant, represent, guarantee and agree for the Term hereof that neither S&S, Tomkivicz or any S&S Related Entities, either individually or jointly and severally, shall directly or indirectly, solicit, accept or enter into any agreement concerning any Prohibited Financial Assistance from any other public or private person or entity, to the extent such Prohibited Financial Assistance is given for the purpose of causing or would result in the relocation from the City of S&S or any S&S Related Entities, the alteration of the Point of Sale for any Current Sale or Expanded Sales of S&S or S&S Related Entities, or the establishment of any Expanded Sales of S&S or and S&S Related Entities outside the City or which would result in an Event of Default pursuant to this Agreement or which would result in a material (five percent (5%) or greater reduction in Sales Tax Revenues to the City.

8.2 Use of the Premises. S&S and Tomkovicz, both individually and jointly and severally hereby covenant, warrant, represent, guarantee and agree that at all times during the Term of this Agreement, S&S will continuously use and operate substantially all of the Premises for the Specified Use. S&S specifically acknowledges and agrees that the continual use and operation of the Premises for the Specified Use by S&S is a condition precedent to the City's payment obligations provided for in this Agreement. Nothing contained in this Agreement shall be deemed or construed to prohibit or limit S&S from relocating to an Alternate Location, temporarily closing the Premises in connection with any necessary or desirable repair, maintenance, remodeling and/or refurbishment of the Premises, and no such temporary closure of the Premises shall limit the rights or benefits of S&S (or the obligations of the City) under this Agreement, except to the extent that such relocation or temporary closure results in the non payment of Sales Tax Revenue to the City.

9. Covenant Payment. In consideration for the obligations of S&S and Tomkivicz as set forth in this Agreement, and subject to satisfaction of all conditions precedent thereto, the City shall, for each Operating Quarter during the Term hereof, pay to S&S an amount equal to the following:

Zero Percent (0%) of the Tier-1 Sales Tax Revenues actually received by the City attributable to the sales and business activities of S&S as remitted to the City by the BOE during the fiscal year.

Eighty Percent (80%) of the Tier-2 Sales Tax Revenues actually received by the City attributable to the sales and business activities of S&S as remitted to the City by the BOE during the fiscal year, less any Tier 2 Covenant Payment previously made to S&S during the Fiscal Year; plus

Sixty Percent (60%) of the Tier-3 Sales Tax Revenues actually received by the City attributable to the sales and business activities of S&S as remitted to the City by the BOE during the fiscal year, less any Tier-3 Covenant Payments previously made to S&S during the Fiscal Year.

Such percentage amounts payable to S&S are herein defined as the "Covenant Payments" In. the event any adjustments are required to be made to the amounts payable to S&S's for any Operating Quarter, such adjustments shall be made with respect to the payment due and payable for the specific Operating Quarter in which the particular milestone has been achieved pursuant to the formula as set forth above. Should the City be required to refund any Sales Tax Revenues attributable to S&S and/or any S&S Related Entities, sales, services or business activities on the Premises, S&S shall pay City an amount equal to the amount theretofore paid by City to S&S on account of City's receipt of said refundable Sales Tax Revenues in accordance with the provisions of this Agreement.

9.1 Conditions Precedent. Notwithstanding anything to the contrary contained in this Agreement, the City's obligation to pay the Covenant Payment to S&S is expressly contingent and conditional upon (i) S&S's paying or causing to be paid any and all taxes for the benefit of the City which are imposed on S&S and are applicable to or arising out of the ownership, lease, operation and/or use of the Premises by S&S (which may include, without limitation, taxes attributable to sales by S&S occurring from the Premises), except that S&S retains its right to protest and contest governmental decisions related to the payment of any such taxes, (ii) S&S's timely delivering or causing to be delivered to the City full and complete copies of the Sales Tax Reports in accordance with Section 12 hereof, (iii) the City's receiving and having the legal right under State and or Federal law to retain and control the disposition of all or substantially all of its portion of the Sales Tax Revenues, and (iv) subject to the provisions hereof the continual use, operation and occupancy of the Premises by S&S in compliance with all of the terms of this Agreement. If any or all of conditions above shall not be satisfied or shall fail at any time thereafter to remain satisfied, and S&S shall fail to cause such condition to be satisfied within one hundred twenty (120) days (subject to extension as provided herein) after written notice thereof from the City to S&S, then the City may, as its sole right and remedy, terminate this Agreement upon written notice to S&S, in which event the City shall be relieved of its obligations under this Agreement to pay the Covenant Payment for any period of time following such termination and the parties shall be subject to the provisions of this Agreement regarding Termination and Default.

9.2 State of California Legislation Impact on Covenant Payment. Without limiting the generality of the foregoing paragraph, S&S and Tomkovicz acknowledge that the State of California legislature has in the past adopted certain legislation which diverted to the State of California a portion of the Sales Tax Revenues which would otherwise be payable to the City. S&S and Tomkovicz acknowledge that it is possible that the State of California legislature may enact similar legislation in the future which would cause a corresponding reduction of and/or delay in the payment of the Sales Tax Revenues and that such reduction will cause a corresponding reduction for S&S and/or delay in the payment of the Covenant Payments due to S&S during such time as such legislation is in effect. Furthermore, S&S and Tomkovicz acknowledge that it is possible that the legislation described above, or some variant thereof,

may be enacted and effective during one or more subsequent times during the Term hereof and may materially and negatively impact the amount of Sales Tax Revenues and, accordingly, the Covenant Payments. The City does not make any representation, warranty or commitment concerning the future actions of the State of California legislature with respect to the allocation of Sales Tax Revenues to the City. S&S and Tomkovicz agree that they are undertaking the obligations under this Agreement after having considered, and expressly assuming the risk of, the possibility of the enactment of such legislation. The City acknowledges that the State of California legislature or the federal government through Congressional actions or other public entities may provide for the payment to City of other revenues for the purpose of offsetting any losses in Local Sales Tax Revenues resulting from the enactment of legislation of the type described in this paragraph. The City agrees that should any such offsetting revenues be provided, then for purposes of this Agreement and the computation of any Covenant Payments which may become due to S&S hereunder, the City will consider any such offsetting revenues which are (i) indexed to Sales Tax and offset the loss of Sales Tax revenues to the City on a dollar for dollar basis, (ii) actually received by the City, and (iii) not subject to any restrictions on use beyond those which are otherwise generally applicable to Sales Tax revenues received by California municipalities, to be Local Sales Tax Revenues within the meaning of this Agreement.

9.3 Notice of Determination of Operating Quarter Local Sales Tax Revenues and Covenant Payment. Within thirty (30) calendar days following the end of each Operating Quarter during the Term hereof, S&S's shall submit to City: certified copies of S&S's quarterly Sales Tax Reports to the BOE which set forth the amount of Sales Tax paid to the BOE during the prior Operating Quarter in connection with the sales and business activities of S&S. Within one hundred twenty (120) calendar days following its receipt of the foregoing information from S&S's, the City will determine the Sales Tax Revenues applicable to the Operating Quarter and the Covenant Payment due and provide S&S's with written notice of the City's determination ("Notice of Determination"), together with reasonable supporting documents and calculations, and the City shall verify that the City is in receipt of the requisite dollar amount of Sales Tax from the BOE as a condition precedent to any remittance by the City of the Covenant Payment to S&S.

9.4 Appeal of Covenant Payment: Negotiation Period. Notwithstanding any other provision of law, including, without implied limitation, any statutes of limitation provided therefore in the California Government Code or the California Code of Civil Procedure, the City's determination of the matters set forth in the Notice of Determination shall be deemed final, conclusive, and non-appealable unless, within ninety (90) calendar days from the receipt of the Notice of Determination by S&S, S&S notifies the City in writing that S&S appeals one or more of the matters set forth in the Notice of Determination, which notice must specifically identify the matter appealed and all of the bases for such appeal ("Notice of Appeal"). Any matter set forth in the Notice of Determination that is not appealed in the manner and within

the time limits set forth above, shall be final and conclusive as against S&S, Tomkovicz and all others claiming by or through either of them. The provisions of this Section 9.4 shall be strictly construed and S&S and Tomkovicz hereby waive, to the maximum extent permitted by law, any statutory or judicially created right to institute any administrative or judicial proceeding to contest any matter set forth in a Notice of Determination that is not timely appealed in strict accordance with this Section. If S&S does not file a Notice of Appeal, the City shall tender the Covenant Payment due within forty-five (45) calendar days from the issuance of the Notice of Determination by the City to S&S as provided in Section 9.3. If S&S files a timely Notice of Appeal with the City, the City and S&S shall negotiate in good faith to resolve their dispute for a period of thirty (30) calendar days from the date of the Notice of Appeal (the "Negotiation Period"). If, by the end of the Negotiation Period, the City and S&S are unable to resolve the dispute set forth in the Notice of Appeal, each of them may exercise any judicial remedy available to them pursuant to this Agreement for the resolution of such dispute; provided, however, that any provision of law to the contrary notwithstanding, such judicial remedy must be instituted (the term "instituted" is defined as the filing of an action in a court of competent jurisdiction in strict accordance with the terms of this Agreement) within the applicable statute of limitations period following the end of the Negotiation Period or be barred forever.

9.5 No Accrual of Interest on Disputed Covenant Payments. The City and S&S hereby agree that any disputed amount of the Covenant Payments shall not accrue interest during the pendency of any Negotiation Period or subsequent legal proceeding (including any appeals filed in connection therewith), unless the court makes a determination that the City acted in bad faith with regard to the dispute, in which case, any amount ultimately determined to be owing by the City shall be deemed to have accrued interest at the rate of two percent (2%) simple interest per annum, commencing on the ninetieth (90th) calendar day following the end of the Negotiation Period and continuing thereafter until paid in whole by the City. S&S hereby waives, to the maximum extent permitted by law, the right to the imposition of any different rate of interest in accordance with any provision of law.

9.6 Covenant Payment Paid From Any Source of City Funds. Any Covenant Payment due under Section 9 may be payable from any source of any legally available funds of the City. The City covenants to reasonably consider such actions as may be necessary to include all payments owed hereunder in each of its annual budgets during the Term hereof and to reasonably consider the necessary annual budgetary appropriations for all such payments.

9.7 Remittance of Covenant Payments As Contingent Obligation of City. The City's obligations under Section 9 are contingent on a year to year basis on and, for each Fiscal Year during the Term hereof, the City's obligations to make any payments to S&S under this Agreement are expressly contingent upon S&S, for the entirety of such Fiscal Year, not being in Default in any of its material obligations under this Agreement. If for any reason S&S fails to authorize the release or use of Sales Tax information in a manner satisfactory to the BOE or provide any information reasonably required by the City to perform the City's obligations under this Agreement, the City

shall have no obligation to make any Covenant. Payment with respect thereto to S&S for the period during which such information is unavailable to the City or the City is not legally authorized to use such information for the purposes of performing its obligations under this Agreement. Additionally, during any period in which the Sales Tax information of S&S is unavailable to the City or the City is not legally authorized to use such information for the purposes of performing its obligations under this Agreement, Covenant Payments with respect thereto shall be deemed suspended.

9.8 Covenant Payment Calculated on Quarterly Basis. The Parties agree that the calculation and determination of all financial components of the Parties' rights and obligations under this Agreement shall be computed on an Operating Quarter to Operating Quarter basis. Sales Tax Revenues generated in one Fiscal Year shall not be carried forward or back to any future or prior Fiscal Year, it being the express understanding of the Parties that for each Fiscal Year the financial obligations of the Parties and satisfaction of the conditions precedent to such obligations shall be determined and made independently of any other Fiscal Year.

9.9 BOE Determination of Improperly Allocated Local Sales Tax Revenues. If, at any time during or after the Eligibility Period of this Agreement, the BOE determines that all or any portion of the Sales Tax Revenues received by the City and shared with S&S as provided herein were improperly allocated and/or paid to the City ("Misallocation"), and if the BOE requires repayment of, offsets against future Sales Tax payments due to the City, or otherwise recaptures from the City the Misallocation, then S&S, shall, within thirty (30) calendar days after written demand from the City, repay the amount of the Misallocation theretofore paid to S&S. This Section 9.9 shall survive the expiration or termination of this Agreement. Further, if at any time, the BOE fails or refuses to remit to the City all or any portion of any Sales Tax Revenues applicable to any time period during the Term hereof, then such Sales Tax Revenues retained, by the BOE shall not be considered in calculating any Covenant Payment otherwise due and payable under this Agreement, unless and until such retained Sales Tax Revenues are paid to the City.

10. Indemnification. Subject to the terms of this Agreement, to the fullest extent permitted by law, S&S shall defend, indemnify and hold the City, its directors, officials, officers, employees volunteers and agents free and harmless from and against any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury of any kind, in law or equity, in any manner arising out of, pertaining to, or incident to any alleged acts, errors or omissions of Tomkovicz, S&S, its officials, officers, employees, subcontractors, consultants or agents in connection with the performance of this Agreement, including without limitation the payment of expert witness fees and attorneys fees and other related costs and expenses.

11. Defense of this Agreement. If a third-party files a legal action regarding the City's approval of this Agreement or the pursuit of the Sales Activities contemplated by this Agreement, the City or S&S may terminate this Agreement on thirty (30) calendar days'

written notice to the non-terminating Party stating the terminating Party's intent to terminate this Agreement, referencing this Section 11, without any further obligation of the terminating Party to perform the terms of this Agreement and without any liability of the terminating Party to non-terminating Party resulting from such termination, unless the non-terminating Party unconditionally agrees to indemnify and defend the terminating Party against such third-party legal action, as provided hereinafter in this Section 11. Within thirty (30) calendar days after receipt of the terminating Party's notice of intent to terminate this Agreement, as provided in the preceding sentence, the non-terminating Party may offer to defend the terminating Party in the third-party legal action and pay all of the court costs, attorneys' fees, monetary awards, sanctions, attorney fee awards, expert witness and consulting fees, and the expenses of any and all financial or performance obligations (subject to the terms of this Agreement) resulting from the disposition of the legal action. Any such offer from non-terminating Party must be in writing and in a form reasonably acceptable to the terminating Party.

12. Compliance with Laws and Requirements. Nothing in this Agreement shall limit or restrict the authority of the City to take any other actions with respect to the Premises and/or S&S without notice to or consent from S&S, except as may otherwise be expressly provided by applicable law. S&S acknowledges and agrees that the execution of this Agreement by the City does not in any way constitute, nor shall the same be inferred to be a waiver by the City of any applicable laws, regulations, requirements, permits, fees or agreements pertaining to or affecting S&S's ownership or leasehold interest as the case may be, or continued development, improvement, construction, occupancy or use of the Premises all of which shall continue to be and remain fully applicable and effective with the same force and effect as if this Agreement had never been executed by the City and S&S. Nothing herein contained shall constitute a prejudgment or precommitment by the City with respect to any discretionary City permits and approvals that may be required for the Premises, including, without limitation, any General Plan amendment, Zoning Code amendment, Municipal Code Amendment, and/or conditional or special use permits, and the environmental reviews and approvals required pursuant to the California Environmental Quality Act in conjunction therewith that are required to accommodate the activities of S&S at or on the Premises. The City reserves its full and unfettered discretion with respect thereto to the same extent it would have such discretion in the absence of this Agreement

13. Permit Processing. In the event that the uses contemplated by S&S at the Premises requires any permit or entitlements from the City, the City agrees to process said permit or other entitlement in good faith and in accordance with the City's Municipal Code.

14. Non-liability of the City or City Officials and Employees. No member of the City Council of the City, the Mayor or any City officer, official, contractor, consultant, attorney or employee of the City shall be personally liable to S&S, Tomkovicz, any S&S Related Entity, any voluntary or involuntary successors or assignees, or any lender or other party holding an interest in the Premises, in the event of any default or breach by the City, or for any amount

which may become due to S&S or to its successors or assignees, or on any obligations arising under this Agreement.

15. Defaults. Subject to any extensions of time provided for in this Agreement for event of Enforced Delay, the occurrence of any of the following shall constitute a "Default."

15.1 The failure by either Party to perform any obligation of such Party under this Agreement for the payment of money, if such failure is not cured within ten (10) calendar days after the non-performing Party's receipt of written notice from the injured Party that such obligation was not performed when due; or

15.2 The failure by either Party to perform any of its obligations set forth in this Agreement other than obligations subject to subsection 15.1, if such failure is not cured within thirty (30) calendar days after the non-performing Party's receipt of written notice from the injured Party that such obligation was not performed when due or, if such failure is of a nature that cannot reasonably be cured within thirty (30) calendar days, the failure by such Party to commence such cure within thirty (30) calendar days after receipt of such notice and to, thereafter, diligently prosecute such cure to completion; or

15.3 Any representation or warranty by a Party set forth in this Agreement proves to have been false or misleading in any material respect when made and said Party does not take the necessary action, following notice pursuant to subsection 15.2, to remedy said misrepresentation or breach of warranty within the time period set forth in subsection 15.2, such that the original representation or warranty becomes truthful and accurate.

15.4 Any failure or delays by any Party in asserting any of their rights and/or remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies. Delays by any Party in asserting any of their rights and/or remedies shall not deprive any Party of its right to institute and maintain any actions or proceedings that it may deem necessary to protect, assert or enforce any such rights or remedies.

15.5 If S&S fails to make any repayment of a Misallocation (as defined above) within sixty (60) calendar days after the City's written demand therefor (the "Grace Period"), then S&S shall be in breach of this Agreement from and after the expiration of the Grace Period and the amount of such repayment shall thereupon accrue interest at four percent (4%) simple interest per annum, until, paid.

15.6 If S&S fails to comply with any of the covenants contained herein which failure continues for thirty (30) days after the City's written notice thereof then S&S shall be in breach of this Agreement and the City shall be entitled to pursue any remedy or damages available under this Agreement, at law, or in equity for such breach.

15.7 Upon the occurrence of any Default by S&S, and after S&S receipt of written notice of default and expiration of the time for S&S to cure such Default as provided in subsection 15.2, the City may at its option:

(a) suspend the payment of the Covenant Payments otherwise due and payable to S&S hereunder for the period that S&S remains in Default. If the City has so suspended its payments in accordance with the terms of this clause (i), then upon S&S cure of such Default, the City shall resume its payment obligations, but shall have no obligation to make payments for any Operating Quarter or portion thereof during which the City's obligation to make payments was so suspended; or

(b) if the Default continues uninterrupted for a period of six (6) months, the City may terminate this Agreement, in which case the City's obligation to make Covenant Payments to S&S for any period of time after the occurrence of the Default shall be finally terminated and discharged; or

(c) the City have the right to specifically enforce S&S covenants set forth in this Agreement regarding the operation of the Specified Use at the Premises and the covenants contained in Section 8 of this Agreement; or

(d) the City may seek damages to recover from S&S any amount that is actually or allegedly attributable to loss of anticipated Sales Tax or other revenues which the City would have received pursuant to the terms of this Agreement.

15.8 Upon the occurrence of any Default by the City, and after the City's receipt of written notice of Default from S&S and expiration of the time for the City to cure such Default as provided in Section 15, S&S may terminate this Agreement by written notice to the City and/or seek whatever legal or equitable remedies may be available to S&S.

15.9 In addition to any other rights or remedies, but subject to the other terms and conditions of this Agreement, either Party may institute legal action to cure, correct or remedy any Default by the other Party, to recover general or consequential damages for any default, or to obtain any other remedy available to that Party under this Agreement or at law.

16. City Offset Remedy. In addition to those rights and remedies provided by Section 15, the City's rights and remedies for a Default by S&S include the right to off-set any amount of money due to S&S from City following the notice and opportunity to cure provided in Section 15, against any Covenant Payments due or becoming due to S&S.

17. Rights and Remedies are Cumulative. Except as otherwise expressly stated in this Agreement, the rights and remedies of the Parties under this Agreement are cumulative and the exercise by any Party of one or more of such rights or remedies shall not preclude the



19. Interpretation. The Parties acknowledge that this Agreement is the product of arms-length negotiation and drafting and that each of the Parties have been represented by legal counsel in the negotiation and drafting of this Agreement. Accordingly, any rule of construction that the ambiguities in a document shall be construed against the drafter of that document shall have no application to the interpretation and enforcement of this Agreement. In any action or proceeding to interpret or enforce this Agreement, the finder of fact may refer to any extrinsic evidence not in direct conflict with any specific provision of this Agreement to determine and give effect to the intention of the Parties.

20. Counterpart Originals; Integration; Amendments. This Agreement may be executed in duplicate originals, each of which is deemed to be an original, but all of which taken together shall constitute one and the same instrument. This Agreement represents the entire understanding of the Parties and shall supersede all negotiations, letters of intent, memoranda of understanding or previous agreements between the Parties with respect to all or any part of the subject matter of this Agreement. This Agreement may not be amended except by a written instrument executed by both Parties and approved in the manner as required by both Parties.

21. No Waiver. Failure to insist on any one occasion upon strict compliance with any of the terms, covenants or conditions of this Agreement shall not be deemed a waiver of such term, covenant or condition, nor shall any waiver or relinquishment of any rights or powers under this Agreement at any one time or more times be deemed a waiver or relinquishment of such other right or power at any other time or times.

22. Time is of the Essence/Force Majeure. Time is of the essence in the performance of the Parties' obligations under this Agreement. In addition to specific provisions of this Agreement providing for extensions of time, times for performance under this Agreement shall be extended by an Enforced Delay, provided, however, that the Party claiming the extension notify the other Party of the nature of the matter causing the Enforced Delay within thirty (30) calendar days from the date of the occurrence thereof; and, provided further, that the extension of time shall be only for the period of the Enforced Delay.

23. Changes in Conditions. NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, S&S AND TOMKOVICZ EXPRESSLY ASSUME THE RISK OF UNFORESEEABLE CHANGES IN ECONOMIC CIRCUMSTANCES AND/OR MARKET DEMAND/CONDITIONS AND WAIVE, TO THE MAXIMUM EXTENT PERMITTED BY LAW, ANY DEFENSE, CLAIM, OR CAUSE OF ACTION BASED IN WHOLE OR IN PART ON ECONOMIC NECESSITY, IMPRACTICABILITY, CHANGED ECONOMIC CIRCUMSTANCES, FRUSTRATION OF PURPOSE, OR SIMILAR THEORIES. S&S AND TOMKOVICZ EXPRESSLY AGREE THAT ADVERSE CHANGES IN ECONOMIC CONDITIONS, EITHER OF S&S AND/OR TOMKOVICZ SPECIFICALLY OR THE ECONOMY GENERALLY, OR CHANGES IN MARKET CONDITIONS OR DEMANDS, SHALL NOT OPERATE TO EXCUSE OR DELAY THE STRICT OBSERVANCE OF

EACH AND EVERY OF THE OBLIGATIONS, COVENANTS, CONDITIONS AND REQUIREMENTS OF THIS AGREEMENT. S&S AND TOMKOVICZ EXPRESSLY ASSUME THE RISK OF SUCH ADVERSE ECONOMIC OR MARKET CHANGES, WHETHER OR NOT FORESEEABLE AS OF THE EFFECTIVE DATE.

S&S

Steve Tomkovicz

Tracy Tomkovicz

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24. No Third Party Beneficiaries. The performance of the Parties' respective obligations under this Agreement is not intended to benefit any party other than the City and S&S, except as may be expressly provided otherwise in this Agreement. No person or entity not a signatory to this Agreement shall have any rights or causes of action against either Party to this Agreement as a result of that Party's performance or non-performance under this Agreement.

25. No Effect on Eminent Domain Authority. Nothing in this Agreement shall be deemed to limit, modify, or abridge or affect in any manner whatsoever the City's eminent domain powers with respect to the Premises.

26. Tax Consequences. S&S acknowledges that it may experience tax consequences as a result of its receipt of the payments provided for in this Agreement and agrees that it shall bear any and all responsibility, liability; costs, and expenses connected in any way therewith.

27. Warranty against Payment of Consideration for Agreement. S&S warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement. Third parties, for the purposes of this Section 27, shall not include persons to whom fees are paid for professional services if rendered by attorneys, consultants, accountants, engineers, architects and the like when such fees are considered necessary by S&S.

28. Assignment. S&S acknowledges and agrees that the rights, benefits, duties and obligations of S&S as provided in this Agreement are personal to S&S. Except as provided herein, neither this Agreement nor any rights, benefits, duties or obligations of S&S may be assigned or delegated to any other person or entity without the City's written consent. Notwithstanding anything to the contrary contained herein, S&S may undertake any of the following without the consent of the City, and no such action shall limit or otherwise affect any of the duties, rights or benefits of S&S (or the duties and obligations of the City) hereunder: (i) issue or transfer stock or other voting or ownership interests in S&S (and/or assign this Agreement in connection with any such issuance or transfer), (ii) merge or consolidate with any other entity, and/or sell or transfer all or substantially all of the assets of S&S (and/or assign this Agreement in connection with any such merger, consolidation or sale), or (iii) assign its interest in this Agreement to any entity that controls, is controlled by, or is under common control with

S&S. The word “control”, for purposes of the foregoing, means the power, directly or indirectly, by voting rights, contract or otherwise, to direct or cause the direction of the management or policies of a person or entity.

29. Notice to City of Changes in Organization. S&S shall, within ten (10) calendar days notify City of any changes in organization, or any other business actions requiring notification to the California State Board of Equalization, California Secretary of State, Contra Costa County Recorder, California Franchise Tax Board, Contra Costa County Assessor or any other state or local entity required to be notified of any change in business organization or action.

30. Captions. The section headings or captions used herein are for convenience only and are not a part of this instrument and do not in any way limit, define or amplify the scope or intent of the terms and provisions hereof.

31. Invalidity of Provision. If any provision of this Agreement shall be adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, then the same shall (to the maximum extent permissible by law) in no way affect any other provision of this Agreement or the application of any such provision under circumstances different from those adjudicated by the court, or the validity or enforceability of the instrument as a whole; provided, however, if the condition described in Section 3.1(iv) shall at any time fail to be satisfied, or the obligation of City to pay the Covenant Payment be held to be void or unenforceable, S&S will have the right, upon written notice to City, to terminate this Agreement without any liability to City.

32. Prevailing Wage. In the event that the provisions of this Agreement shall trigger the payment of prevailing wages in accordance with California Labor Code Section 1720 et. seq., S&S shall comply with, and shall require all contractors doing work on the Premises to comply with all applicable law relating to same. In this regard, S&S shall indemnify, hold harmless, release and defend City, its officials, officers, employees and agents from and against any and all actions, claims, demands, damages, disability, losses, failure to comply with any current or prospective laws, expenses including attorney's fees and other defense costs or liabilities of any nature that may be asserted by any person or entity including any contractor, worker or other governmental entity relating to compliance with the California Labor Code for work done at the Premises or work paid for in whole or in part with the Covenant Payment funds.

33. Attorneys' Fees. In the event of the bringing of an arbitration, action or suit by a Party to this Agreement against the other Party to this Agreement by reason of any breach of any of the covenants or agreements or any intentional inaccuracies in any of the representations and warranties on the part of the Party arising out of this Agreement or any other dispute between the Parties concerning this Agreement, then, in that event, the prevailing Party in such action or dispute, whether by final judgment or arbitration award, shall be entitled to have and recover of and from the other Party or Parties all costs and expenses of suit or claim, including reasonable attorneys' fees. Any judgment, order or award entered in any final judgment or

award shall contain a specific provision providing for the recovery of all costs and expenses of suit or claim, including reasonable attorneys' fees (collectively, the "Costs") incurred in enforcing, perfecting and executing such judgment or award. For the purposes of this Section 33, Costs shall include, without implied limitation, reasonable attorneys' and experts' fees, costs and expenses incurred in the following: (i) post judgment motions and appeals, (ii) contempt proceedings, (iii) garnishment, levy and debtor and. third party examination; (iv) discovery; and (v) bankruptcy litigation. The term Costs shall also include the costs incurred by the City Attorney and members of the City Attorney's staff including attorneys, investigators and other staff personnel, plus salaries and benefits payable to such employees, for any such Costs incurred by the City Attorney pursuant to this Agreement. This Section 33 shall survive any termination of this Agreement.

34. Governing Law, Jurisdiction and Venue. This Agreement and the terms hereof shall be governed by and construed in accordance with the procedural and substantive laws of the State of California. Any legal action or proceeding concerning this Agreement shall be filed and prosecuted in the appropriate state or federal court in the State of California. The Parties to this Agreement irrevocably consent to the personal jurisdiction of that court. Venue shall be in Contra Costa County, California.

35. Nondiscrimination.

35.1 Obligation to Refrain from Discrimination. There shall be no discrimination against or, segregation of, any persons or group of persons, on account of race, color, creed, religion, sex, marital status, ancestry, or national origin in the enjoyment of S&S's interest in the Premises, nor shall S&S, or any person claiming under or through S&S, establish or permit any such practice or practices or discrimination or segregation with reference to the selection, location, number, use, or occupancy of tenants, lessees, subtenants, sublessees, or vendees of the Premises or any portion thereof.

35.2 Form of Nondiscrimination and Nonsegregation Clauses. S&S covenants to the City that it will not unlawfully discriminate within the Premises against any employee or applicant for employment because of sex, marital status, race, color, religion, creed, national origin, or ancestry, and that they will comply with all applicable local, state and federal fair employment laws and regulations. S&S further covenants and agrees that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, ancestry or national origin in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Premises, nor shall S&S itself, or any person. claiming under or through it, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use of occupancy of tenants, lessees, subtenants, sublessee or vendees or contractors of the Premises. All such deeds, leases or contracts shall contain or be subject to substantially the following nondiscrimination or nonsegregation clauses:

In deeds/leases: “The grantee/lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, national origin, or ancestry in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the land/premises herein conveyed/leased, nor shall the grantee/lessee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, or vendees in the land/premises herein conveyed/leased. The foregoing covenants shall run with the land.”

In contracts for the sale, lease, sublease or other transfer of the Premises or any portion thereof: “That there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, national origin, or ancestry in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the land herein transferred, nor shall the transferee himself, or any person claiming under or through him or her establish or permit any such practice or practice of discrimination or segregation with reference to the selection, location, number, use, or occupancy of tenants, lessees, sublessees, subtenants, or vendees of land.”

The City is deemed a beneficiary of the terms and provisions of this Section 35 for and in its own right and for the purposes of protecting the interests of the community and other parties, public or private, in whose favor and for whose benefit the covenants in this Section 35 have been provided. The City shall have the right, if S&S defaults under this Section 35 and fails to cure such default within thirty (30) days after notice from City, to exercise all rights and remedies and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breaches to which it or any other beneficiaries of such covenants may be entitled.

36. Enforced Delay; Extension of Time for Performance. If City and/or S&S are prevented from proceeding with any of their obligations, or satisfying any of the conditions, under this Agreement by reason Enforced Delay then that party shall be entitled to an additional grace period or extension of time in which to perform the obligations or satisfy the conditions whose performance or satisfaction is precluded by such event, equal to the period of delay caused by such event beyond that party’s control.

37. Successors in Interest. Subject to any restrictions against assignment contained herein, and to any legal limitations on the power of the signatories to bind non-signatories to this Agreement, this Agreement shall inure to the benefit of, and shall be binding upon, the assigns, successors in interest, personal representatives, executors, estates, heirs, legatees, agents and related entities of each of the parties.

38. Further Acts. Each of the parties shall execute such other and further documents and do such further acts as may be reasonably required to effectuate the intent of the parties and carry out the terms of this Agreement.

39. Advice of Counsel. The parties, and each of them, acknowledge that in connection with the negotiation and execution of this Agreement, they have each been, or had an opportunity to be represented by independent counsel of their own choosing, and the parties executed this Agreement after review, or an opportunity for review by such independent counsel or, if they were not so represented, then said non-representation is and was the voluntary, intelligent and informed decision and election of the party not so represented and, prior to executing this Agreement, each party has had an adequate opportunity to conduct an independent investigation of all of the facts and circumstances with respect to the matters which are the subject of this Agreement.

40. Voluntary Agreement. The parties, and each of them, further represent and declare that they have carefully read this Agreement and know the contents thereof and that they sign the same freely and voluntarily.

41. Context and Construction. When the context and construction so require, all words used in the singular herein shall be deemed to have been used in the plural, and the masculine shall include the feminine and neuter and vice versa. Whenever the word “day” or “days” issued herein, such shall refer to calendar day or days, unless otherwise specifically provided herein. Whenever a reference is made herein to a particular section of this Agreement, it shall mean and include all subsections and subparts thereof unless otherwise specified.

Confidentiality. S&S acknowledges and agrees that the Sales Tax reporting and payment information related to Sales Taxes may become a public record as a result of the covenants of S&S's contained in this Agreement and the Covenant Payments to be made by the City to S&S. S&S hereby authorizes the City to use the Sales Tax reporting and payment information to allow the City to perform its obligations under this Agreement and to disclose such information when, in the City's reasonable opinion, such disclosure is required by law. S&S acknowledges that it may be requested to make certain confidential financial disclosures to City, its staff or legal counsel, pursuant to this Agreement. The parties recognize that such financial disclosures may contain sensitive information relating to business transactions of S&S, that the disclosure of such information to third parties could impose commercially unreasonable and/or anti-competitive burdens on S&S. Accordingly, City agrees to maintain the confidentiality of any of S&S financial and/or proprietary information, described in Government Code Section 6254.15, as may be provided by S&S to City or its consultants, to the maximum extent permitted by law. Should any litigation be filed or threatened against the City arising from or related to the disclosure of a copy of any business record of S&S, S&S will be notified of same. Upon notification by the City, S&S may determine whether to direct the City to disclose such record or, at the election of S&S, S&S shall defend the City with counsel reasonable

acceptable to the City and indemnify and hold the City, its directors, officials, officers, employees volunteers and agents free and harmless from and against any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury of any kind, in law or equity, in any manner arising out of, pertaining to the failure to disclose such business record of S&S.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the date set forth below.

CITY:

CITY OF MARTINEZ,

\_\_\_\_\_  
By: Robert Schroder, Mayor

ATTEST:

\_\_\_\_\_  
By: Mercy Cabral, Deputy City Clerk

APPROVED AS TO FORM,

\_\_\_\_\_  
By: Veronica A. F. Nebb, Sr. Asst. City Attorney

S&S:

Supplies and Solutions, a \_\_\_\_\_

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

ATTEST:

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

APPROVED AS TO FORM,

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By:

TOMKOVICZ:

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Steve Tomkovicz

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Tracy Tomkovicz