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2:00 PM - 3:15 PM**

**Seminar 2**

**SNAP, CRACKLE AND POP-UP:  
SERIAL ISSUES RELATED TO POP UP LEASING**

Presented to

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The Evolution of Retail – What is a Pop-Up?

Modern day “pop-up” retail has been around since the late 1990’s, although Trendwatching.com claims to have coined the term in January, 2004.<sup>1</sup> Pop-ups take a variety of different forms, from a soft-goods retail use like Aerie Offline who might operate for a few months to a year to a one day experiential use like Oculus where users get to try out a particular product for a day to otherwise online subscription services such as birchbox who want to let consumers touch and feel their product as a form of marketing the online product.

The temporary nature of the pop-up structure permits existing or new retailers to try out a new brand or product without committing to a long-term lease. They also provide a unique opportunity for start-ups who have confidence in their service or product, understand the impact of an in-store experience for their customers, but might not otherwise have the capital or ability to commit to a long-term lease. By starting with a temporary space, these operators are able to test out new products, develop a customer base, and establish brand loyalty, all with less risk and financial investment than traditional long term retail space.

Landlords also benefit from having pop-up tenants in their centers in a number of ways. New uses and products create a buzz and excitement that might otherwise be lacking. Often, pop-up tenants expend a lot of time, energy and money on marketing in order to reach as many people as possible in a short period of time. A smart landlord will assist with these efforts, thereby creating greater exposure for its overall project and helping drive new customers to its existing tenants. Temporary tenants also help fill vacant spaces and provide an income stream while landlords search for more permanent tenants. In addition, having fewer vacant storefronts tends to boost confidence in the location and is more likely to attract long-term occupants.

The growing popularity of pop-up tenants has led to an entirely new subset of the commercial real estate industry, one which specializes in leasing to temporary pop-up uses, including companies such as Appear Here, Storefront and Popuphood. Local municipalities have also embraced the opportunities afforded by pop-up deals by creating programs to encourage new businesses. One such program is Pop-Up MKE in Milwaukee, Wisconsin

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<sup>1</sup>Trend Watching, Pop-up Retail, [http://trendwatching.com/trends/POPUP\\_RETAIL.htm](http://trendwatching.com/trends/POPUP_RETAIL.htm)

where small businesses and entrepreneurs are given 45-60 days in one of three vital corridors in downtown Milwaukee. The program focuses on businesses reflective of the community, such as women and people of color. Chicago offers Pop-Up User business licenses which enables retail entrepreneurs and restaurateurs to obtain a short-term license enabling them to operate in temporary commercial locations throughout Chicago.

### What to Consider in Documenting the Pop-Up Deals.

Just as the temporary nature of the pop-up relationship allows operators to be creative with how they get their goods and services to market, that same nature also presents a number of unique issues that must be considered when documenting such relationship. The first being the need for speed. Often an idea will get floated around and a deal will need to be finalized in a matter of days. The trick is achieving efficiency while maintaining the appropriate legal safeguards.

The first item to consider is whether to use a license agreement or a lease. A lease is “a conveyance of lands or tenements to a person for life, for a term of years, at will, in consideration of a return of rent some other recompense.”<sup>2</sup> Leases are typically governed by specific landlord tenant laws and often require a landlord to go through an official eviction process with the applicable court. Leases inherently provide more certainty for a tenant as they grant a tenant an exclusive right to occupy a particular space for a period of time. Leases also tend to require a longer term, complicated construction and alterations provisions, provisions related to the calculation and payment of NNNs, assignment and subletting provisions, subordination and estoppel provisions, and a number of other bells and whistles that are not necessary in the pop-up context.

In contrast, a license is merely “a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest or estate in such property.”<sup>3</sup> Since licenses are not subject to the same landlord tenant laws as leases, lessors under a license are often able to exercise “self-help” to remove a licensee rather than engaging in the potentially lengthy and costly eviction process. Licenses are also typically shorter and more streamlined than leases and do not need to contain many standard lease provisions, such as assignment and subletting provisions or subordination and estoppel provisions. And because licenses are typically short term, licensees do not want to invest a lot of money into construction or build-out which means one can omit the provisions related to construction and alterations. Finally, a license can be even further streamlined by structuring the deal as a “gross” deal and one can thereby avoid including complicated NNN provisions.

A word of caution when choosing between a lease and a license comes from the NY case *Nextel of New York, Inc. v. Time Management Corp.*, 93 N.Y.2d 508, 693 N.Y.S.2d 91, 715 N.E.2d 508. In quoting prior case law, the court noted that a license “gives no interest in land. It confers only the non-exclusive, revocable right to enter the land of the licensor to perform an act.” Under the Nextel lease, the tenant had exclusive control of a portion of the rooftop together with “...approximately 200 square feet of interior space in the Building...”. Further, the tenant’s equipment remained the tenant’s property, and tenant had exclusive access to certain portions of the building. According to the court, those facts “...demonstrate[d] that the defendant has contracted to surrender absolute possession and control of a specific portion of the Building...” which made the agreement a lease rather than a license. Of course, the case law and statutory framework governing the lease vs license argument can vary from state to state but it is safe to assume that every jurisdiction applies some version of the “if it walks like a duck and talks like a duck then it must be a duck” philosophy. Given that, it is important to carefully choose what terminology one uses in a license agreement. For instance, consider using the term “licensed area” rather than “premises”, “license fee” rather than “rent” and including a liquidated damages penalty instead of a typical hold-over provision.

Next one must consider which key deal terms to include in whichever form of agreement one chooses to use. For convenience, let’s assume that a license agreement is being used.

1. License Area. As in any lease, the premises should be clearly identified on a plan which is incorporated as an exhibit to the license agreement. This is particularly important when the pop-up will occupy common areas instead of an inline space. Consider if licensor requires the ability to take back or relocate the premises and include the appropriate provisions.
2. Permitted Use. The permitted use should be narrowly and clearly defined. Unlike a longer term lease, where a tenant will often want the right to operate for a broad use or even any lawful use, the short-term nature of a pop-up relationship does not warrant such broad use rights and a pop-up licensee should be comfortable that it can only operate within the parameters outlined in its license agreement.

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<sup>2</sup> Black’s Law Dictionary

<sup>3</sup> Black’s Law Dictionary

Special consideration should be given to a particular use and additional provisions included accordingly. For instance, if the pop-up use is anticipated to draw crowds, consider adding a requirement that the licensee be responsible for crowd control. More recently, certain mobile COVID testing and vaccination sites warrant the inclusion of medical waste disposal provisions.

3. License Period(s). Unlike a typical lease where the tenant is required to operate for standard shopping center hours, many pop-up tenants operate only on specific days and/or during specific timeframes. Consider a farmer's market that only operates on Saturdays and Sundays or a COVID testing or vaccine "truck" that is only available during certain hours of the day and which is not parked overnight. Yet another example is a concert series where licensor contracts with a promoter to host concerts each Saturday night over a period of several months. The license period in such instances should include time for set-up and tear down. If the pop-up operator is paying based upon a percentage of sales (rather than a fixed fee), then it is important to stipulate as to the expected hours of operation and to include a monetary "hammer" if the operator fails to comply.

Consider too any existing restrictions on both the pop-up user's use as well as the location of the premises. Many anchor tenants place strict restrictions on what the shopping center can be used for and which portions of the common areas can be used for things other than parking and pedestrian traffic. Similar restrictions are found in many underlying project documents, such as reciprocal easement agreements and declarations. If you don't have time to do a careful review of the existing leases and underlying project documents, consider including strong termination or relocation rights that permit the licensor to quickly terminate or relocate the pop-up user if they do run afoul of existing restrictions.

4. Delivery; Licensee's Work. Just like a typical lease, licensor's delivery obligations and licensee's build-out obligations should be clearly defined. With respect to licensor's delivery obligations, will the licensed area be delivered strictly "as-is" or will licensor perform any work or provide utility hookups? If the licensee's work would require permits, be sure to include the appropriate plan review and permitting provisions. Alternatively, if delivery is to be "turn-key", it is worth including a provision that expressly prohibits the licensee from performing any work in or around the license area.
5. License Fee. A variety of fee structures can be utilized in a pop-up license agreement, although a simple gross license fee is the easiest to memorialize and administer. If a gross license fee is used, be sure to clarify if it includes the cost of any utilities used by the licensee. If the deal contemplates a rental based on gross receipts, be sure to include strict reporting requirements, licensor audit rights and radius restrictions. Depending on the particular pop-up user and license fee involved, a prudent licensor might consider requiring payment of a portion of the license fee up front with the balance to be paid as the license period progresses.
6. Security Deposit. Although pop-up users are temporary, a security deposit is still typically a good idea and should be in an amount sufficient to compensate the licensor if the pop-up user fails to perform.
7. Utilities. Identify whether utilities are to be provided by the licensor or will be the responsibility of the licensee. If utilities are not available to the license area, as is often the case with the use of common areas for mobile units or events such as concerts, then the license agreement should clearly identify who is responsible for providing and paying for the necessary utilities.
8. Permitting. Pop-up uses often require special permits or municipal approvals, particularly in cases of foodservice and the sale of alcohol or if any portion of the pop-up is located outside of traditional inline space. For instance, a pop-up selling food in a business which is otherwise permitted for retail may be required to obtain a license to sell food from a retail store. While the pop-up may be able to get a temporary use or special event permit, these exceptions vary by situation. Language memorializing who is responsible for obtaining same should be included in the pop-up license agreement.
9. Signage. Every tenant requires signage and a pop-up user is no different. Licensee's rights and obligations relative to signage should be clearly articulated and subject to existing restrictions and compliance with applicable laws.
10. Marketing. Because pop-up users are new to the market, requiring minimum marketing efforts is often a good idea. If the licensor has a marketing team, the requirements can even be dovetailed with existing marketing efforts for the shopping center.

11. Assignment / Subletting. Given the special nature of a pop-up use, any assignment, subletting or other transfer should be strictly prohibited.
12. Surrender / Hold Over. Similar to a typical lease, the license agreement should clearly identify licensee's surrender obligations. Consider the particular use and location of the pop-up user and the location of the license area and draft accordingly. For instance, consider including language requiring repairs to any asphalt or macadam damaged by a pop-up user utilizing a mobile unit in the parking areas. In addition, because pop-up users are typically either filling otherwise vacant space that a licensor would prefer to lease to a more permanent tenant or are located in common areas that a licensor might need to reclaim quickly, it is prudent to include a liquidated damages provision which kicks in immediately upon the licensee's failure to timely surrender and vacate the license area.
13. Rules and Regulations. Comprehensive rules and regulations are particularly important with unsophisticated pop-up users who might have not ever been in a shopping center environment and should be tailored to the particular pop-up user's use.
14. Boilerplate. Even though the license structure is intended to be streamlined and less onerous than a typical lease, don't ignore the boilerplate! Maintenance provisions, provisions granting licensor the right to access the license area, insurance, indemnity, default (including the ability of licensor to recover attorneys' fees), notice, licensor's limitation of liability, choice of law, waiver of jury trial, severability, counterpart and electronic signatures, and merger provisions are all still relevant and critical for a comprehensive license agreement.

#### How to Facilitate Internally.

These pop-up deals can come fast and furious. In order to help manage the documentation, consider implementing an information sheet that your clients or business folks, as applicable, can use to gather the various pieces of information that will be required to complete the actual agreement. Also consider developing a specific approval and execution process that will ensure that these transactions can be understood by decision makers and signed quickly.

#### How to Help a Pop-Up User Succeed.

Where a traditional tenant might have extensive experience in opening and operating for their particular use, a pop-up tenant often lacks such experience. In those instances, it behooves a licensor to partner with the pop-up user. For instance, many smaller start-up pop-ups lack robust insurance coverage and both parties would be better served by adding them to the licensor's insurance. Often the licensor has more experience with the permitting process and should guide the pop-up user as needed.

The partnership concept is particularly relevant when it comes to marketing. Real synergy can be created by coordinating a licensor's existing marketing with the new pop-up users. Does the pop-up user have a story to tell? Is the product unique and exciting? This is an opportunity to get creative. Well-shot posts on Instagram, Facebook, etc. help drum up excitement and announce the pop-up user to community.

#### Conclusion.

Pop Up retailers are now mainstream. Indeed, many large developers have full time real estate professionals coordinating their use across real estate portfolios. To quickly capture that potential income, while protecting your clients' interests, requires careful consideration, although the prudent use of mechanisms such as termination and relocation rights will go a long way in that regard.

## SAMPLE PROVISIONS

That certain portion of the outdoor parking area comprising approximately [\_\_\_\_\_] (\_\_) parking spaces as depicted on Exhibit A (the "Licensed Area") in which Licensee shall be permitted to park one (1) vehicle (the "Vehicle"); provided, however, that, notwithstanding anything to the contrary set forth in this Agreement at any time, upon no less than one (1) day prior written notice to Licensee, Licensor shall have the right, in its sole discretion, to relocate the Licensed Area to any similarly sized area within the Shopping Center.

**License Fee.** In consideration for Licensor granting the foregoing temporary revocable license to Licensee, Licensee shall pay Licensor a "License Fee" equal to [fifteen percent (15%)] of all Gross Sales (as such term is defined below) generated by Licensee in the License Area which shall be due and payable to Licensor no later than the tenth (10<sup>th</sup>) day of each month during the Term, without any prior demand and without any offset or deduction whatsoever. If any payment of the License Fee or any other amount due and payable hereunder is not received by Licensor within five (5) days after its due date, Licensee shall be immediately obligated to pay a late charge equal to ten percent (10%) of the amount due, to compensate Licensor for the additional administrative expense and inconvenience occasioned thereby, which late charge shall be due within ten (10) days after written demand therefor by Licensor.

**Gross Sales, Reporting, Licensor's Audit Right.** "Gross Sales" shall be construed to include the entire amount of the actual receipts, whether for cash or otherwise, of all sales of merchandise, service or any other receipt whatsoever of all business conducted at, in, from, about, or upon the License Area, including, but not limited to, mail orders, telephone orders, internet orders, and/or other orders in whatever manner received, placed or filled, whether in whole or in part, at the License Area, and including all deposits not refunded to purchasers, orders taken (although said orders may be filled elsewhere), sales to employees, sales through vending machines or other devices, and sales by any subtenant, concessionaire or licensee or otherwise at, in, from, about or upon the License Area. Within ten (10) days after the end of each calendar month during the Term (as such term is defined below), Licensee shall submit to Licensor a complete statement showing the amount of Gross Sales from the License Area during said calendar month. Licensee shall record at the time of each sale or other transaction, in the presence of the customer, all receipts from sales or other transactions whether for cash or credit in a cash register or in cash registers sealed in a manner approved by Licensor and having such other features as shall be approved by Licensor. Licensor shall have the right to have an audit made of Licensee's books and records pertaining to all receipts and Gross Sales from any business conducted from, on or about the License Area. Licensee shall promptly pay Licensor any deficiency found in Licensee's payment of the License Fee. If any statement required pursuant to this Paragraph 4 is found to differ by more than two percent (2%) from the audited amount, Licensee shall also pay for any and all costs and fees of such audit within fifteen (15) days after notice from Licensor, and if such audit proves such statements to be correct, or such statements collectively do not vary by more than two percent (2%) from the results of the audit, then the expenses of such audit shall be borne by Licensor.

**License Fee.** \_\_\_\_\_ agrees to pay \_\_\_\_\_ a "License Fee" as follows: (i) \_\_\_\_\_ (\$0.00) per Event if \_\_\_\_\_ performs only one (1) Event during the Term; (ii) \_\_\_\_\_ (\$0.00) if \_\_\_\_\_ performs two (2) Events during the Term; and (iii) \_\_\_\_\_ (\$0.00) per Event if \_\_\_\_\_ performs three (3) or more Events during the License Period. The License Fee shall be due and payable as follows: (i) one-half shall be due and payable to \_\_\_\_\_ on the Effective Date and (ii) one-half shall be due and payable to \_\_\_\_\_ no later than \_\_\_\_\_ days prior to each Event. Unless otherwise agreed by Licensor in writing, the License Fee shall be paid to Licensor by certified check, cashier's check, wire transfer of federal funds, or other form of immediately available funds acceptable to Licensor. In addition to its other rights and remedies hereunder, in the event Licensee fails to timely surrender the License Area to Licensor as required above then, without being deemed to have extended the License Period, for each day or portion thereof by which surrender is delayed, Licensee shall pay Licensor an "Unauthorized Holdover Fee" equal to the License Fee payable for that License Period, which shall be paid in immediately available funds to Licensor upon demand. In addition, Licensee shall be liable to Licensor for all claims, liabilities, losses, costs or damages ("Claims") which Licensor, Prime Licensor or any of their affiliates suffer as a result of any holding over by Licensee, and Licensee shall indemnify Licensor, its affiliates and the officers, directors, managers, members, agents and employee of each of them against all Claims made by and third party against any of them as a result of any failure to timely surrender the License Area to Licensor in the condition required by this Agreement.

**Commission.** In consideration of the terms and conditions set forth herein, \_\_\_\_\_ hereby agrees to pay to \_\_\_\_\_ a "Commission" equal to \_\_\_\_\_ (\$0.00) for each ticket sold for an Event; provided, however, Licensee acknowledges and agrees that it may not sell more than \_\_\_ tickets per Event. The Commission shall be due and payable concurrently with the Licensee's submission of each "Event Sales Report" (as defined below). Licensee agrees to keep records of all ticket sales, merchandise sales and concession sales, which records shall be preserved for at least three (3) years, or until resolution of any dispute with respect thereto, either at the

License Area or at Licensee's home or regional offices. Licensee shall submit to Licensor on or before the fifteenth (15th) day following the expiration of the License Period, a written unaudited statement of the information required in the preceding sentence for the Events, signed by an officer of Licensee (the "Events Sales Report"). Licensee shall maintain all books of account and all documents necessary to audit, review and verify the Commission due to Special Events, and shall allow authorized representatives of Special Events to have reasonable access to and the right to audit such books and records, and to make such copies thereof as such \_\_\_\_\_ representatives shall reasonably require. Licensee shall immediately pay, together with interest at the rate of one (1%) percent per month, the amount of any shortfall. In the event that an audit reflects a ten (10%) percent or greater discrepancy from the accounting furnished by Licensee to Licensor, then Licensee shall be responsible for payment of the costs of such audit.

Permitted Use. Licensee shall use the License Area solely for the purpose of producing, promoting and conducting those certain event(s) more particularly described on the Addenda attached hereto (each an "Event", collectively, the "Events"), said Event(s) to be held on the dates set forth in each Addenda, as well as set-up and take-down as set forth in each Addenda. In no event shall any Event continue later than \_\_\_\_\_ pm EST, except that Licensee may perform certain tear-down work after \_\_\_\_\_ pm EST so long as the noise associated with such tear-down does not disrupt other occupants of the Project. The Event(s) shall be operated in strict accordance with the terms and conditions set forth on the Addenda attached hereto (material changes or deviations from which shall require \_\_\_\_\_ prior written approval, which approval may be given or withheld in \_\_\_\_\_ sole and absolute discretion). Without limiting \_\_\_\_\_ obligation to operate the Event(s) as described above and on the attached Addenda, in no event shall any Event be operated as a wine or beer festival, fall festival, clambake, crab feast, a circus, or include merchandise or concessions which, unless otherwise approved by Licensor in Licensor's sole, absolute and subjective discretion: (i) are inconsistent with the Project's family friendly standards, (ii) involve the depiction of pornographic or sexually explicit images or messages or involve the sale of illegal drug paraphernalia or paraphernalia intended for or commonly associated with the use of illegal drugs; or (iii) conflict or directly compete with the primary use of any current or then existing tenant or occupant of the Project. Kool Productions further agrees to operate the Event in strict accordance with all applicable laws, rules, regulations and codes including, without limitation, those applicable to alcoholic beverages.

(b) Licensee covenants and agrees to maintain order and decorum in and around all portions of the License Area, and if security personnel shall reasonably be required to maintain such order and decorum, the Licensee shall, at its sole cost and expense, provide professional security personnel in the form of off duty police officers. Furthermore, Licensee shall use all reasonable efforts to prohibit and control conduct by the invitees to each Event which would constitute a nuisance, whether occurring in or in the vicinity of the License Area. The License Area may be used solely by Licensee, its employees, agents, and invitees, and no one else, for the purposes of the Permitted Use only in accordance with the terms set forth on the Addenda and for no other use without the prior written consent of Licensor. Licensee shall not do anything which violates any order, regulation or requirement imposed by the applicable board of health, sanitary, police, zoning or fire departments, or other legal requirement. Licensee shall not commit any act or cause to be done any act which creates a nuisance in, upon or connected with the License Area. **Licensee shall coordinate its use of the License Area hereunder with \_\_\_\_\_ at telephone number \_\_\_\_\_**, or with such other representative of Licensor as Licensor may from time to time designate. Licensee and its employees, agents and invitees may enter upon the License Area with furniture, fixtures and equipment for the Permitted Use only, none of which shall be permanently installed upon the License Area without Licensor's prior written consent.

Design and Location (negotiated): The size and design of the container shall be substantially similar to that depicted on Exhibit "\_" attached hereto and made a part hereof and the final size and design shall be subject to Licensor's prior written approval, which shall not be unreasonably withheld provided the same is consistent with Exhibit "\_".

Use and Operation: "Operating Guidelines. Licensee shall abide by and observe the operating guidelines promulgated by Licensor from time to time regarding the operation of the Building. The initial operating guidelines are attached hereto as Exhibit "\_". In furtherance thereof, Licensee must refrain from permitting any nuisance or unlawful or immoral practice to be carried on within the Premises and shall operate the Premises in a dignified manner and in accordance with high standards of store operation so as not to detract from the reputation and integrity of the Building and the operation of the Project as a whole. Licensee expressly acknowledges that Licensee's failure to comply with the operating guidelines shall constitute a Default under this Agreement, entitling Licensor to exercise those rights and remedies set forth in this Agreement, or at law or in equity, as well as the immediate right to terminate this Agreement."

Operator: "Assignment. Licensee shall not assign, mortgage, pledge, encumber, sublet, license or permit the Premises or any part thereof to be used by others, or otherwise transfer, voluntarily, by operation of law, or

otherwise, this Agreement or the Premises without the prior consent of Licensor, which consent may be given or withheld in Licensor's sole and absolute discretion."

Flexibility regarding Premises (relocation and condition of premises provisions were negotiated):

"Termination. Licensor shall have the right to terminate this Agreement by giving Licensee not less than 20 days' prior written Notice of its intent to do so. Then and in such event, this Agreement and the right to use and occupy the Premises so created shall terminate. Licensee shall be under no further obligation to pay Rent from and after the termination date as specified in the aforementioned Notice. Licensor and Licensee shall be under no further obligation to each other, except with respect to any liabilities incurred by either of the parties pursuant to the terms and conditions of the Agreement prior to the date of termination and those specific obligations which specifically survive the termination or expiration of this Agreement."

"Relocation. Licensor shall have the absolute right, throughout the Term and any extension thereof (if any), to require Licensee to relocate from the Premises to another available location ("Relocation Premises") in the Project. The size and location of the Relocation Premises shall be determined by Licensor in its sole discretion. Licensor shall give Licensee at least 10 days' prior written Notice to relocate Licensee's Premises ("Relocation Notice"). Upon expiration of 10 days after Licensor's Relocation Notice, Licensee shall have no further right to use and occupy the Premises. Licensee's failure to surrender possession of the Premises and relocate to the Relocation Premises in accordance with the Relocation Notice (time being of the essence) shall constitute an immediate and non-monetary default under this Agreement entitling Licensor, in addition to any and all remedies available under this Agreement or at law or in equity, to re-enter the Premises and remove all persons and property therefrom. Licensor shall not be liable to Licensee for any damage claimed or suffered by Licensee pursuant to a relocation, but Licensee may, as its sole and exclusive remedy, within 7 days of its receipt of a Relocation Notice, elect to terminate this Agreement by providing Licensor with 30 days' notice thereof, in which event this Agreement shall be deemed terminated effective as of the last day of the month within which the expiration of such 30-day period occurs."

"Premises and Condition of Premises. Licensee acknowledges and agrees that Licensor may terminate Licensee's right to use the Second Floor Space at any time during the Term upon not less than fourteen (14) days prior written notice, and, in such event, Licensee shall, on or before such effective date of such termination: (a) remove Licensee's furniture, trade fixtures, equipment, and other property from the Second Floor Space; and (b) surrender the Second Floor Space to Licensee broom clean and otherwise in good condition."

Delivery (negotiated): "Licensor shall deliver the Premises on the Commencement Date. Licensee is obligated to open for business during the Minimum Operating Hours set forth below, except during periods of force majeure. If Licensor does not deliver the Premises to Licensee by \_\_\_\_\_, \_\_\_\_\_ (subject to a day-for-day extension for any event of force majeure and/or delay caused by Licensee), then Licensee may terminate this Agreement upon ten (10) days written notice to Licensee, provided, however, that Licensee's election to terminate shall be of no force or effect if Licensor causes delivery of the Premises to occur within said 10 day period."

Payment of Rent - % of Gross Sales (negotiated): "Rent. At the close of business on each Sunday during the Term, Licensee shall submit to Licensor (at \_\_\_\_\_ @edens.com) a statement in the form of Exhibit" \_\_\_ "setting forth the amount of Gross Sales from the Premises during the Term, listed by the amount of Gross Sales from the Premises during each day of such Term. The Gross Sales statement shall be accompanied by a supporting point of sales report and each report shall be signed by a duly authorized representative of Licensee. On or before the immediately succeeding Friday, Licensee must pay to Licensee at the Rent Payment Address set forth above the Rent calculated in accordance with the table set forth above. In addition to any other rights and remedies which Licensor may have at law, in equity or under this Agreement, if Licensee fails to either (i) deliver the statements of Gross Sales to Licensor pursuant to this Section within 3 days after the date due, or (ii) pay Rent within 3 days after the date due, then, in either event, after 5 days' notice to Licensee, Licensee shall pay to Licensor, upon demand, a late charge of \$100.00 per day during which any such failure shall continue."

Alterations and Repairs (negotiated): "Notwithstanding anything to the contrary contained in this Agreement and after Licensee has completed Licensee's initial work and opened for business in the Premises, Licensee shall have the right to make non-structural interior alterations, repairs or replacements in and to the Premises without first obtaining Licensor's prior written consent or approval, but upon at least forty-eight (48) hours' prior notice to Licensor, provided (i) such interior alterations, repairs or replacements neither require any structural alteration nor impose any greater load on any structural portion of the Premises or on the utility or mechanical system serving the Premises, (ii) such interior repairs or replacements are in accordance with Licensor's then current Design Criteria for the Project, (iii) the cost of such interior alteration, repair or replacement shall not exceed \$\_\_\_\_\_, (iv) such changes do not affect parking requirements or entitlements for the Premises or the Project, and (v) Licensee agrees to indemnify and hold harmless Licensor from and against all claims, actions, liability and damage sustained by

Licensors as a result of any such work by Licensee, its agents, employees or contractors. Licensee shall comply with all Laws in making any alterations, repairs or replacements. If Licensee is required to file plans as a condition to doing such work, Licensee shall provide Licensor with a copy of the plans for informational purposes. During the Term, Licensee shall be solely responsible for maintaining the Premises, including all Licensee's personal property and any improvements to the Premises made or installed by Licensee, in good condition and repair. Licensee shall not store or use hazardous substances or wastes, toxic substances or wastes, pollutants, or contaminants as those terms are defined by environmental laws. Licensee shall cure any spill, leak, discharge, or other release of hazardous substances or moisture from, on, about or under the Premises."

Casualty/Condemnation: "Casualty/Condemnation. If the Premises or all or any substantial part of the Building shall be damaged by fire or other cause, or taken by condemnation or eminent domain, Licensor or Licensee, upon Notice to the other party, may immediately terminate this Agreement, in which event the Rent shall be apportioned and paid to the date such damage occurred and neither party shall have any further obligation to the other hereunder."

### **Single-Day or 2-Day "Events":**

The term of this Agreement shall be for a period commencing at [9:00] a.m. and ending at [4:00] p.m. on [April 3, 2019], unless sooner terminated pursuant to applicable laws and/or the terms hereof (the "License Period").

Payment: "Event Fee: Ten Thousand and 00/100 Dollars (\$10,000.00) Dollars, to be paid as follows: Fifty percent (50%) due upon execution and delivery of this Agreement by Licensee; balance of fifty percent (50%) due no later than seven (7) days prior to the Event Date. If Licensee cancels the Event for any reason other than a Force Majeure Event, Licensee shall forfeit to Licensor the Damage Deposit and the following amount of the Event Fee: If cancellation occurs at least thirty (30) days prior to the Event Date, Licensee forfeits seventy-five percent (75%) of the Event Fee; and if cancellation occurs less than thirty (30) days prior to the Event Date, Licensee forfeits the entire Event Fee."

Utilities: "Electrical and Water Utility Service. Licensee acknowledges that power to the Property's normal house wattage receptacles will be available for Licensee to use during the Event. Licensee must share its production plan with Licensor in advance of the Event so that the parties can determine if Licensee will need to secure a supplemental external electrical power source for the conduct of the Event. Licensee shall operate no instruments, appliances, machinery, equipment, or other objects requiring electricity without the prior written approval of Licensor. If the existing electric power service is not sufficient for Licensee to conduct the Event, Licensee shall be responsible, at its sole cost, expense, and liability, for causing such adequate service to be provided (the location of which shall be subject to Licensor's prior written approval to be granted or withheld in Licensor's sole and absolute discretion), and shall secure any and all governmental or non-governmental licenses, permits, and/or approvals as may be necessary to obtain same in a lawful and safe manner. Licensor shall provide reasonable access to restrooms during the Event, but will have no other responsibility for the provision of water utility services."

Services; Rules and Regulations: "Licensee Event Services; Venue Rules and Regulations. Licensor shall not be responsible for the provision of any services, facilities, and/or equipment relating to the Event. All Event services necessary for conducting the Event shall be provided by Licensee, at Licensee's sole cost, expense, and liability, including, without limitation, those set forth on Exhibit "  " (collectively, the "Licensee Event Services"). In addition, Licensee must comply with the Venue Rules and Regulations set forth on Exhibit "  " attached hereto and made a part hereof (the "Rules"), at Licensee's sole cost, expense, and liability, to the extent the same are applicable to the Event."

Security: "Security Services. Licensee shall be responsible for providing, at Licensee's sole cost and expense, a minimum of one (1) security guard for every one hundred (100) Event attendees at all times during the Event in order to maintain a safe and secure Event. Upon notice from Licensor, a security walk-through with the \_\_\_\_\_ Event Manager and head of security shall be required on either the day before or the day of the Event at Licensor's discretion (the "Security walk-through"). Security services shall be provided by a security service provider approved by Licensor with such services being in strict accordance with all applicable \_\_\_\_\_ governmental requirements; evidence of insurance in form and content reasonably acceptable to Licensor and/or Licensor's insurer, must be supplied to Licensor on or before the Event Date, but in no event later than the time of the Security walk-through (if applicable)."



Control over Design and Location:

FACEBOOK/OCULUS - The size and design of the container shall be substantially similar to that depicted on **Exhibit "D"** attached hereto and made a part hereof and the final size and design shall be subject to Licensor's prior written approval, which shall not be unreasonably withheld provided the same is consistent with **Exhibit "D"**.

**Operating Guidelines.** Licensee shall abide by and observe the operating guidelines promulgated by Licensor from time to time regarding the operation of the Building. The initial operating guidelines are attached hereto as **Exhibit B**. In furtherance thereof, Licensee must refrain from permitting any nuisance or unlawful or immoral practice to be carried on within the Licensed Area and shall operate the Licensed Area in a dignified manner and in accordance with high standards of store operation so as not to detract from the reputation and integrity of the Building and the Union Market District as a whole. Licensee expressly acknowledges that Licensee's failure to comply with the operating guidelines shall constitute a Default under this Agreement, entitling Licensor to exercise those rights and remedies set forth in this Agreement, or at law or in equity, as well as the immediate right to terminate this Agreement.