



THE CITY OF SAN DIEGO

September 13, 2016

Gabby@capitaltrustescrow.com
via facsimile (888) 908-0836

Ms. Gabby Garcia, Escrow Officer
Capital Trust Escrow
280 S. Beverly Drive, Suite 300
Beverly Hills, CA 90212

Subject: Escrow Number 005201
MDTQ, LLC (dba Downtown Johnny Brown's)

Dear Ms. Garcia:

Please find enclosed the revised City of San Diego Lease Surrender and Termination Agreement ("Agreement") between the City of San Diego ("City"), and MDTQ, LLC, a limited liability corporation ("MDTQ") (collectively referred to herein as the "Parties"), to be effective when executed by the parties and as of the date approved by the San Diego City Attorney (the "Effective Date").

As outlined in Section 7 of the Agreement, the City has included the total outstanding amount due for rent, late fees, and close-out audit credits in the amount of \$31,874.74. It is the understanding of all parties that the total amount due of \$31,874.74 will be paid to the "City Treasurer" concurrent with the close of escrow, and is a condition of the City consenting to the Agreement.

If you have any questions regarding the Agreement, please contact me at hfarst@saniego.gov or at (619) 236-6727.

Sincerely,

Heide E. Farst, CSM
Property Agent, Real Estate Assets

cc: Patti Phillips, Asset Manager, Real Estate Assets
Sean Cole, MDTQ, LLC

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Real Estate Assets

1200 Third Avenue, Suite 1700, MS 51A • San Diego, CA 92101-4199
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CITY OF SAN DIEGO

LEASE SURRENDER AND TERMINATION AGREEMENT

THIS LEASE SURRENDER AND TERMINATION AGREEMENT ("Agreement") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), and MDTQ LLC, a limited liability corporation ("MDTQ") (collectively referred to herein as the "Parties"), to be effective when executed by the parties and as of the date approved by the San Diego City Attorney (the "Effective Date"), as follows:

RECITALS

- A. CITY, as lessor, and Downtown Johnny Brown's, Inc., as lessee, entered into that certain CITY OF SAN DIEGO PERCENTAGE LEASE (the "Lease") filed in the Office of the San Diego City Clerk as Document No. RR-296518 on May 21, 2002, which was assigned to Alexander Construction and Home Inspection, Inc. pursuant to that certain CITY OF SAN DIEGO CONSENT TO ASSIGNMENT OF LEASE AGREEMENT, dated March 30, 2016, and assigned to MDTQ pursuant to that certain CITY OF SAN DIEGO CONSENT TO ASSIGNMENT AND AGREEMENT, dated October 2, 2013, by which MDTQ leased from CITY the CITY-owned improved real property located at 1220 Third Avenue, in the City of San Diego, California and more particularly described in the Lease (the "Premises") to operate and maintain a café-style restaurant and bar for use by the general public, as more particularly specified in the Lease.
- B. The Lease is scheduled to expire on May 31, 2017.
- C. CITY and MDTQ entered into a Letter Agreement dated January 15, 2016, whereby CITY agreed to refrain from issuing MDTQ a Notice of Default for its failure to timely pay rent, as further set forth in the Letter Agreement. MDTQ agreed to allow CITY to instigate and process a Request for Proposals ("RFP") for the award of a new lease for the Premises, as further set forth in the Letter Agreement.
- D. On April 29, 2016, CITY sent MDTQ a Notice that the CITY does not waive any rights or remedies available to the CITY at law or in equity as a result of damages that the CITY may incur as a result of MDTQ's abandonment of the Lease.
- E. Since the Letter Agreement dated January 16, 2016, MDTQ claims it has incurred extreme financial hardship, including pending ADA lawsuits.
- F. On June 24, 2016, CITY received a letter from MDTQ requesting early termination of the Lease.

- G. CITY desires to accept the surrender and termination of the Lease effective on the Effective Date ("Termination Date"), and as of the Termination Date release each other from their respective rights and obligations under the Lease on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the Recitals stated above and incorporated herein by this reference and of the mutual benefits and obligations of the Parties set forth in this Agreement, the Parties agree as follows:

1. Termination of Lease. The Lease shall terminate as of the Termination Date, subject to the terms and conditions set forth below.
2. Release. On the Termination Date, CITY and MDTQ are released from their respective rights and obligations under the terms and conditions of the Lease, except as to any monetary obligations, claims and remedies accrued thereunder and rights and obligations that shall normally survive the termination of the Lease, including, but not limited to, indemnity.
3. Surrender. On or before the Termination Date, MDTQ shall vacate the Premises and surrenders to CITY the Lease and all rights of MDTQ in and to the Premises, however acquired, together with all of its right and interest, and title, if any, in and to all improvements, furniture, equipment, and fixtures (except any and all personal property and trade fixtures) contained in the Premises, and all of the right of MTDQ in and to the Lease, and shall deliver to CITY all keys possessed and/or controlled by it to the Premises. On or before the Termination Date, MDTQ shall remove all of its trade fixtures and personal property from the Premises, upon providing to CITY written receipts or other documentation for the trade fixtures and personal property.
4. MDTQ's Release of Claims. MDTQ, for itself and its successors and assigns forever releases CITY from any claim, demand, or cause of action against CITY, its successors and assigns, arising after the Termination Date out of the Lease or its use and occupancy of the Premises or the termination of the Lease and surrender of the Premises.
5. Acceptance of Termination. CITY, for itself and its successors and assigns, accepts the termination of the Lease and the surrender of the Premises by MDTQ as of the Termination Date subject to the conditions of this Agreement, and acknowledges that the Premises is in good condition and repair and that MTDQ shall have no liability with respect to the Premises or condition thereof.
6. Effect of Termination. CITY and MDTQ agree that the Lease, and all obligations thereunder, is to be canceled and the term brought to an end as of the Termination Date with the same force and effect as if the term of the Lease were fixed to expire on the Termination Date by the provisions of the Lease.

7. Past Due Rents. MDTQ shall pay past due rents to CITY in the amount of THIRTY-ONE THOUSAND EIGHT HUNDRED SEVENTY-FOUR DOLLARS AND 74/100 CENTS (\$31,874.74) upon the close of escrow of the sale of the liquor license held by MDTQ but in no event later than December 30, 2016, representing minimum monthly rent of \$4,185.21 for the period November 1, 2015 through May 31, 2017 (\$33,481.68), an August 2015 late fee in the amount of \$198.80, a September 2015 late fee in the amount of \$206.26, and overpaid percentage rent credits of (\$1,168) and (\$844), respectively, for lease years 2013/2014 and 2014/2015. MDTQ shall notify the escrow agent for the liquor license of its approval for the payment of these past due rents to CITY upon the close of escrow and shall instruct the escrow agent to pay these past due rents to CITY upon the close of escrow.
8. MDTQ Representations and Warranties. MDTQ represents and warrants that:
 - a. It is the legal and equitable owner of MTDQ's interest in the Lease with full power and authority to terminate it.
 - b. The Lease is not and has not been assigned or transferred and is not and has not been hypothecated, pledged, mortgaged, or in any way encumbered.
 - c. No filed, pending, or potential legal claims of any kind related to the Lease or the Premises exist as of the date of this Agreement. All subleases, concessions, and other rights of use and occupancy of the Premises, insurance policies, and maintenance and service contracts which, prior to this Agreement, CITY has not elected in writing to continue have been legally terminated and all charges paid in full and no cause of action against CITY exists as of the date of this Agreement nor will exist subsequent to this Agreement in any party to a sublease, concession, agreement for use, or occupancy or insurance policy, or maintenance or service contract, based on inducing the breach of contract with respect to it.
 - d. That it has not made any assignment, sublease, transfer, or other disposition of the Lease or any interest in the Lease or any demand, obligation, liability, or cause of action arising out of the Lease, in any manner.
 - e. All charges of those insurance policies and maintenance and service contracts which CITY has elected in writing prior to this Agreement to continue have been paid in full, except those accrued charges which have been approved by CITY and prorated to the Termination Date.
 - f. All rent or other payments on any sublease or other agreement for use and occupancy which CITY has elected in writing prior to this Agreement to continue have been paid in full or prorated to the Termination Date, the sublessee's or holders' rights under other agreements are not in default under these agreements, and rent or other charges have been paid in advance, except for rent and other charges which have been approved by CITY and prorated to the date of this Agreement.

- g. All charges for utility service (gas, water, electricity, etc.) have been paid in full, except those charged approved by CITY and prorated to the Termination Date.
 - h. There are no outstanding contracts for the supply of labor or materials as of the date of this Agreement, and no work has been done or is being done nor have materials been delivered to the Premises for which full payment has not been made or for which a mechanic's lien or stop notice could be asserted or foreclosed under the laws of California.
 - i. Neither MTDQ nor any of its predecessors in interest under the Lease has done or permitted anything resulting in the Premises or CITY's title to the Premises being in any manner encumbered or charged.
 - j. All taxes, charges, assessments, levies, or impositions required by the Lease to be paid by MTDQ have been paid in full, except those charges approved by CITY and prorated to the Termination Date.
 - k. The Premises are now and will, on the Termination Date, be clean and in good condition and repair, reasonable wear and tear excepted.
 - l. MTDQ is the legal and equitable owner of all personal property that will remain and that CITY has permitted to remain on the Premises pursuant to Section 9, below, and that no property other than that permitted by CITY to remain will remain on the Premises as of the Termination Date.
9. Personal Property. MTDQ agrees that, if any property or other items which may be considered personal property remain on the Premises as of the Termination Date, that property shall belong to CITY, free and clear of any claim or interest of MDTQ or any third party, and this Agreement shall constitute a bill of sale for that property to CITY.
10. Indemnity. MDTQ shall protect, defend, indemnify, and hold CITY and its elected officials, officers, employees, representative and agents ("City Indemnified Parties") harmless from and against any and all claims asserted and liability established for any breach by MTDQ of the representations and warranties made in this Agreement; from MTDQ's termination of the Lease; from any lien, charge, encumbrance, or claim against the Premises; from any claim against the City Indemnified Parties for which Lessee is responsible; or from any damages or injuries to any person or property, including injury to MDTQ's officers, employees, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with any person or legal entity claiming to hold any right under the Lease and/or in the Premises, and all expenses of investigating and defending against same, including without limitation attorney fees and costs.

11. Quitclaim. Pursuant to section 2.5 Surrender of Premises, of the Lease, concurrent with the execution of this Agreement, MDTQ shall execute, acknowledge, and deliver to CITY a valid and recordable quitclaim deed in form and content as attached hereto as **Exhibit A: Quitclaim Deed.**
12. Construction. The provisions of this Agreement, or this Agreement as a whole, shall not be construed against the drafting party.
13. Waiver. No breach of any provision of this Agreement shall be waived unless in writing. Waiver of any one breach of any provision of this Agreement shall not be deemed to be a waiver of any other breach of the same or any other provision.
14. Entire Agreement. This Agreement contains the entire agreement between the Parties regarding the matters covered in this Agreement and supersedes any and all prior understandings, representations, warranties and agreements between the parties pertaining to this Agreement. There have been no other statements, promises, or representations made by the Parties that are intended to alter, modify, or complement this Agreement. Any further amendments to the Lease or the Termination Date shall require the prior written authorization of the Parties hereto.
15. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, representative, successors and assigns.
16. Governing Law. This Agreement shall be governed by, construed, interpreted and enforced in accordance with the laws of the State of California.
17. Titles. The section titles in this Agreement are used for the convenience of the Parties and are not to be taken as part of the instrument or used to interpret this Agreement.

[Page intentionally left blank.]

18. Authority. Each individual executing this Agreement on behalf of another person or legal entity represents and warrants that he/she is authorized to execute and deliver this Agreement on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Agreement is binding upon such person or entity in accordance with its terms. Each person executing this Agreement on behalf of another person or legal entity shall provide CITY with evidence, satisfactory to CITY, that such authority is valid and that such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

IN WITNESS WHEREOF, this Agreement shall be effective as of the Effective Date.

Date: 9/7/16

MDTQ LLC, a limited liability company

BY: Sean E. Cole

Name: SEAN E. COLE

Title: MANAGING MEMBER

Date: _____

THE CITY OF SAN DIEGO,
a California municipal corporation

BY: _____

Cybele Thompson

Director, Real Estate Assets

Approved as to form this _____ day of _____, 2016.

JAN I. GOLDSMITH, City Attorney

BY: _____

Name: _____

Title: _____