

**RECYCLABLES CONTAINER ENCLOSURE
LEASE AGREEMENT**

Authorizing Agreement No. ____

This Lease Agreement is entered into effective October 7, 2014, between the CITY OF CALISTOGA, a California municipal corporation ("**City**"), and SR Restaurant LLC, a California limited liability corporation ("**Lessee**"), who agree as follows:

1. Background

A. City is the owner of that certain enclosure located at 1235 Washington Street in the City of Calistoga adjacent to the City's Police Department (the "Enclosure").

B. Lessee wishes to use, at its expense, the Enclosure for a recyclables trash container for its business activities.

C. On October 7, 2014, the Calistoga City Council adopted Resolution No. 2014-____, authorizing the City Manager to execute an agreement providing for the lease of the Enclosure by City to Lessee on the terms set forth herein.

D. City desires to lease to Lessee and Lessee desires to lease from City the Enclosure, as hereinafter defined, on the terms and conditions set forth in this Lease Agreement.

Section 1. Lease Agreement.

(a) Enclosure. City leases to Lessee and Lessee leases from City that certain Enclosure in the City of Calistoga, depicted in the Site Plan attached hereto as Exhibit A on the terms and conditions set forth herein. Lessee has no leasehold or possessory interest in the Property, and such lease arrangement is a license to use the Enclosure and a limited license to cross the Property on marked driveways to gain access to the public street. The Enclosure is owned by City, and City has granted a limited license for a Recyclables Trash Container to be located on the Property.

Section 2. Term of Rental Agreement; Extension Option; City's Option to Terminate.

(a) Term. The initial term of this Lease Agreement shall be thirty-eight (38) months commencing on October 8, 2014 ("**Commencement Date**") and expiring on December 31, 2017 ("**Expiration Date**"), unless extended as provided in subsection (b) below or sooner terminated pursuant to the terms of this Lease Agreement.

(b) Extension. Lessee may extend the initial term of the Lease Agreement for a period of three (3) years on mutual agreement of City and Lessee, provided:

(i) At the time of the Expiration Date, Lessee shall not be in material default of the Lease Agreement; and

(ii) Lessee must give written notice given to City not less than six (6) months prior to expiration of the initial term of its desire to extend the Lease Agreement.

(c) City's Option to Terminate. Lessee acknowledges and agrees that the parties have entered into this Lease Agreement for the purpose of providing a site for Lessee's recyclables trash container and that City may need to terminate the Lease Agreement and retake possession of the Enclosure to accommodate future public projects. Lessee further agrees that City shall have an option to terminate this Lease Agreement on the following conditions:

(i) City may exercise its option to terminate by written notice delivered to Lessee not less than three (3) months prior to the effective date of termination specified in City's notice. If City exercises its option to terminate, (1) this Lease Agreement shall terminate on the effective date of termination set forth in City's notice as if such date were the Expiration Date set forth in Section 2(a) above; and (2) Lessee shall remove the recyclables trash container, repair any damage, restore the Premises to a clean and orderly condition, and surrender and deliver possession of the Enclosure to City free of debris as provided in Section 10(a) below.

Section 3. Rent.

(a) The rent shall be \$250 per year, or pro-rata amount, for the term of this Lease Agreement. The Lease payment shall be due and payable on the Commencement Date and by January 15th each year, thereafter beginning in January 2015.

(b) Rent amount may be increased by resolution of the City Council.

Section 4. Use.

Lessee shall use the Enclosure for placement of a recyclables trash container. Lessee shall, at its expense, contract with Upper Valley Disposal (UVD) for regular and routine collection service of the recyclable trash container. In no event shall the Enclosure be used for general garbage. Lessee shall not allow the commission of any waste or any public or private nuisance upon the Enclosure. Lessee shall, at its expense, comply with all laws, rules, regulations and orders of all federal, state, and local governments or agencies that may be applicable to use of the Enclosure, including but not limited to the General Plan and Zoning Ordinance of the City of Calistoga, in their current form or as they may hereafter be amended.

Section 5. Condition of Enclosure.

Lessee acknowledges that it has inspected the Enclosure and accepts the Enclosure in its "AS IS" condition with no representations or warranties whatsoever from City as to its suitability for Lessee's intended purposes. Lessee shall, at its expense, contract with a licensed tree trimming service to trim any tree branches necessary for proper and safe access by UVD. Any trimming shall be coordinated with the City's Public Works Department.

Section 6. Repairs and Maintenance.

Lessee shall be responsible, at its sole expense, for maintenance and repair of the Enclosure throughout the term of this Lease Agreement, including tree trimming to allow access by UVD collection vehicles, repairs to the fencing, gates and graffiti abatement. If Capital

maintenance is required due to Lessee's gross negligence or intentional misconduct, such repairs shall be at Lessee's sole expense. Capital maintenance shall include the renovation, repair or replacement of any components of the Enclosure.

Section 7. Lessee Improvements.

Lessee may not construct any additional alterations or improvements to the Enclosure without City's reasonable consent. City may reasonably withhold such consent if the improvements or alterations alter the structural portions of the Enclosure or modify the external appearance.

Section 8. Entry.

Lessee shall permit City and City's agents, representatives, and employees to enter upon the Enclosure at all reasonable times and upon reasonable notice (except in an emergency in which case no notice shall be required) to inspect the Enclosure, to determine whether Lessee is complying with the terms of this Lease Agreement and to do other lawful acts that may be necessary to protect City's interest in the Enclosure.

Section 9. Surrender of Enclosure; Holding Over.

(a) Surrender. By the Expiration Date or earlier termination of the term, Lessee, at its expense, shall (i) at City's option, cause the Lessee improvements and/or any subsequent alterations or improvements, utilities and trade fixtures installed by Lessee, to be removed from the Enclosure; and (ii) promptly surrender and deliver possession of the Enclosure to City free of debris, clean and in good repair.

(b) Holdover. In the event Lessee holds over with permission of the City for any reason beyond the Expiration Date, in the absence of a written agreement to the contrary, the tenancy shall be from month-to-month and the holdover rent shall be 150% of the rent in effect immediately prior to the expiration.

Section 10. Indemnity.

As insurance is available to protect it, Lessee hereby waives all claims against City for damage to Enclosure or injury to or death of any person in, upon or about the Enclosure arising at any time and from any cause, and Lessee shall hold City harmless from and defend City against all claims and liabilities for damage to any property or injury to or death of any person (i) arising from the use of the Enclosure by Lessee, or (ii) arising from the negligence or willful misconduct of Lessee, its employees, agents or contractors in, upon or about the Enclosure. The foregoing indemnity obligation of Lessee shall include reasonable attorneys' fees, investigation costs and all other reasonable costs and expenses incurred by City from the first notice that any claim or demand is to be made or may be made. The provisions of this Section 11 shall survive the termination of this Lease Agreement with respect to any damage, injury or death occurring prior to such termination.

Section 11. Insurance.

(a) Liability; Worker's Comp; Employer's Insurance. Lessee shall obtain and maintain during the term of this Rental Agreement commercial general liability insurance with a combined single limit for personal injury and property damage in an amount not less than One Million Dollars (\$1,000,000), and employer's liability and workers' compensation insurance as required by law. Lessee's commercial general liability insurance policy shall be endorsed to provide that (i) it may not be canceled or altered in such a manner as adversely to affect the coverage afforded thereby without thirty (30) days prior written notice to City, (ii) City is named as additional insured, (iii) the insurer acknowledges acceptance of the waiver of claims by Lessee pursuant to Section 11 above, and (iv) such insurance is primary with respect to City and that any other insurance or self-insurance maintained by City is excess and noncontributing with such insurance. If, in the reasonable opinion of City's insurance adviser, based on a substantial increase in recovered liability claims generally, the specified amounts of coverage are no longer adequate, within fifteen (15) days following notice from City such coverage shall be appropriately increased.

Section 12. Assignment and Subletting

Lessee shall not have any right to assign this Lease Agreement or sublease the right to use the Enclosure.

Section 13. Default.

Any of the following events or occurrences shall constitute a material breach of this Lease Agreement by Lessee and, after the expiration of any applicable cure period, shall constitute an event of default (each an "**Event of Default**"):

(a) The failure by Lessee to pay any amount in full when it is due under this Lease Agreement;

(b) The failure by Lessee to perform any other obligation under this Lease Agreement, if the failure has continued for a period of ten (10) days after City demands in writing that Lessee cure the failure. If, however, by its nature the failure cannot be cured within ten (10) days, Lessee may have a longer period as is necessary to cure the failure, in any event not to exceed thirty (30) days, but this is conditioned upon Lessee's promptly commencing to cure within the ten (10) day period and thereafter diligently completing the cure. Notwithstanding the foregoing, if Lessee has defaulted in the performance of the same obligation more than one time in any twelve (12) month period and notice of such default has been given by City in each instance, no cure period shall thereafter be applicable hereunder. Lessee shall indemnify, defend and hold harmless City against any liability, claim, damage, loss, or penalty that may be threatened or may in fact arise from that failure during the period the failure is uncured;

(c) The appointment of a trustee or receiver to take possession of all or substantially all of Lessee's assets; or the attachment, execution or other judicial seizure of all or substantially all of Lessee's assets located at the Enclosure or of Lessee's interest in this Lease Agreement, unless the appointment or attachment, execution, or seizure is discharged within thirty (30) days; or the involuntary filing against Lessee, of (i) a petition to have Lessee declared bankrupt, or

(ii) a petition for reorganization or arrangement of Lessee under any law relating to insolvency or bankruptcy, unless, in the case of any involuntary filing, it is dismissed within sixty (60) days;

(d) The abandonment of the Enclosure by Lessee.

Section 14. Remedies.

Upon the occurrence of an Event of Default, City, in addition to any other rights or remedies available to City at law or in equity, shall have the right to terminate this Lease Agreement and all rights of Lessee under this Lease Agreement by giving Lessee written notice that this Lease Agreement is terminated.

Except where inconsistent with or contrary to any express provisions of this Lease Agreement, no right or remedy conferred upon or reserved to either party is intended to be exclusive of any other right or remedy, or any right or remedy given or now or later existing at law or in equity or by statute.

Section 15. Default Interest.

If Lessee fails to pay any amount due under this Lease Agreement as and when due, that amount shall bear interest at the rate of ten percent (10%) per annum from the due date until paid, or at such lower rate as may be the highest rate legally permitted.

Section 16. No Waiver of Breach.

Any express or implied waiver of a breach of any term of this Lease Agreement shall not constitute a waiver of any further breach of the same or any other term of this Lease Agreement; and the acceptance of rent shall not constitute a waiver of any breach of any term of this Lease Agreement, except as to the payment of rent accepted.

Section 17. Attorneys' Fees.

If any action at law or in equity is brought to recover any rent or other sums due under this Lease Agreement, or for or on account of any breach of, or to enforce or interpret any of, the covenants, terms, or conditions of this Lease Agreement, or for the recovery of the possession of the Enclosure, the prevailing party shall be entitled to recover from the other party as part of prevailing party's costs reasonable attorneys' fees, the amount of which shall be fixed by the court and shall be made a part of any judgment rendered.

Section 18. Notices.

Except as otherwise expressly provided by law, all notices or other communications required or permitted by this Lease Agreement or by law to be served on or given to either party to this Lease Agreement by the other party shall be in writing and shall be deemed served when personally delivered to the party to whom they are directed, or three (3) business days after deposit in the United States Mail, first-class, postage prepaid, addressed as follows:

to Lessee at:

SR Restaurant LLC
755 Silverado Trail
Calistoga, CA 94515
Attn: Brandon Sharp

to City at:

City of Calistoga
1232 Washington Street
Calistoga, CA 94515
Attention: City Manager

Either party, Lessee or City, may change the address for the purpose of this Section by giving written notice of the change to the other party in the manner provided in this Section.

Section 19. Successors in Interest.

Subject to the provisions of this Lease Agreement prohibiting assignment or subletting by Lessee, this Lease Agreement shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of City and Lessee.

Section 20. Severability.

Should any provision of this Lease Agreement be held by a court of competent jurisdiction to be either invalid or unenforceable, the remaining provisions of this Lease Agreement shall remain in effect to the fullest extent allowed by law.

Section 21. Entire Agreement.

This Lease Agreement constitutes the sole agreement between City and Lessee respecting the Enclosure, the leasing of the Enclosure to Lessee, and the specified term, and correctly sets forth the obligations of City and Lessee. Any other oral or written understandings, agreements or representations respecting the Enclosure or the leasing thereof by City to Lessee not expressly set forth in this Lease Agreement are of no force or effect. All recitals are incorporated into the Lease Agreement by this reference.

Section 22. Time of Essence.

Time is of the essence in this Lease Agreement.

Section 23. Amendments.

This Lease Agreement may be modified only in writing and only if signed by the parties at the time of the modification.

Section 24. Subordination.

This Lease Agreement shall be subordinate to any ground lease, mortgage, deed of trust, security agreement or any other hypothecation for security now or later placed upon the Enclosure and to any advances made on such security or City's interest in the Enclosure, and to all renewals, modifications, consolidations, replacements, and extensions thereof. However, if any mortgagee, trustee, or ground lessor elects to have this Lease Agreement prior to the lien of its mortgage or deed of trust or prior to its ground lease, and gives notice of such election to Lessee, this Lease Agreement shall be deemed prior to the mortgage, deed of trust, or ground lease, whether this Lease Agreement is dated prior or subsequent to the date of the mortgage, deed of trust, or ground lease, or the date of recording thereof. If any mortgage or deed of trust to which this Lease Agreement is subordinate is foreclosed or a deed in lieu of foreclosure is given to the mortgagee or beneficiary, Lessee shall attend to the purchaser at the foreclosure sale or to the grantee under the deed in lieu of foreclosure. If any ground lease to which this Lease Agreement is subordinate is terminated, Lessee shall attend to the ground lessor. Lessee agrees to execute any documents, in form and substance reasonably acceptable to Lessee, required to subordinate this Lease Agreement, to make this Lease Agreement prior to the lien of any mortgage or deed of trust or ground lease, or to evidence the attornment.

Section 25. Hazardous Materials.

City and Lessee agree as follows with respect to the existence or use of Hazardous Materials on the Property.

(a) **"Environmental Laws"** shall mean all present and future applicable federal, state and local laws, ordinances or regulations or policies pertaining to Hazardous Materials (including, without limitation, the use, handling, transportation, production, disposal, discharge or storage thereof) or to industrial hygiene or the environmental conditions on, under or about the Property and to the protection of the environment or human or animal health and safety.

(b) **"Hazardous Materials"** shall mean any hazardous or toxic substance, material or waste the storage, use, or disposition of which is or becomes regulated by any local governmental authority, the State of California or the United States Government. The term Hazardous Material includes, without limitation, any material or substance which is (i) defined as hazardous or extremely hazardous pursuant to Article II of Title 22 of the California Administrative Code, Division 4, Chapter 20, (ii) defined as a hazardous waste pursuant to Section 1004 of the Federal Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., (iii) defined as a hazardous substance pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq. or (iv) is listed or defined as a hazardous waste, hazardous substance, or other similar designation by any regulatory scheme of the State of California or the U.S. Government that is similar to the foregoing.

(c) Lessee shall not use, generate, manufacture, produce, store, release, discharge, or dispose of, on, or about the Enclosure or the Property or transport to or from the Enclosure or the Property any Hazardous Material or allow its employees, agents, contractors, licensees, invitees or sublessees (collectively, **"Lessee's Agents"**) to do so. Lessee shall comply with and shall cause

Lessee's Agents to comply with, and shall keep and maintain the Enclosure and cause Lessee's Agents to keep and maintain the Enclosure in compliance with all Environmental Laws.

(d) Lessee shall give written notice to City promptly after Lessee receives notice of any of the following: (i) any proceeding or inquiry by, notice from, or order of any governmental authority (including, without limitation, the California State Department of Toxic Substances Control) with respect to the presence of any Hazardous Material on, under or about the Enclosure or Property or the migration thereof from or to other property; and (ii) all claims made or threatened by any third party against Lessee or the Enclosure or Property relating to any loss or injury resulting from any Hazardous Materials. Lessee shall give written notice to City promptly after Lessee becomes aware of any spill, release or discharge of Hazardous Materials with respect to the Enclosure or Property by Lessee or Lessee's Agents.

(e) Lessee shall protect, defend, indemnify and hold harmless City, its directors, officers, partners, employees, agents, successor and assigns from and against any and all claims, fines, judgments, penalties, losses, damages, costs, expenses or liability (including reasonable attorneys' fees and costs) to the extent directly or indirectly arising out of or attributable to the use, generation, manufacture, production, storage, release, threatened release, discharge or disposal of any Hazardous Material on, under or about the Property or the transportation of any Hazardous Material to or from the Enclosure or Property by Lessee or Lessee's Agents including, without limitation, the costs of any investigation, monitoring, removal, restoration, abatement, repair, cleanup, detoxification or other ameliorative work of any kind or nature (collectively, "**Remedial Work**"). Lessee's obligations under this Section 27(e) shall survive the expiration or earlier termination of this Lease Agreement.

(f) Upon any spill or release of Hazardous Materials by Lessee or Lessee's Agents, Lessee shall promptly notify City of the spill or release of Hazardous Materials and shall, at its sole expense and promptly after demand by City, commence to perform and thereafter diligently prosecute to completion such Remedial Work as is required under Environmental Laws.

Section 26. Governing Law.

This Lease Agreement shall be governed by and construed in accordance with the laws of the State of California and the City of Calistoga.

Section 27. Authority.

If Lessee is a corporation, each individual executing this Lease Agreement on behalf of Lessee (not in his/her individual capacity, but only in his/her capacity as an officer of Lessee) represents and warrants that he is duly authorized to execute and deliver this Lease Agreement on behalf of the corporation in accordance with a duly adopted resolution of the Board of Directors and that this Lease Agreement is binding upon the corporation in accordance with its terms.

Section 28. Joint & Several Liability.

If more than one person or corporation is named as City or Lessee in this Lease Agreement and executes the same as such, then and in such event, the words "City" or "Lessee" wherever used in this Lease Agreement are intended to refer to all such persons or corporations,

and the liability of such persons or corporations for compliance with and performance of all the terms, covenants and provisions of this Lease Agreement shall be joint and several.

Section 29. Nondiscrimination

Neither Lessee nor City shall discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin, in connection with or related to the performance of this Lease Agreement.

Section 30. Headings.

The headings in the sections of this Lease Agreement are merely for the convenience of the parties.

Section 31. Counterparts.

This Lease Agreement may be signed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement.

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

LESSEE:

SR Restaurant LLC, a California Limited Liability Corporation

By: _____
Brandon Sharp, Its _____

CITY:

CITY OF CALISTOGA, a California municipal corporation

By: _____
Richard Spitler, City Manager

ATTEST:

By: _____
Kathy Flamson, Deputy City Clerk

EXHIBIT A

Site Plan

[To be Inserted]