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NO. LTC # **172-2015**

LETTER TO COMMISSION

TO: Mayor Philip Levine and Members of the City Commission

FROM: Raul J. Aguila, City Attorney

DATE: April 28, 2015

SUBJECT: Status of Lease between the City and the Miami Beach Redevelopment Agency (as Landlord) and Penn 17, LLC (as Tenant), relating to property located at 1661 Pennsylvania Avenue (Oolite Restaurant)

The purpose of this LTC is to provide the City Commission with a background and update with respect to the above referenced matter.

On April 13, 2011, the Mayor and City Commission adopted Resolution No. 2011-27647, approving a Lease Agreement (the "Lease"), between the City, the RDA (collectively, the "City" or "Landlord") and Penn 17 LLC. ("PENN" or "Tenant"), having a term of nine (9) years and 364 days, for use of approximately 7,655 square feet of ground level retail space at the Pennsylvania Avenue Garage, located at 1661 Pennsylvania Avenue, Miami Beach, Florida, for a restaurant (primary use) known as the Cooper Avenue Restaurant, with ancillary uses for a bakery, a bar/café, and a book and gift shop (the "Premises").

The Lease has been amended three times, including various rent abatements and rent deferrals, more particularly described herein.

On February 8, 2012, the Mayor and City Commission adopted Resolution No. 2012-27844, approving Amendment No. 1 to the Lease, correcting the gross rentable retail space for the Premises.

On June 6, 2012, the Mayor and City Commission adopted Resolution No. 2012-27925, approving Amendment No. 2 to the Lease, granting the Tenant rent relief and increasing the size of the Premises by approximately 2,514 square feet for food preparation, including two bathrooms, and a separate area for storage of flood panels.

The Premises, which housed the Cooper Avenue Restaurant, closed on December 17, 2012.

Thereafter, PENN requested rent relief in connection with certain operational complications resulting from the failure of its air conditioning system and the complaints from the New World Symphony (NWS) that the odors emanating from the Premises' kitchen exhaust system, which at the time was channeled in the direction of the NWS, was interfering with the NWS' use of their space.

Following Tenant's request for a rent reduction and other relief, on December 20, 2012 and January 24, 2013, the City's Finance & Citywide Projects Committee (FCWPC) expressed support for providing some level of relief to PENN, subject to the inclusion of specific release language absolving the City of any liability regarding Tenant's cost overruns and claims related to loss of business.

On March 13, 2013, the Mayor and City Commission adopted Resolution No. 2013-28167 (in conjunction with RDA Resolution No. 592-2013), accepting the FCWPC's recommendation, and approving, in concept, the proposed terms for an Amendment No. 3 to the Lease, which amendment, upon future final approval by the City/RDA, would include the re-branding of the Premises, to include an entertainment component (i.e. Tenant contemplated using part of the Premises as a lounge, featuring a combination of a deejay and live music).

On or about May 14, 2013, the City was notified of a sale proposal to sell Mr. Ben-Zion's 50% managing interest in Penn 17 LLC (the Tenant entity), to a new entity, OBK Project LLC (OBK), whereby PENN would continue as the Tenant under the Lease (without Mr. Ben-Zion as a manager member), and Mr. Cherstovov and OBK would each have a fifty percent (50%) membership interest in the Tenant entity.

On May 17, 2013, the City placed Tenant in default under the Lease.

On June 5, 2013, the City/RDA approved City Resolution No. 2013-28239 and RDA Resolution No. 593-2013, approving and authorizing the execution of Amendment No. 3, containing the following material terms and conditions:

1. Landlord's approval of the transfer of 50% managing interest of the Tenant entity, from Mr. Ben-Zion to OBK Project LLC;
2. Landlord to pay for the relocation of the existing kitchen exhaust venting system, for a total cost not to exceed \$250,000;
3. Tenant to pay past due rent for May, June, Jul and August, 2013 without penalties;
4. Tenant to re-deposit the minimum required \$50,000 Construction Deposit into the Tenant Construction Fund (under the Escrow Agreement);
5. Tenant to assume responsibility for paying and prosecuting the work related to Tenant's prior request to re-locate the Premises' air conditioning units to the roof of the Pennsylvania Avenue Garage;
6. Tenant to resolve and/or otherwise satisfy any outstanding contractor and sub-contractors liens against the Premises;
7. Tenant to provide the City/RDA with an updated general release, releasing City/RDA from any and all claims under the Lease;
8. Tenant authorized the payment of rent for November and December, 2012, in the total sum of \$120,520.52 (i.e. Minimum Rent and CAM of \$112,636.00 plus sales tax of \$7,884.52), from Tenant's Security Deposit (Deposit Disbursement). Tenant was obligated to re-pay and reimburse Landlord for the Deposit Disbursement, in six (6) equal payments of \$18,772.67 each (the Deposit Disbursement Payments), with the first Deposit Disbursement Payment due on October 1, 2013, and with the last Payment to be made on March 1, 2014. Landlord waived any and all late charges, interest and penalties on said Deposit Disbursement Payments;
9. commencing retroactively as of January, 1, 2013, Tenant was permitted to abate fifty percent (50%) of Minimum Rent and CAM payments for the months of

January, 2013, through June 2013 (the "Rent Abatement Period"), in the total sum of \$168,954.00;

10. commencing retroactively as of July 1, 2013, Tenant was permitted to defer the payment of fifty percent (50%) of Minimum Rent and CAM payments for the months of July 2013, through December, 2013 (the "Rent Deferral Period"), in the total sum of \$171,106.59 (the "Rent Deferral Amount"). Tenant was required to re-pay the monthly payments of \$7,129.44 each, over a period of twenty-four (24) months, commencing on the first day of Year Six (6) of the Lease (10-1-2016), and ending on the last day of Year Seven (7) of the Lease (9-1-2018), in addition to Tenant's payment of Minimum Rent, CAM, and any other sums due and payable under the Lease; and
11. the restaurant would be opened by December 31, 2013.

The Tenant opened the restaurant, under the new name Oolite, on June 15th, 2014.

PENN paid the rent, pursuant to Amendment No. 3, through June of 2014. In July, 2014, PENN paid partial rent, in the amount of \$20,000.

During the July 30th, 2014 City Commission meeting, Steve Polisar, Esq., representing the Tenant, stated that the rent which Tenant was paying, in the approximate sum of \$65,000 per month, was too high for the Tenant and which rent PENN believe to be higher than market rent for the Premises.

At the July 30th 2014 City Commission meeting, the City Commission referred the item to the September Finance and Citywide Projects Committee meeting, and requested that the item be brought back for final approval at the October 22, 2014 Commission Meeting.

On September 24, 2014, the Finance and Citywide Projects Committee met and discussed the item and recommended that the Administration hire a commercial real estate broker to analyze the Premises; however, Tenant would be required to pay interim base rent, in the amount of \$24,474.00, plus applicable sales tax (Interim Base Rent), retroactively, commencing July 1, 2014.

On October 22, 2014, the City Commission adopted Resolution No 2014-28789, accepting the recommendation of the Finance and Citywide Projects Committee with respect to hiring a commercial real estate broker to analyze the Premises; directing the Administration to market the Premises; and directing the City Attorney's Office to protect the City's interests including, without limitation, placing PENN in default under the Lease.

Pursuant to said direction from the City Commission, on October 23, 2014, the City sent PENN a Notice of Default for failure to pay the rental payments due under the Lease.

On November 6, 2014, the City sent PENN a second notice of default, requesting documentation to support the change in ownership of OBK Project, LLC, the Manager of Penn 17 LLC, as the City's Legal Department had discovered, through the records of the Secretary of State, that there appeared to have been a change in the ownership of PENN's managing member, OBK.

City staff worked diligently with PENN for several months, including various meetings with PENN and its attorneys, and the drafting of various proposed settlement

agreements, in order to devise a settlement contemplating the appraisal of rent for the Premises. During this interim period, PENN made rent payments, in the amount of \$25,594.00 from October, 2014 through January, 2015 (PENN paid \$20,000.00 for rent in July and no rent during the months of August or September, 2014).

On March 13, 2015, City Staff became aware that PENN's February, 2015 payment, in the amount of \$25,594.00, had been returned due to insufficient funds.

On March 16, 2015, PENN advised Staff and the City's Legal Department that PENN was trying to raise capital but was unsure as to whether or not PENN would be successful, and that the filing of bankruptcy was a possibility.

On March 17, 2015, the City's Legal Department sent PENN a notice of termination of lease, based upon PENN's failure to cure the arrearage owed under the October 23, 2014 default notice, and further advising PENN that its security deposit had been applied toward said balance.

On March 27, 2015, the City commenced eviction proceedings against PENN and is pending service of process. Staff continues to work with Tenant to reach an amicable solution to the pending eviction proceeding.

The current monthly rent for the Premises is \$61,889.70 plus applicable sales tax. PENN currently owes the City rent under the Lease, through April 30, 2015, in the amount of \$446,095.82 (plus applicable late fees).