



AGENDA REPORT

Meeting Date: August 23, 2012

Item Number: F-2

To: Honorable Parking Authority

From: Brenda A. Lavender, Real Estate & Property Manager

Subject: FOURTH AMENDMENT TO LEASE, REAFFIRMATION BY GUARANTORS AND MEMORANDUM OF AMENDMENTS TO LEASE BY AND BETWEEN THE PARKING AUTHORITY OF THE CITY OF BEVERLY HILLS AND BOUCHON BEVERLY HILLS, L.P.

Attachments:

1. Fourth Amendment to Lease
2. Reaffirmation by Guarantors
3. Memorandum of Amendments to Lease

RECOMMENDATION

It is recommended that the Parking Authority approve the Fourth Amendment to Lease, Reaffirmation by Guarantors and Memorandum of Amendments to Lease by and between the Parking Authority of the City of Beverly Hills and Bouchon Beverly Hills, L.P. Copies of the amended documents are on file with the City Clerk. Bouchon Beverly Hills, LP is located in the City of Beverly Hills Gardens Building located at 235 N. Canon Drive.

INTRODUCTION

The referenced agreements have been prepared for Parking Authority approval. This amendment restructures the fixed base rent to a percentage rent with a guaranteed monthly payment of \$53,069. This will allow Bouchon to continue operating the restaurant with reduced overhead and as sales increase, the City will benefit through percentage rent payments.

DISCUSSION

Over the past year Bouchon has continued to refine its operations to improve sales, but in the current recovering climate increasing sales has still been challenging. In light of the continuing challenge Bouchon has again requested that The Parking Authority work with it to reduce and restructure the rent payment under the lease. The Parking Authority has agreed to restructure the rental rate. This amendment also deletes the two (2) 5-year options to extend the term.

FISCAL IMPACT

This amendment restructures the base rent from a fixed rent to percentage rent with a guaranteed minimum payment. Based on the guaranteed minimum payment alone, the base rent for the first year of the amended term will be reduced by (\$127,366).



Scott G. Miller, Director of
Administrative Services, CFO

Approved By

Attachment 1

FOURTH AMENDMENT TO LEASE

THIS FOURTH AMENDMENT TO LEASE ("Fourth Amendment") is dated August 23, 2012, but effective as of January 1, 2012 (the "Effective Date"), and is entered into by and between THE PARKING AUTHORITY OF THE CITY OF BEVERLY HILLS, a parking authority established pursuant to the Parking Law of 1949 of the State of California ("Landlord"), and BOUCHON BEVERLY HILLS, L.P., a California limited partnership, doing business as "Bouchon Beverly Hills" ("Tenant").

RECITALS

A. Landlord and Tenant entered into a Lease dated as of August 18, 2008, as amended by a First Amendment to Lease dated as of April 7, 2009, a Second Amendment to Lease dated as of April 6, 2010, and a Third Amendment to Lease dated October 18, 2010 (as so amended, said Lease is hereinafter referred to as the "Lease"). Landlord and Tenant executed a Memorandum of Lease dated July 8, 2008 that was recorded on May 22, 2009 as Document No. 20090767440 in the Official Records of Los Angeles County, California.

B. The Lease was guaranteed by a Guaranty of Lease dated August 18, 2008, as amended by a First Amendment to Guaranty of Lease dated October 18, 2010.

C. Landlord and Tenant desire to further amend the Lease.

NOW, THEREFORE, in consideration of the foregoing recitals, and the covenants and conditions contained herein, and for other consideration, the sufficiency of which is hereby acknowledged, the parties agree as follows:

AGREEMENT

1. Definitions. Capitalized terms used in this Fourth Amendment but not defined herein shall have the meanings set forth in the Lease.

2. No Extension Options. Section 3(b) and 3(c) of the Lease are hereby deleted; Tenant shall not have the right to extend the Term of the Lease, which shall expire on December 31, 2035.

3. Monthly Rent. Section 1(e) of the Lease is deleted and is replaced with the following:

"(e) Monthly Rent: Commencing on January 1, 2012, and continuing throughout the remainder of the Term, Tenant shall pay as Monthly Rent the sum of Fifty Three Thousand Seventy-One and No/100 Dollars (\$53,071.00)."

4. Percentage Rent. Section 5(e) of the Lease is hereby deleted and is replaced with the following:

"(e) (i) Commencing on January 1, 2012, and continuing throughout the remainder of the Term, Tenant shall pay to Landlord as additional rent a sum ("Percentage

Rent”) equal to the amount, if any, by which six percent (6%) of “Gross Sales” (as hereinafter defined) for each calendar year exceeds the sum of Six Hundred Thirty-six Thousand Eight Hundred Fifty-two Dollars and No/100 (\$636,852.00) (the “Breakpoint”). For any partial year at the end of the Term (due to an earlier termination of the Lease), the Breakpoint shall be prorated by multiplying the Breakpoint by a fraction, the numerator of which is the number of days during such partial calendar year, and the denominator of which is three hundred sixty-five (365).

(ii) Tenant shall furnish or cause to be furnished to Landlord a statement of the monthly Gross Sales of Tenant within ten (10) days after the end of each calendar month and a statement of the annual Gross Sales of Tenant (“Sales Report”) audited by a certified public accountant (together with a copy of all tax filings submitted by Tenant to the State of California for the applicable year in connection with or related to sales taxes, and a reconciliation of such filings with the Sales Report) within sixty (60) days after the end of each calendar year. Such statements shall be in a form acceptable to Landlord. Such statements shall also be certified as accurate by the Chief Financial Officer of Tenant. Tenant shall pay to Landlord the Percentage Rent owed, if any, concurrently with its delivery to Landlord of the statement of annual Gross Sales.

(iii) In the event of the termination or earlier expiration of this Lease, Tenant shall remain obligated to deliver a statement of Gross Sales for the final partial year of the Term and to pay to Landlord any Percentage Rent due by Tenant under this Lease with respect thereto, and the provisions of this Section shall survive the termination or earlier expiration of this Lease for such purpose.

(iv) “Gross Sales”, as used in this Lease, shall mean the gross selling price of all food, beverages, merchandise, and services sold in or from the Premises by Tenant, its subtenants, licensees and concessionaires, whether for cash or on credit excluding therefrom the following, provided they are documented in Tenant’s accounting records and, if applicable, Tenant’s tax returns delivered to Landlord: (i) sales taxes, excise taxes or gross receipts taxes imposed by governmental entities upon the sale of merchandise or services, but only if paid by Tenant to the respective governmental entities; (ii) proceeds from the sale of fixtures, equipment or property which are not stock in trade; (iii) the selling price of all merchandise returned by customers and accepted for full credit; (iv) interest or other charges paid by customers for extension of credit; (v) receipts from vending machines used solely by Tenant’s employees; (vi) proceeds of insurance received by Tenant, except for business interruption insurance proceeds that is based on loss of income from the items included in “Gross Sales”; (vii) value of meals furnished to Tenant’s employees and incident to their employment; (viii) tips, gratuities and service charges paid by patrons of Tenant directly to employees of Tenant or turned over by Tenant to employees of Tenant; (ix) refunds for items returned to vendors or manufacturers; (x) credit card charges that are uncollectible and counterfeit currency or unnegotiable check (which must first be included in Gross Sales but may be deducted from Gross Sales for the period in which the charge becomes uncollectible); (xi) direct expenses of credit card sales by Tenant to the issuers of such credit cards; and (xii) donations or discounts to non-profit organizations; (xiii) the sales of any books; and (xiv) the sales of gift certificates that do not, by their terms, expire and are not included in income under Tenant’s accrual accounting method until they are redeemed, but such sales shall be included in “Gross Sales” when such gift certificates are

redeemed (the "Exclusions from Gross Sales"). Tenant shall use its reasonable and good faith efforts to maximize Gross Sales from the Premises.

(v) Tenant shall retain records of its Gross Sales, Exclusions from Gross Sales for each calendar year for at least three (3) calendar years ("Retention Period") after the end of such calendar year. Within ten (10) days after written request from Landlord given from time to time, Tenant shall make available to an auditor designated by Landlord in its notice (the "Auditor") access to Tenant's books and records regarding Gross Sales and Exclusions from Gross Sales for the year(s) designated in Landlord's notice and reasonable space for reviewing/auditing such books and records at a location in the City of Beverly Hills, California, and the Auditor(s) may make copies of the books and records; provided however that such year(s) designated are within the Retention Period. If the audit discloses an underpayment of Percentage Rent, then Tenant shall pay such to Landlord the amount of the underpayment, with interest at the rate applicable to late payments under this Lease, within thirty (30) days after Landlord gives Tenant a copy of the audit. If the audit reveals an underpayment of more than two percent (2%) for any calendar year, then Tenant shall pay to Landlord the costs incurred by Landlord for the audit, as additional rent, within ten (10) days after written demand by Landlord with evidence of the costs incurred. Nothing in the forgoing shall be deemed to limit Tenant's right to contest the results of such audit by Landlord and such results shall not be considered as final until any such challenge is resolved.

5. Security Deposit. Section 1(g) of the Lease is hereby deleted and is replaced with the following:

"(g) Security Deposit: Tenant has deposited Two Hundred Thousand Dollars (\$200,000.00) with Landlord as a Security Deposit (the " Security Deposit"). The Security Deposit shall be included in calculating Tenant's Liquidity (as defined in Paragraph 34 of the Lease)."

Section 5(c) of the Lease is hereby deleted.

Section 5(d) of the Lease is hereby deleted and is replaced with the following:

"(d) The Security Deposit shall be held by Landlord as security for the faithful performance by Tenant of all of the terms, covenants, and conditions of this Lease to be kept and performed by Tenant during the Term hereof. If an Event of Default of Tenant occurs with respect to any provisions of this Lease, including but not limited to the provisions relating to the payment of Rent, Landlord may (but shall not be required to) use, apply or retain all or any part of the Security Deposit for the payment of any Rent or any other sum in default, or for the payment of any other amount which Landlord may spend or become obligated to spend by reason of Tenant's Event of Default or to compensate Landlord for any loss or damage which Landlord may suffer by reason of Tenant's Event of Default. If any portion of the Security Deposit is so used or applied, Tenant shall, within ten (10) days after written demand therefor, deposit cash with Landlord in an amount sufficient to restore the Security Deposit to the then required amount. Landlord shall not be required to keep the Security Deposit separate from its general funds and Tenant shall not be entitled to interest on the Security Deposit. Tenant

waives any rights it may have under Section 1950.7 of the California Civil Code with respect to the Security Deposit. Within ninety (90) days following the expiration of the Term or earlier termination of this Lease and Tenant's performance of all of its obligations under this Lease, the Security Deposit or any balance thereof shall be returned to Tenant. If Landlord sells its interest in the Building during the Term hereof and deposits with the purchaser thereof the then unappropriated funds deposited by Tenant as aforesaid, Landlord shall be discharged from any further liability with respect to such Security Deposit accruing after the date Landlord deposits such Security Deposit with such purchaser.”

6. Financial Covenants. Section 35 of the Lease is hereby deleted.

7. As of the date hereof, Landlord has not delivered to Tenant any notice of an Event of Default by Tenant for which such failure presently remains uncured, nor to the actual knowledge of Landlord has any event occurred which constitutes, or which, with the giving of notice or passage of time, or both, would result in an Event of Default by Tenant.

8. In the event of a conflict or inconsistency between the terms and conditions of the Lease and the terms and conditions of this Fourth Amendment, the terms and conditions of this Fourth Amendment shall prevail and control.

9. Except as specifically modified by this Fourth Amendment, the Lease shall remain unaffected and unchanged. The Lease is hereby ratified and affirmed by Landlord and Tenant and remains in full force and effect as modified hereby.

10. This Fourth Amendment may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed to be an original, and all of which, taken together, shall be deemed to be one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Fourth Amendment to Lease as of the date first above written.

TENANT:

BOUCHON BEVERLY HILLS, L.P.,
a California limited partnership
(dba: Bouchon Beverly Hills)

By: Bouchon Beverly Hills, LLC,
a California limited liability company,
the sole general partner

By: 
Thomas Keller, Manager

LANDLORD:

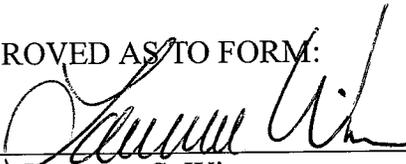
ATTEST:

(Seal)
Byron Pope
Secretary to Board of Directors

THE PARKING AUTHORITY
OF THE CITY OF BEVERLY HILLS,
a parking authority established pursuant to the
Parking Law of 1949 of the State of California

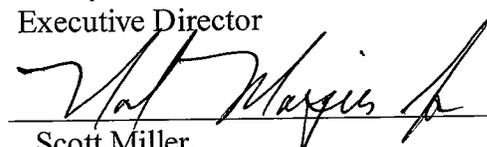
By: _____
William W. Brien, M.D.,
Chairman of Board of Directors

APPROVED AS TO FORM:

By: 

Laurence S. Wiener
Authority Counsel

APPROVED AS TO CONTENT:

By: _____
Jeffrey Kolin, CCM,
Executive Director
By: 

Scott Miller,
Chief Financial Officer

Attachment 2

REAFFIRMATION BY GUARANTORS

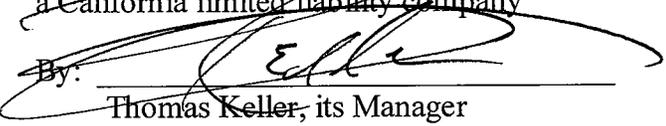
The undersigned (i) guarantors under that certain Guaranty of Lease dated as of August 18, 2008, as amended by the First Amendment to Guaranty of Lease, dated October 18, 2010 (as amended hereby, and as may be further amended and restated, the "Guaranty") in regard to the Lease by and between The Parking Authority Of The City Of Beverly Hills and Bouchon Beverly Hills, L.P. ("Landlord") dated as of August 18, 2008, as amended ("Lease"), and (ii) the Landlord hereby: (1) approve the foregoing Fourth Amendment to Lease; (2) agree that the Fourth Amendment to Lease shall not release or waive either of the undersigned's obligations under the Guaranty; (3) agree to delete Section 5 of the Guaranty in its entirety; and (4) agree that the Guaranty and all the undersigned's obligations therein, as amended herein, are hereby reaffirmed and shall remain in full force and effect and apply to the Lease as modified by the foregoing Fourth Amendment to Lease.

GUARANTORS:

Dated: August 23, 2012

SHAMUS & PEABODY, LLC,
a California limited liability company

By: _____

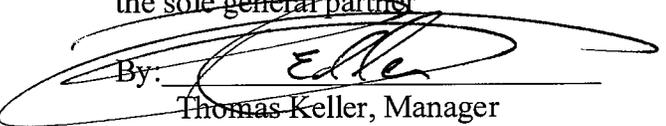

Thomas Keller, its Manager
6540 Washington Street
Yountville, CA

Dated: August 23, 2012

BOUCHON, L.P.,
a California limited partnership

By: Bouchon, LLC,
a California limited liability company,
the sole general partner

By: _____


Thomas Keller, Manager
6540 Washington Street
Yountville, CA

LANDLORD:

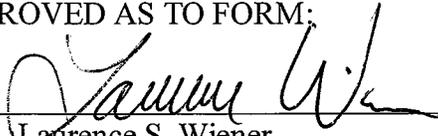
ATTEST:

(Seal)
Byron Pope
Secretary to Board of Directors

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OF THE CITY OF BEVERLY HILLS,
a parking authority established pursuant to the
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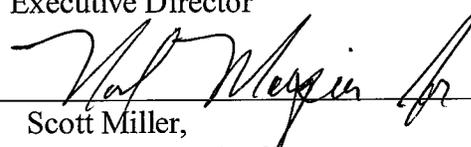
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APPROVED AS TO FORM:

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Laurence S. Wiener
Authority Counsel

APPROVED AS TO CONTENT:

By: _____
Jeffrey Kolin, CCM,
Executive Director

By: 
Scott Miller,
Chief Financial Officer

Attachment 3

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

The Parking Authority of the City of
Beverly Hills
455 North Rexford Drive
Beverly Hills, California 90210
Attn: City Clerk

SPACE ABOVE THIS LINE FOR RECORDER'S USE

The undersigned declare that this Memorandum of Amendments to Lease is exempt from Recording Fees pursuant to California Government Code Section 27383 and exempt from Documentary Transfer Tax pursuant to California Revenue and Taxation Code Section 11922.

MEMORANDUM OF AMENDMENTS TO LEASE

THIS MEMORANDUM OF AMENDMENTS TO LEASE ("Memorandum") is dated as of August 23, 2012, and is entered into by and between THE PARKING AUTHORITY OF THE CITY OF BEVERLY HILLS, a parking authority established pursuant to the Parking Law of 1949 of the State of California ("Landlord"), and BOUCHON BEVERLY HILLS, L.P., a California limited partnership, doing business as "Bouchon Beverly Hills" ("Tenant").

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A. Landlord and Tenant entered into a Lease dated as of August 18, 2008, as amended by a First Amendment to Lease dated as of April 7, 2009, a Second Amendment to Lease dated as of April 6, 2010, and a Third Amendment to Lease dated October 18, 2010. Landlord and Tenant executed a Memorandum of Lease dated July 8, 2008 that was recorded on May 22, 2009 as Document No. 20090767440 in the Official Records of Los Angeles County, California.

B. The Lease was guaranteed by a Guaranty of Lease dated August 18, 2008, as amended by a First Amendment to Guaranty of Lease dated October 18, 2010.

C. Substantially concurrently herewith, Landlord and Tenant are entering into a Fourth Amendment to Lease ("Fourth Amendment").

NOW, THEREFORE, in consideration of the foregoing recitals, and the covenants and conditions contained herein, and for other consideration, the sufficiency of which is hereby acknowledged, the parties agree as follows:

AGREEMENT

1. The Fourth Amendment and the previous amendments of the Lease are hereby incorporated herein by reference. This Memorandum is intended to satisfy any requirement under applicable law that the Fourth Amendment and any previous lease amendments be recorded.

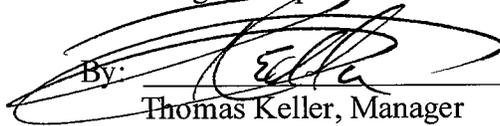
2. This Memorandum may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed to be an original, and all of which, taken together, shall be deemed to be one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Memorandum as of the date first written above.

TENANT:

BOUCHON BEVERLY HILLS, L.P.,
a California limited partnership
(dba: Bouchon Beverly Hills)

By: Bouchon Beverly Hills, LLC,
a California limited liability company,
the sole general partner

By: 
Thomas Keller, Manager

LANDLORD:

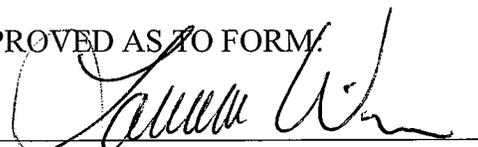
ATTEST:

(Seal)
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Secretary to Board of Directors

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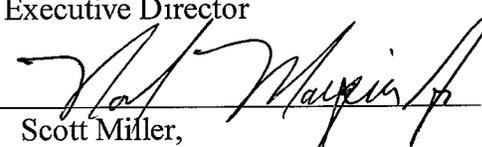
By: _____
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APPROVED AS TO FORM:

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APPROVED AS TO CONTENT:

By: _____
Jeffrey Kolin, CCM,
Executive Director

By: 
Scott Miller,
Chief Financial Officer

ACKNOWLEDGMENT

State of California)
County of Napa)

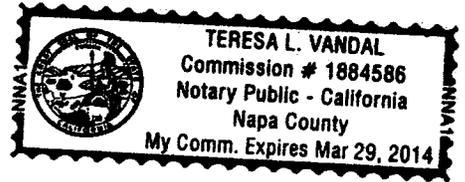
On August 10, 2012 before me, Teresa L. Vandal, Notary Public
(insert name and title of the officer)

personally appeared Thomas Keller
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Teresa L. Vandal (Seal)
Signature of Notary Public



ACKNOWLEDGMENT

State of California)
County of _____)

On _____ before me, _____
(insert name and title of the officer)

personally appeared _____
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)
Signature of Notary Public