



Real Estate Assets Department

SDC003

Mercury Street Annex LLC
N419 PM - ØØ1 - AØ2

Document Type

LEGAL DOCUMENTS



Sub - Category

SUBLEASES



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CITY OF SAN DIEGO CONSENT TO SUBLEASE ASSIGNMENT

THIS CITY OF SAN DIEGO CONSENT TO SUBLEASE ASSIGNMENT (Consent) is made by the City of San Diego, a California municipal corporation (CITY), to be effective as of SEPTEMBER 1, 2015 (Effective Date), subject to the following recitals and terms and conditions.

RECITALS

This Consent is made with regard to the following facts:

- A. CITY leases certain CITY-owned improved real property located at 4611 Mercury Street, San Diego, California (Premises), to Mercury Street Annex LLC, a California limited liability company (LESSEE), pursuant to that certain City of San Diego Percentage Lease (Master Lease) filed June 23, 1986, as Document No. RR-266057 in the San Diego Office of the City Clerk.
- B. LESSEE subleases portions of the Premises to ZION MARKET SAN DIEGO, INC, a California corporation ("Zion"), pursuant to that certain "Lease" agreement between LESSEE and Zion dated October 16, 2014 ("Sublease").
- C. LESSEE, Zion, and FM San Diego, LLC, a California limited liability company (FMSD), entered into a certain "Lease Assignment Agreement" dated April 28, 2015 (Assignment), among other things assigning Zion's interest in the Sublease to FMSD.
- D. Pursuant to Section 4.02 of the Master Lease, LESSEE has sought CITY consent to the assignment of the Sublease to FMSD.
- E. CITY is willing to consent to the assignment and to LESSEE subleasing to FMSD on the terms and conditions contained in this Consent.

CONSENT

1. CITY's Consent. CITY consents to the assignment of the Sublease to FMSD. This consent is granted only on the terms and conditions stated in this Consent. CITY is not bound by any of the terms, covenants, or conditions of the Sublease or the Assignment. The Sublease is and shall remain subject and subordinate to the Master Lease, as may be amended from time to time. If there is a conflict between this Sublease and either the Master Lease or this Consent, the terms, conditions, and obligations of this Consent and the Master Lease shall control. If there is a conflict between this Consent and the Master Lease, the terms, conditions, and obligations of this Consent shall control.

2. Limits of CITY's Consent. Neither the Sublease nor this Consent will:

- (a) release LESSEE from any liability, whether past, present, or future, under the Master Lease as to the Premises or any portion thereof;
- (b) alter the primary liability of LESSEE to pay the rent and perform all LESSEE's obligations under the Master Lease;
- (c) be construed as a waiver of CITY's right to consent to any proposed sublease or assignment after the date hereof by LESSEE under the Master Lease or by LESSEE under the Sublease, or as a consent to any portion of the Premises in the Sublease being used or occupied by any other party;
- (d) grant any rights to LESSEE greater than those rights granted to LESSEE under the Master Lease;
- (e) be deemed CITY consent to any other assignment, sublease, or transfer, notwithstanding anything to the contrary in the Sublease or the Assignment;
- (f) require CITY to recognize FMSD in the event of a default in the Master Lease by LESSEE;
- (g) enlarge or in any manner increase CITY's obligations or duties under the Master Lease;
- (h) create obligations or costs to CITY with regard to the Sublease;
- (i) modify, waive, amend, or otherwise affect any provision of the Master Lease other than as explicitly set forth in this Consent;
- (j) be deemed CITY approval of any alterations to the Premises referenced in the Sublease. Any and all alterations to the Premises are subject to the prior written approval of CITY as set forth in the Master Lease;
- (k) be deemed to be any type of obligation by CITY to LESSEE, FMSD or to any governmental agent, board, commission, or agency with regard to any other action relating to FMSD's occupancy, use, development, maintenance or modification of any portion of the Premises or improvements thereon.
- (l) be deemed approval of CITY as required by any other provision of the Master Lease or Sublease.

3. NOTICE.

Address for FMSD for any notice or demand shall be:

FM San Diego, LLC
4611 Mercury Street
San Diego, CA 92122

4. CAPITALIZED TERMS. All terms spelled with initial-capital letters in this Consent that are not expressly defined in this Consent will have the respective meanings given such terms in the Master Lease.

IN WITNESS WHEREOF, this Consent is executed by CITY acting by and through its Mayor, or his designee.

Signed as acknowledging:

MERCURY STREET ANNEX LLC,
a California limited liability company

By: Sheila Winston
Name: Sheila Winston
Title: Manager

FM SAN DIEGO, LLC,
a California limited liability company

By: [Signature]
Name: Michael Scott
Title: PRESIDENT

THE CITY OF SAN DIEGO, a California
municipal corporation

By: [Signature]
Cybele Thompson
Director, Real Estate Assets Department
Date: 8/31/15

APPROVED as to form this
1st day of Sept, 2015

JAN I. GOLDSMITH, City Attorney

By: [Signature]
Name: Debra J. Butler
Title: DCA

SECOND AMENDMENT TO LEASE

THIS SECOND AMENDMENT TO LEASE ("Amendment") is made and entered into as of the 16th day of June, 2015, by and between MERCURY STREET ANNEX LLC, a California limited liability company ("Landlord"), and FM SAN DIEGO, LLC, a California limited liability company ("Tenant").

RECITALS:

A. Landlord and Zion Market San Diego, Inc., a California corporation and Tenant's predecessor-in-interest under the Lease, as defined herein ("**Original Tenant**") entered into that certain Lease dated October 16, 2014 (the "**Original Lease**") as assigned to Tenant and amended by that certain Lease Assignment Agreement dated as of April 28, 2015 ("**First Amendment**") by and among Landlord, Original Tenant and Tenant, whereby Tenant leased certain space (the "**Existing Premises**") consisting of approximately 29,158 square feet of floor area in the building (the "**Building**") located at 4611 Mercury Street, San Diego, California 92122. The Original Lease, as amended by the First Amendment, is referred to herein as the "**Lease**." Tenant is the successor-in-interest to Original Tenant under the Lease.

B. Pursuant to that certain Lease Termination Agreement dated as of June __, 2015 (the "**Termination Agreement**") by and among Landlord, Thomas Joseph Studio I, Inc., a California corporation ("**Adjacent Tenant**") and Tenant, Landlord, Adjacent Tenant and Tenant agreed to terminate Adjacent Tenant's lease (the "**Existing Expansion Space Lease**") for that certain premises in the Building adjacent to the Existing Premises (the "**Expansion Space**") consisting of approximately 3,909 square feet of floor area, as depicted on Exhibit A attached hereto, upon and subject to the terms of the Termination Agreement.

C. By this Amendment, Landlord and Tenant desire to expand the Existing Premises and to otherwise modify the Lease as provided herein.

D. Unless otherwise defined herein, capitalized terms as used herein shall have the same meanings as given thereto in the Lease.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

AGREEMENT:

1. Expansion of the Existing Premises. Landlord and Tenant stipulate that the Expansion Space contains 3,909 square feet of floor area. Effective as of the date of the termination of the Existing Expansion Space Lease ("**Expansion Commencement Date**") pursuant to the Termination Agreement, and continuing for the duration of the Term of the Lease (scheduled to expire February 28, 2025), Tenant shall lease the Expansion Space. Accordingly, effective upon the Expansion Commencement Date, the Existing Premises shall be increased to include the Expansion Space. Such addition of the Expansion Space to the Existing Premises shall, effective as of the Expansion Commencement Date, increase the number of square feet leased by Tenant in the Building to a total of 33,067 square feet. The Expansion

Commencement Date is anticipated to be August 1, 2015; however, Landlord will not be in default under the Lease if the Expansion Commencement Date does not occur by such date. Effective as of the Expansion Commencement Date, (a) all references to the "Premises" shall mean and refer to the Existing Premises as expanded by the Expansion Space, (b) Section 1.3 of the Summary (as defined in the Original Lease) is amended to provided that the aggregate floor area of the Building is 33,067 square feet, (c) Section 1.6 of the Summary is amended to provided that Tenant's Share shall be one hundred percent (100%), and (d) Sections 8 and 9 of the First Amendment are hereby deleted and of no further force or effect. Landlord and Tenant hereby acknowledge and agree that such stated amounts of the square footages of the Premises and the Building are not representations or warranties of the exact number of rentable square feet therein but rather are only reasonable approximations that shall be conclusive and binding as between the parties.

2. Monthly Basic Rent. Effective as of the Expansion Commencement Date (but subject abatement pursuant to Section 3, below) Tenant shall pay Annual Basic Rent for the entire Premises (i.e., the Existing Premises and the Expansion Space) as follows:

<u>Period</u>	<u>Annual Basic Rent</u>	<u>Monthly Basic Rent</u>
Expansion Commencement Date – 2/29/16*	\$436,484.40	\$36,373.70
3/1/16 – 2/28/17	\$445,214.04	\$37,101.17
3/1/17 – 2/28/18	\$454,118.40	\$37,843.20
3/1/18 – 2/28/19	\$463,200.72	\$38,600.06
3/1/19 – 2/29/20	\$472,464.72	\$39,372.06
3/1/20 – 2/28/21	\$481,914.00	\$40,159.50
3/1/21 – 2/28/22	\$491,552.28	\$40,962.69
3/1/22 – 2/28/23	\$501,383.40	\$41,781.95
3/1/23 – 2/29/24	\$511,411.08	\$42,617.59
3/1/24 – 2/28/25	\$521,639.28	\$43,469.94

*Subject to abatement pursuant to Section 3, below.

3. Rental Abatement. Notwithstanding anything to the contrary contained in Section 2 above, and provided that Tenant faithfully performs all of the terms and conditions of the Lease, as amended by this Amendment, Landlord hereby agrees to abate Tenant's obligation to pay Monthly Basic Rent for the Expansion Space only (i.e., in an amount equal to \$4,299.90, calculated as \$1.10 per square foot of the Expansion Space per month) for the period from the

Expansion Commencement Date through September 30, 2015. During such abatement period, Tenant shall still be responsible for the payment of all of its other monetary obligations under the Lease. In the event of a default by Tenant under the terms of the Lease that results in early termination pursuant to the provisions of Section 23.2 of the Original Lease, then as a part of the recovery set forth in Section 23.2 of the Original Lease, Landlord shall be entitled to the recovery of the Monthly Basic Rent that was abated under the provisions of this Section 4.

4. Condition of Premises. Tenant acknowledges that (a) it is familiar with the condition of each of the Existing Premises and the Expansion Space, (b) it accepts each of the Existing Premises and the Expansion Space in its "as-is, where-is and with all faults" condition without improvement or allowance, and (c) Landlord has made no representation or warranty regarding the condition of the Existing Premises or the Expansion Space or the suitability of either thereof for Tenant's business.

5. Brokers. Each party represents and warrants to the other that no broker, agent or finder negotiated or was instrumental in negotiating or consummating this Amendment. Each party further agrees to defend, indemnify and hold harmless the other party from and against any claim for commission or finder's fee by any person or entity who claims or alleges that they were retained or engaged by the indemnifying party or at the request of such party in connection with this Amendment.

6. Defaults. Tenant hereby represents and warrants to Landlord that, as of the date of this Amendment, Tenant is in full compliance with all terms, covenants and conditions of the Lease and that there are no breaches or defaults under the Lease by Landlord or Tenant, and that Tenant knows of no events or circumstances which, given the passage of time, would constitute a default under the Lease by either Landlord or Tenant.

7. Tenant Representations. Each person executing this Amendment on behalf of Tenant represents and warrants to Landlord that: (a) Tenant is properly formed and validly existing under the laws of the state in which Tenant is formed and Tenant is authorized to transact business in the state in which the Building is located; (b) Tenant has full right and authority to enter into this Amendment and to perform all of Tenant's obligations hereunder; and (c) each person (and both persons if more than one signs) signing this Amendment on behalf of Tenant is duly and validly authorized to do so.

8. No Further Modification. Except as set forth in this Amendment, all of the terms and provisions of the Lease shall apply with respect to the Expansion Space and shall remain unmodified and in full force and effect. Effective as of the date hereof, all references to the "Lease" shall refer to the Lease as amended by this Amendment.

9. Counterparts and Fax/Email Signatures. This Amendment may be executed in counterparts, each of which shall be deemed an original, but such counterparts, when taken together, shall constitute one agreement. This Amendment may be executed by a party's signature transmitted by facsimile ("fax") or e-mail, and copies of this Amendment executed and delivered by means of faxed or e-mailed copies of signatures shall have the same force and effect as copies hereof executed and delivered with original wet signatures. All parties hereto may rely upon faxed or emailed signatures as if such signatures were original wet signatures. Any party

executing and delivering this Amendment by fax or email shall promptly thereafter deliver a counterpart signature page of this Amendment containing said party's original signature. All parties hereto agree that a faxed or emailed signature page may be introduced into evidence in any proceeding arising out of or related to this Amendment as if it were an original wet signature page.

10. Accessibility Disclosure. As of the date of this Amendment, the Premises and Building have not been inspected by a Certified Access Specialist.

11. Contingency. Notwithstanding anything in this Amendment to the contrary, Tenant acknowledges and agrees that the rights and obligations of Landlord under this Amendment are expressly conditioned upon Landlord and Tenant obtaining the City's written consent to this Amendment and Landlord's lease of the Expansion Space to Tenant pursuant to this Amendment, upon the terms and conditions reasonably acceptable to Landlord and Tenant (the "Contingency"). If the Contingency is not satisfied on or before the Expansion Commencement Date, then this Amendment shall, at Landlord's option and upon written notice which may be given to Tenant at any time after such date until the Outside Contingency Date (as defined below), be null and void and of no force or effect, and the Original Lease, as amended by the First Amendment, shall continue in full force and effect as if this Amendment had not been executed. If the Contingency is not satisfied by the date (the "Outside Contingency Date") that is ninety (90) days after submittal by Tenant to the City of all documents and information required by the City in order to determine whether the City will consent to this Amendment and Landlord's lease of the Expansion Space to Tenant pursuant to this Amendment, and Landlord has not previously elected to terminate this Amendment, then this Amendment shall automatically be null and void and of no force or effect, and the Original Lease, as amended by the First Amendment, shall continue in full force and effect as if this Amendment had not been executed.

IN WITNESS WHEREOF, this Amendment has been executed as of the day and year first above written.

"Landlord":

MERCURY STREET ANNEX LLC,
a California limited liability company

By:

Chela W. Winkler
Name:

Title: _____

"Tenant":

FM SAN DIEGO, LLC,
a California limited liability company

By:

William Story
Name:

Title: President