

COMPLAINT

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

**RIVER CITY ALE WORKS, LLC
1400 Main Street
Wheeling, WV**

Civil Case No. 17-C-58

vs.

**WHEELING NATIONAL
HERITAGE AREA
CORPORATION & THE ARTISAN
CENTER
1400 Main Street
Wheeling, WV 26003**

**COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT
INJUNCTION, AND DECLARATORY JUDGMENT**

**Comes now the plaintiffs, by and through Mark A. Kepple, Esquire, and for their
complaint states as follows:**

1. The plaintiff River City Ale Works, LLC (River City) is a limited liability company organized and existing under the law of the State of West Virginia. The plaintiff operates a restaurant and catering business located at the Artisan Center located at 1400 Main Street, Wheeling, WV. A Notice of Lis Pendens will be filed with the Clerk of the Ohio County Commission.
2. WNHAC (Wheeling National Heritage Area Corporation) fulfills a vital role of supporting and enhancing the historical interests, economic vitality and overall integrity of the Wheeling Area. WNHAC also owns the Artisan Center and leases the first and third floor of the Artisan Center to the plaintiff to operate a Restaurant, Catering, Banquet and Conference operation.

3. WNHAC and River City have cooperatively worked together pursuant to a leasing agreement since 1999. The current and applicable lease is attached hereto and incorporated herein by reference as Exhibit A.
4. River City has a leasehold and real property interest in the first and third floor of the Artisan Center pursuant to the lease agreement referenced herein. The subject lease is valid, applicable, and enforceable. Said lease agreement continues into the future.
5. River City uses the Artisan Center for virtually daily and nightly restaurant and bar activities.
6. River City has invested thousands of dollars in advertising and branding of its restaurant, catering, and banquet enterprises.
7. River City has invested tens of thousands of dollars in restaurant supplies and equipment.
8. River City has entered into revolving and continuing contracts and/or leasing agreements with service providers, other businesses, and companies that will continue into the future.
9. River City employs approximately 50 full-time and part-time employees who depend upon it for their income.
10. River City has entered into contractual relationships with numerous companies, entities, and individuals to host banquets and events through 2018 Artisan Center.
11. River City has scheduled approximately 50 events through 2018 at the Artisan Center into the foreseeable future.
12. River City has paid to WNHAC all rents due and owing through their leasing agreement.

13. River City has paid to WNHAC all percentages of gross due and owing pursuant to the leasing agreement.
14. River City has paid literally hundreds of thousands of dollars to WNHAC in rent.
15. River City and WNHAC had an informal agreement to pay rent on a floating schedule without regard to the explicit due date under the lease.
16. River City and WNHAC continued to agree to accept rental payments on a floating schedule for years.
17. River City timely paid all rent as agreed to by WNHAC.
18. River City never missed any rent payments or other financial obligations.
19. River City received a Notice of Default claiming that one rent payment was not made and thus River City's lease was terminated and that the tenancy will continue on a month to month basis. The Notice further provided that the month to month tenancy could be terminable with two week's notice.
20. River City, through its owner and manager, Jason Miller, advised WNHAC, that it objected to this Notice and that it was not possible for River City to continue to operate if WNHAC continued to assert the position that the lease was terminated.
21. River City was forced to retain counsel to address these unfortunate developments. In this regard River City's counsel sent three letters to WNHAC clarifying the payment of rents and demanding that WNHAC rescind the Default notice and allow the lease to continue pursuant to the express terms of the lease. See Exhibits B,C, & D attached hereto and incorporated herein by reference.
22. WNHAC seemingly has ignored River City's request for rescission of the Default Notice and has further failed to confirm that the lease shall continue into the future.

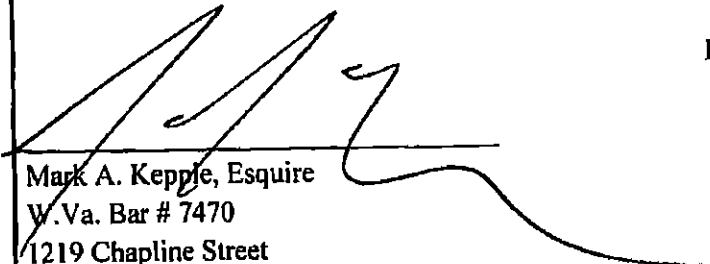
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23. River City has provided specific information to WNHAC demonstrating that the lease payments were made in direct contravention of the information provided in the Default Notice.
 24. River City has received questions from patrons and potential customers inquiring whether River City will continue in this location and be able to host their events and dining needs.
 25. River City has investigated the local availability for restaurant and conference space to determine whether a suitable replacement space is available. Such investigation has revealed that no other space of the caliber and quality of the Artisan space is available.
 26. River City is certain that should WNHAC be continued to proceed to claim that the lease is terminated, it will lose business that it has already booked, and that it is losing potential business due to the uncertainty created by WNHAC in claiming default.
 27. Upon information and belief, Wheeling's business and community environment, particularly the Downtown sector, is improving and will only become more vibrant.
 28. Upon information and belief, more residential living options are available in Downtown Wheeling.
 29. Upon information and belief, more commerce and business is coming to the Downtown Wheeling area.
 30. It is a misguided approach for WNHAC to take any actions which jeopardizes River City's ability to continue doing business at the Artisan Center.

31. Terminating the lease and/or implementing the two week cancellation of the month to month tenancy will irreparably harm River City and likely cause the failure of the business.
32. River City is entitled to Declaratory Judgment that the Default Notice is insufficient to terminate the lease, and that the lease will continue pursuant to the express terms of the lease attached hereto as Exhibit A.
33. Pursuant to Rule 65 of the West Virginia Rules of Civil Procedure, it clearly appears from specific facts shown by this verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff if an injunction is not entered.
34. The Injunction should issue due to the likelihood of irreparable harm to the plaintiff without the injunction; there is no likelihood of harm to the defendant with an injunction; the plaintiff has a high likelihood of success on the merits; and (4) the public interest supports keeping a local business and restaurant in downtown Wheeling employing up to 50 people and serving as a dining destination and conference and banquet center.
35. River City respectfully requests that this Court enter an Order of Injunction prohibiting the defendant from terminating the lease pursuant to the Default Notice, and further prohibiting the defendant from converting the lease to a month to month tenancy, and further prohibiting the defendant from attempting to terminate the lease agreement in any respect.
36. Failing the relief sought in the above paragraphs, the Plaintiff will suffer irreparable harm consisting of loss of business and termination of future opportunities.

37. A permanent injunction is necessary to prohibit the defendant from harming this plaintiff further.

WHEREFORE, the plaintiff respectfully requests Declaratory Judgment as requested herein, that the Court decree that the lease is not in Default, but may continue pursuant to the terms expressed in Exhibit A, and that the Court issue an injunction prohibiting the defendant from claiming that the plaintiff is in default of their leasing agreement, and for all other further relief as this Court deems appropriate.

River City Ale Works, LLC,
By Counsel



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(304)233-0201
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GROSS LEASE AGREEMENT

THIS LEASE is entered into this 1st day of May, 2011, by and between the Wheeling National Heritage Area Corporation, a West Virginia not-for-profit corporation ("Lessor"), and River City Ale Works, L.L.C., a West Virginia L.L.C., qualified to do business in West Virginia ("Lessee"). Lessor represents that it is presently leasing the building of which the premises hereby leased are a part, from the City of Wheeling.

(1) **Premises**

Lessor leases to Lessee and Lessee leases from Lessor upon terms and conditions set forth herein certain real property being that portion of the building commonly known as the Wheeling Artisan Center, 1400 Main Street, Wheeling, Ohio County, West Virginia, as shown on the floor plans dated 18 September 1995 attached hereto as "Exhibit A," approximately 12,780 square feet of the first floor and 14,080 square feet of the basement of the said building, together with any improvements, rights-of-way, easements and any other rights, if any, appurtenant thereto. The premises shall also include the third floor kitchen, bathrooms, hall, common areas, stock room, liquor room (closet), and banquet space to be used in a shared manner with the Lessor as hereinafter described in subsequent portions of this lease.

(2) **Term of Lease**

The term of this Lease shall begin on the 1st day of May 2011 "Commencement Date") and shall extend through the 30th day of April 2016 (60 months), unless terminated sooner as provided herein ("Termination Date").

(3) **Rental**

Lessee agrees to pay to Lessor sixty (60) equal monthly installments of \$5,763.47 on the first day of each month during said lease period, beginning on May 1, 2011 at the following address: Wheeling National Heritage Area Corporation, 1400 Main Street, Post Office Box 350, Wheeling, West Virginia 26003 (or at such other address as Lessor may designate in writing from time to time) without any setoff or deduction whatsoever. Lessee will also pay in rent six percent (6%) of the Gross Sales gained from events conducted by Lessee on the third floor of the Wheeling Artisan Center.

"Gross Sales" shall be defined as gross receipts derived from restaurant, catering and bar sales, except sales on coin operated machines, limited video lottery machines or other authorized West Virginia Lottery products. Authorized deductions from the aforementioned "Gross Sales" include, without limitation, tips, salaries and wages, employment taxes, B&O taxes, sales tax, rental fees and security deposits.

Lessor may examine Lessee's books and records from time to time, during reasonable business hours after reasonable prior notice, to verify Lessee's reported gross sales. Lessor's right to examine books and records under the preceding sentence with respect to each other during the term of this lease shall expire six months after the close of that calendar year. The Lessor agrees that the materials contained within the Lessee's books and records constitute the Lessee's private and privileged materials and must be maintained in a private and privileged manner. It is the Lessor and Lessee's agreement that the Lessor shall not disclose the contents of the Lessee's books and records to any outside entity with the exception of the Lessor's certified public



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accountant insofar as it is necessary for the examination contemplated under this agreement. It is agreed the certified public accountant shall be bound by this agreement.

(4) **Use of Premises**

Lessee shall have the right to use and occupy the Premises to serve food and alcoholic beverages to the public. Any other use shall be permitted only with the prior written consent of Lessor, which consent shall not be unreasonably withheld. Hours of operation shall be consistent with the market and business flow and at the Lessee's discretion but will not unreasonably interfere with the quiet enjoyment of other tenants of the Wheeling Artisan Center. Throughout the primary term of this Lease (and any extension thereof), Lessee, at Lessee's sole cost and expense, covenants to promptly comply with all laws and ordinances and the orders, rules, regulations and requirements of all federal, state and municipal governments and appropriate departments, commissions, boards and officers thereof with respect to the operation of Lessee's business in the Premises.

(5) **Payment of Taxes and Assessments**

Lessee will pay all sales and use taxes on its food, beverage, merchandise, restaurant and kitchen equipment.

Lessee shall be solely responsible for liquor, beverage and other applicable, state liquor license registration, the annual occupational tax and all required relevant food service and business licenses. Lessee shall pay its portion of the Fire Service fee.

(6) **Lessee's Insurance**

During the primary term of this Lease (and any extension thereof), Lessee shall carry and maintain the following types of insurance in the amounts specified, at Lessee's sole cost and expense, and for the mutual benefit of Lessor and Lessee:

(a) **Liability Insurance**. Lessee shall at all times keep in force a comprehensive general combined liability insurance policy, including liquor liability, providing protection of at least \$1 million combined single limit (with no deductible) against claim and liability for personal injury, bodily injury, death and property damage arising from the use, ownership, maintenance, disuse or condition of the Premises, any improvements located on or appurtenant to the Premises, improvements or adjoining areas or ways. Lessor shall be named and protected under the terms and conditions of said policy as Lessor of the Premises.

(b) **Workmen's Compensation**. Lessee shall also purchase Worker's Compensation Insurance in compliance with all state, federal and other governmental laws, rules and regulations.

(c) **Personal Property**. Lessee shall be responsible for insuring any and all personal property that may be owned by Lessee. Any insurance that may be purchased pursuant to this paragraph and any proceeds that may be payable as a result of a loss under any such insurance shall in no way reduce, alter, diminish or modify any provisions of this Lease and specifically the indemnity provisions hereof.

(d) **Waiver of Subrogation**. The parties agree that all insurance policies obtained pursuant to this Lease shall include a clause or endorsement which shall waive the right of subrogation on the part of the insurance carrier against both Lessor and Lessee. Lessor and Lessee hereby release the other from any and all liability or responsibility to the other or anyone claiming through or under them by way of subrogation.

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(e) Miscellaneous. All insurance by virtue of this Lease shall be written with an insurance company licensed to do business within the State of West Virginia and approved by Lessor (which approval shall not be unreasonably withheld), with such policies to be nonassessable. Lessee shall provide Lessor with the original insurance policies or a Certificate of Insurance (with proof of payment thereon), which shall provide that the insuring company shall give notice in writing to Lessor within thirty (30) calendar days prior to cancellation, termination or, in the event of a material change in such insurance, for any reason whatsoever. An endorsement shall provide that any proceeds (except liability insurance proceeds) of any loss shall be payable to Lessor and Lessee as their respective interests may appear, except that in the event Lessor purchases the all-risk insurance, then any loss shall be payable to Lessor.

Lessor shall at all times during the term of this Lease (and any extension thereof) insure the Premises and common areas against all risk of direct physical loss. The insurance policy or a duly executed certificate for the same, together with satisfactory evidence of the payment of the premium thereof, shall be deposited with Lessee upon execution of this Lease and upon renewals of such policies not less than thirty (30) calendar days prior to the expiration of the term of such coverage.

(7) Assignment and Subletting; Lessor's Lien and Transfer

Assignment and Subletting: This Lease or any interest herein may not be assigned by Lessee, voluntarily or involuntarily, by operation of law or otherwise, and all or any part of the Premises shall not be subleased by Lessee without the prior written consent of Lessor, which consent shall not be unreasonably withheld. Any consent to assignment or subletting given by Lessor shall not constitute a waiver of necessity for such consent to a subsequent assignment or subletting. Notwithstanding any assignment or sublease, Lessee shall remain fully liable under the terms and conditions of this Lease and shall not be released from performing any of the terms, covenants and conditions hereof. Any assignee or sublessee (in addition to Lessee) shall be personally responsible for all payments, conditions, covenants and agreements in this Lease. Any assignment or subletting in violation of this paragraph shall be null and void.

Lessor's Lien: As security for the performance of the obligations of the Lessee under this Lease, the Lessee hereby grants the Lessor a security interest in all of the property now owned or hereafter acquired by the Lessee which is located in the Leased Premises and all proceeds and products thereof, unless such property is already subordinated to other parties. The Lessee will not remove any of such personal property from the Leased Premises until all of the Lessee's obligations under this Lease have been satisfied in full. The Lessee agrees to execute and deliver to the Lessor such financing statements, continuation statements and other instruments which might reasonably be required to perfect, protect or continue the foregoing security interest within ten (10) days after written request therefor. Lessor agrees that the security interest granted to it under this paragraph is and will remain subordinate to any security interest of Lessee's lenders as well as the interest of any holder of a purchase money security interest, whether any such security interest now exists or is later created. The preceding sentence is intended to be self-operative, but Lessor shall nevertheless promptly execute reasonable instruments of subordination to the effect if reasonable requested to do so by Lessee.

Lessor's Transfer: In the event the Lessor transfers the Lessor's interest in the Leased Premises, and the transferee assumes this lease in writing, the Lessor will thereby be released from any further obligation hereunder and the Lessee agrees to attom and look solely to the

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transferee for the performance of such obligations. The agreement of the Lessee to attorn to the designee of the Lessor will survive any termination of rights of the Landlord in the Leased Premises and the Lessee agrees to execute and deliver to the designee of the Lessor from time to time within ten (10) days after written request therefor, all instruments which might be reasonably required by the Lessor to confirm such attornment.

(8) Utilities

Lessor represents that the following utility services will be available to the Premises as of the Commencement Date: water, sewer, heat, gas and electricity. Lessee shall promptly pay all separately metered charges for water, sewer, heat, gas, electricity and other public utilities used in the kitchen. The alternative amount to be paid by Lessee to Lessor shall be a mutually agreeable percentage of all water, sewer, heat, gas, electricity and other public utilities utilized by all tenants of the Wheeling Artisan Center. The remainder of utility expenses, including electricity in the restaurant space of the River City Ale Works, LLC and all HVAC will be paid for by the Lessor. Lessee has the right to audit all bills and invoices for utilities as appropriate. Unless caused by the gross negligence or willful misconduct of the Lessor, or the failure of Lessor to fulfill its obligation under this Lease, Lessor shall not be liable for any loss or damage caused by an interruption or failure of utility services serving the Premises. If utility service is not available to the Premises for any period of three consecutive days, rental payments due under this lease shall abate until such time as utility service is restored to the premises.

(9) Liability and Indemnity Provisions

a) No Partnership or Joint Venture, Agreement not an Interest in Real Property. Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between the Lessor, its successors or assigns, on the one part, and the Lessee/Operator, its successors or assigns on the other part. Lessor and Lessee/Operator acknowledge that the relationship between them is one of Lessor and Lessee/Operator and not one of Landlord and Tenant and this Agreement shall not at any time be deemed an interest in the real estate or act as a lien of any nature against the Restaurant or the Premises. Lessee agrees that its rights to the Premises are subordinate to the rights of any current or future lender that executes a non-disturbance agreement with respect to the Premises and this lease.

This provision shall be self-operative and no farther instrument of subordination shall be required. The Lessee shall within five (5) days after written request by Lessor, execute any certificate or other instrument that the Lessor or any lender may reasonably request as to such subordination, and the Lessee hereby irrevocably constitutes and appoints the Lessor as its attorney-in-fact to execute any such certificate or instrument for and on behalf of the Lessee if Lessee shall fail to do so in compliance with the terms and conditions of the provision.

(b) Subject to Section 6(d) above, Lessee agrees to exonerate, hold harmless, protect and indemnify Lessor, or any owner of the Premises, from and against any and all losses, damages, claims, suits or actions, judgments and costs which may arise during the primary term of this Lease, and any extension thereof, for personal injury, loss of life or damaged property sustained in the Premises or the improvements and appurtenances upon the Premises, and from and against all costs, counsel fees, expenses and liabilities incurred in any such claims, the investigation thereof or the defense of any action or proceeding brought thereon; and from and against any judgments, orders, decrees or liens resultant therefrom and any fines levied by any authority for any law, regulation or ordinance by virtue of Lessee's use of the improvements and appurtenances upon the

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Premises. Lessee shall not permit any mechanic's or materialmen's liens to be filed against the Premises and hereby indemnifies and holds Lessor harmless from and against any liability, damage, expense or cost which may be incurred by Lessor in connection with any mechanic's or materialmen's liens which may be filed against the Premises as a result of actions of Lessee. This indemnity shall specifically include attorneys' fees and any costs incurred by Lessor to enforce this indemnity.

(10) Maintenance and Repairs

Throughout the primary term of this Lease (and any extension thereof), Lessor, at Lessor's sole cost and expense, shall maintain in good, substantial and sufficient condition, repair and order, the foundations, bearing and exterior walls (excluding painting thereof), flooring, subflooring, roof and all other structural parts of the Premises ("Structural Repairs"). Notwithstanding the provisions of the sentence immediately preceding, Lessee shall be responsible for any Structural Repairs caused by Lessee by reason of Lessee's occupancy or by the negligence of Lessee. Except for the Structural Repairs and the provisions of paragraph 12 of this Lease, Lessor shall, at Lessor's sole cost and expense, maintain, repair and keep the interior and exterior of the Premises painted and in clean condition and repair, including but not limited to all plate glass, glass and show windows, doors, signs, sidewalks, curbs, adjoining or in front of the Premises, all connections with steam, water, electric, gas mains and sewers, elevators, air conditioning and air cooling systems, heating apparatus, boilers, machinery and any other fixtures used in connection with the operation of the Premises.

Notwithstanding the foregoing, however, the Lessee shall, at its sole cost and expense, maintain and repair and keep all interior of the first and third floors painted and in clean condition, and, if necessary, maintain and repair all connections with steam, heater, electric, gas, and sewers located in the first and third floor kitchen area of the premises. The supply lines for the water, gas and steam, along with the electrical distribution and sewer stacks remain the responsibility of the Lessor. The Lessee's responsibilities begin where its connections are made. The parties to this agreement shall retain a private entity to clear snow, ice and debris from the sidewalks and curbs and share these expenses equally.

Lessee shall have the right, at Lessee's sole cost and expense, to make changes or alterations to the building on the Premises; provided, however, that in all cases any such changes or alterations shall be made subject to the following conditions, which Lessee agrees to observe and perform:

(a) Consent of Lessor. Lessee shall be entitled to make alterations to the Premises that are incident to repair and maintenance activities in the ordinary course of its business, without the need for any consent of Lessor. Notwithstanding the preceding sentence, Lessee shall not make any alterations to the floor plan of the Premises or any alterations that affect the structural integrity of the Wheeling Artisan Center (as reasonably determined by Lessee) without obtaining the prior written consent of Lessor to such alterations. Alterations made by Lessee under this paragraph shall be completed in a good and workmanlike manner in compliance with applicable laws.

(b) Consent of Lender. Before commencing any aforesaid change or alteration costing above \$200,000, Lessee shall procure and deliver to Lessor written consent of the holder or holders of any mortgage or deed of trust ("Mortgage") covering the Premises, if required by said encumbrance or encumbrances.

(c) Permits. No change or alteration shall be undertaken until Lessee shall have procured and paid for all required municipal and other governmental permits and authorizations of the

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various municipal departments and governmental subdivisions having jurisdiction. Lessor shall assure that all applicable building codes and zoning provisions have been met to ensure the operation of a Brewpub on the premises. All plans and specifications relating to any change or alteration shall be submitted to Lessor for Lessor's approval, subject to Section 12, which shall not be unreasonably withheld.

(d) Governmental Compliance. All work done in connection with any change or alteration shall be done in a good and workmanlike manner and in compliance with all building and zoning laws, and with other laws, ordinances, orders, rules, regulations and requirements of all federal, state and municipal governments and the appropriate departments, commissions, boards and officers thereof

(e) Signage. Lessee shall consult with the Wheeling National Heritage Area Corporation with respect to any signs to be placed on the exterior of the Wheeling Artisan Center.

(11) Condemnation

(a) Partial Taking. If, during the primary term of this Lease (or any extension thereof), ten (10) percent or more of the Premises shall be taken as a result of the exercise of the power of eminent domain (with or without litigation) or is transferred by agreement in connection with or in lieu of or under threat of condemnation, the Lessee may terminate this lease without penalty.

If, during the primary term of this Lease (or any extension thereof), less than ten (10) percent of the Premises shall be taken in any such proceeding, this Lease shall not terminate unless it is impracticable for Lessee to continue operation of its business in that portion of the Premises that remains. The rent thereafter due and payable by Lessee shall be reduced in such proportion as the nature, value and extent of the part so taken bears to the whole of the Premises. Lessor shall restore the Premises for the use of Lessee.

(b) Award. Any award granted for either partial or complete taking regarding the Premises shall be the property of Lessor. Lessee shall be entitled to such portion of the award attributable to leasehold improvements or other property of Lessee taken by the condemning authority. Matters which cannot be resolved between the parties shall be submitted to arbitration pursuant to the paragraphs immediately following.

(c) Arbitration. If Lessor and Lessee are unable to agree as to any provision contained in the condemnation paragraph of this Lease, such question or questions shall be submitted to arbitration. Such arbitration shall be submitted to one arbitrator mutually selected, if possible. If the parties are unable to agree upon one such arbitrator within fifteen (15) calendar days after the taking, the arbitration shall be by three arbitrators to be selected as set forth below. The arbitration shall be in accordance with the commercial arbitration rules of the American Arbitration Association then in effect or in accordance with the commercial arbitration rules of a similar organization, if the American Arbitration Association is no longer in existence.

One arbitrator shall be selected by each party hereto and written notice of such appointment shall be given to the other party hereto. The two arbitrators so appointed shall, within fifteen (15) calendar days after their appointment, appoint a third arbitrator, who shall serve as chairman of the board of arbitration. A hearing shall be held on the questions and controversies to be arbitrated as soon as practicable but no later than thirty (30) calendar days after the full board of arbitrators has been selected, and upon written notice thereof given by the chairman of said board to both parties hereto. At such hearing, both parties shall have the right to be present to be heard. After such hearing, the board shall render its written decision on the arbitrated questions and controversies.

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The decision of one arbitrator, if mutually selected, or the decision of a majority of the three arbitrators, if it is necessary to employ same, shall be binding and conclusive upon the parties hereto. All fees and expenses of arbitration (exclusive of attorneys' fees) shall be shared equally by the parties hereto.

In the event either party hereto, after receipt of written notice of the appointment of the first arbitrator by the other party hereto, shall fail or refuse to appoint the second arbitrator or to give written notice of such appointment within the period of fifteen (15) calendar days as aforesaid, such appointment shall be made for the defaulting party, on the application of the other party, by a judge of the court in and for the county in which the Premises is located and which court has unlimited monetary jurisdiction in civil cases. Likewise, if the first two arbitrators selected and appointed in accordance with this provision shall fail to agree upon and appoint said third arbitrator within fifteen (15) calendar days after the second arbitrator shall have been appointed by a party hereto, or by said judge for said party, said third arbitrator shall be named and appointed by another judge of said court having jurisdiction as stated above on the application of either party hereto; provided, however, that if the second arbitrator be appointed by a judge of said court, the appointment of said third arbitrator shall not be made by the same judge.

(12) Destruction of Premises and Casualty

If any building or improvements standing or erected upon the Premises shall be destroyed or damaged ("Damage") in whole or in part by fire or as a result of, directly or indirectly, war or act of God or occurring for any reason whatsoever, Lessor shall promptly repair, replace and rebuild the same ("Restoration") at least to the extent of the value and as nearly as practicable to the character of the building or improvements existing immediately prior to the Damage. During the Restoration, Lessee shall be entitled to a proportionate reduction of rental while such work is being completed, said proportionate reduction shall be based upon the extent to which the Restoration interferes with Lessee's use of the Premises. In the event (a) the Premises are encumbered by a Mortgage and the holder of the Mortgage requires that all or a portion of the proceeds of the insurance be paid to said holder, or (b) the insurance proceeds available for the Restoration are less than ninety percent (90%) of the Restoration, or (c) the Restoration cannot be completed within one hundred twenty (120) calendar days from the date of the Damage, either party, upon written notice to the other party within thirty (30) calendar days from the date of said Damage, may declare this Lease null and void and all parties hereto relieved from any further obligation hereunder.

If receipt of said notice is not received by either party within the time period set forth above, this provision shall be waived and the Lease shall remain in full force and effect. If the improvements contained on the Premises are damaged from any cause whatsoever during the last six (6) month period of this Lease, Lessor may declare this Lease null and void.

(13) Default Provisions

The occurrence of any one or more of the following events shall constitute a default and breach of this Lease by Lessee:

- (a) Failure to Pay Rent, Lessee failing to pay the rental herein reserved.
- (b) Failure to Pay Other Costs, Lessee failing to make any other payments required to be made by Lessee when due, where such failure shall continue for a period of ten (10) calendar days following written notice from Lessor to Lessee.

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(c) Failure to Keep Covenants. Lessee failing to perform or keep any of the other terms, covenants and conditions herein contained for which Lessee is responsible, and such failure continuing and not being cured for a period of thirty (30) calendar days after written notice or if such default is a default which cannot be cured within a 30-calendar-day period, then Lessee's failing to commence to correct the same within said 30-calendar-day period and thereafter failing to prosecute the same to completion with reasonable diligence.

(d) Abandonment. Lessee abandoning the Premises.

(e) Assignment of Benefit of Creditors. Lessee making any general assignment or general arrangement of Lessee's property for the benefit of Lessee's creditors.

(14) Remedies

In the event of an occurrence of default as set forth above, Lessor shall have the right to:

(a) Terminate Lease. Terminate this Lease and end the term hereof by giving to Lessee written notice of such termination, in which event Lessor shall be entitled to recover from Lessee at the time of such termination the present value of the excess, if any, of the amount of rent reserved in this Lease for the then balance of the term hereof over the then reasonable rental value of the Premises for the same period. The present value shall be determined by discounting all future excess rent amounts at a rate of ten (10) percent per annum. It is understood and agreed that the "reasonable rental value" shall be the amount of rental which Lessor can reasonably obtain as rent for the remaining balance of the initial term or renewal term, whichever is applicable; or

(b) Sue Monthly for Rents. Without resuming possession of the Premises or terminating this Lease to sue monthly for and recover all rents, other required payments due under this Lease, and other sums including damages and legal fees at any time and from time to time accruing hereunder.

(15) Holdover and Renewal

Upon expiration of the lease, term or any extension thereof, the lessee shall surrender the leased premises to the Lessor. The lessee shall remove its property and any fixtures it installed. In the event the lessee remains in possession of the premises subsequent to the expiration of the term of the lease, the hold over period shall be deemed to be a tenancy for a period of six months to six months at a rental rate at that which existed at the prior rate of the preexisting term. Such possession of the property shall be subject to the previous terms and conditions.

All Lessee's personal property, trade fixtures and equipment that are not removed by Lessee from the Leased Premises within thirty (30) days after the expiration or earlier termination of this Lease will be presumed to have been abandoned by the Lessee and Lessor may, at Lessor's option, thereafter take possession of such property and either declare the same to be the property of the Lessor, or, at the expense of Lessee, dispose of such property in any manner, and for whatever consideration the Lessor in the Lessor's reasonable discretion deems advisable.

(16) Subordination and Estoppel Letter

This Lease is subject and subordinate to all mortgages which now or hereafter may affect the Premises, subject to execution by the holder of a mortgage of a non-disturbance agreement for the benefit of Lessee, and Lessee shall execute and deliver upon demand of Lessor any and all

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instruments reasonably desired by Lessor subordinating this Lease in the manner reasonably required by Lessor to any new or existing mortgage under which a non-disturbance agreement has been given. Should Lessee fail to execute and deliver any such documents or instruments within ten (10) calendar days after receipt thereof, Lessee irrevocably constitutes and appoints Lessor as Lessee's special attorney-in-fact for the purpose solely of executing and delivering any such documents or instruments pursuant to this paragraph. Any holder of a mortgage under which a non-disturbance agreement has been given may rely upon the terms and conditions of this paragraph. Further, Lessee shall at any time and from time to time, upon not less than ten (10) calendar days' prior written notice from Lessor, execute, acknowledge and deliver to Lessor a statement in writing certifying that this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease as so modified is in full force and effect) and the dates to which rental and other charges are paid in advance, if any, and acknowledging that there are not, to Lessee's knowledge, any incurred defaults on the part of Lessor hereunder, or specifying such defaults, if any are claimed. Lessee shall attorn to any purchaser at any foreclosure sale or to any grantee or transferee designated in any deed given in lieu of foreclosure. Any subordination agreement to be executed by Lessee shall provide that as long as Lessee is current and not in default, the holder of the mortgage shall not disturb the tenancy of Lessee.

(17) Surrender of Premises

Upon the Termination Date of this Lease, Lessee shall peaceably and quietly leave and surrender the Premises.

(18) Notices

All notices, demands and requests required to be given by either party to the other shall be in writing and shall be sent by certified registered mail, return receipt requested, postage prepaid, addressed to the parties at the addresses set forth below or at such other addresses as the parties may designate in writing delivered pursuant to this provision. Any notice when given as provided herein shall be deemed to have been delivered on two (2) calendar days subsequent to the date that said notice was deposited with the United States Postal Service.

Lessor:

Jeremy S. Morris
Executive Director
Wheeling National Heritage Area Corporation
P.O. Box 350
Wheeling, West Virginia 26003

Lessee:

Jason Miller
56426 High Ridge Road
Bellaire, Ohio 43906

and

Becky Schmidt
35 Elm Crest Drive
Wheeling, WV 26003.

BSM
BSP

(19) Quiet Enjoyment

Lessor represents and warrants that:

(a) Authority. Lessor has the right to enter into and consummate this Lease.

(b) Peaceful Possession. Upon Lessee's paying the rental herein reserved and upon performing all of the terms and conditions of this Lease on Lessee's part to be performed, Lessee shall at all times during the primary term of this Lease (and any extension thereof) peacefully and quietly have, hold and enjoy the Premises. Lessee acknowledges that this is a multi-use building with other tenants and agrees to make reasonable efforts to accommodate all tenants of the building.

Lessee accepts the Premises subject to all zoning ordinances and regulations pertaining to the Premises, without responsibility or warranty by Lessor, and further Lessee accepts the Premises subject to easements, rights-of-way, restrictive covenants and reservations of record.

Lessor, or Lessor's agent and representative, shall have the right with reasonable prior notice to Lessee, to show the Premises at reasonable hours to parties interested in purchasing or leasing the same. During the period of seven (7) calendar days prior to the Termination Date, Lessor, or Lessor's agent and representative, shall have the right to place the usual "for lease" or "for sale" notices on the Premises, and Lessee agrees to permit the same to remain thereon without hindrance or molestation.

(20) Miscellaneous

(a) Choice of Law. This Lease is entered into in the State of West Virginia and shall be construed in accordance with the laws thereof.

(b) Headings and Captions. The headings and captions used in this Lease are for the convenience of reference only and shall not be used in the construction or interpretation of this Lease.

(c) Inurement. The covenants and agreements contained herein shall be binding upon and inure to the benefit of the parties hereto, their heirs, personal representatives, administrators, successors and assigns.

(d) Construction of Terms. Words of any gender used in this Lease shall be held to include any other gender, and words in the singular shall be held to include the plural, as the identity of Lessor or Lessee requires.

(21) No Waiver

No waiver by one party of any provisions hereof shall be deemed a waiver of any other provision hereof or of any subsequent breach by the other party of the same or any other provision. Lessor's consent to or approval of any act shall not be deemed to render unnecessary the obtaining of Lessor's consent to or approval of any subsequent act by Lessee. The acceptance of rental hereunder by Lessor shall not be a waiver of any preceding breach by Lessee of any provision hereof, other than the failure of Lessee to pay the particular rental so accepted, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such rent.

(22) Attorneys' Fees

In case suit shall be brought to enforce any provisions of this Lease, the prevailing party shall be awarded (in addition to the relief granted) all reasonable attorneys' fees and costs resulting from such litigation.

(23) Interest on Past-Due Obligations

Any amount due to Lessor not paid when due shall bear interest at the rate of two percent (2%) per month from the date due; provided, however, that any such payment of interest shall not excuse or correct any default by Lessee under this Lease.

(24) Memorandum of Lease

Either party, upon request from the other party, shall execute in recordable form a short form Memorandum of Lease, which Memorandum of Lease shall contain only the names of the parties, the Commencement Date and Termination Date of this Lease (and any options which may be granted hereunder), and the legal description of the Premises.

(25) Legal Counsel

By virtue of this paragraph, Lessor advises and recommends that all parties hereto obtain legal counsel to represent them in connection with the examination of title, zoning of the Premises, the execution of this Lease, tax implications of the transaction and all other aspects relative to the transaction contemplated hereby.

(26) Severability

If any sentence, paragraph or section of this Lease is held to be illegal or invalid, this shall not affect in any manner those other portions of the Lease not illegal or invalid and this Lease shall continue in full force and effect as to those provisions.

(27) Facsimile Transmittals

The parties agree that a facsimile transmittal of this Lease shall be considered as an originally executed document and shall be binding upon the parties hereto. The parties further agree that the exact, originally executed Lease which was transmitted by facsimile shall be delivered to the appropriate party via U.S. Mail, messenger, or other acceptable delivery service within seven (7) calendar days from the date of said facsimile transmittal.

(28) Additional Provisions

(a) Option To Renew. Provided the Lessee is not in default under the terms and conditions of this Lease, Lessee shall have the right to renew this Lease for two (2) additional periods of five (5) years ("Renewal Period") each under the same terms and conditions (excepting the provisions of this paragraph) as stated herein except the rent shall be increased as described below. Lessee shall be assumed to be renewing unless giving to Lessor notice in writing of Lessee's intention not to exercise the Renewal Period at least one hundred twenty (120) calendar days prior to the expiration of this Lease. In the event Lessee elects not to exercise any additional Renewal Period, Lessee shall give Lessor notice in writing at least one hundred twenty (120) calendar days prior to the expiration of the then current Renewal Period. In the event the Lessee

BS. (initials)

elects not to exercise any Renewal Period, then Lessee's right to exercise any subsequent Renewal Period pursuant to the provisions of this paragraph shall be waived.

(b) The rent for the second five (5) year term shall increase by the sum of Two Thousand Two Hundred Dollars (\$2,200) annually paid over twelve (12) monthly installments. The rent for the final five (5) year term will be negotiated and agreed upon, but under no circumstances will it increase in an amount in excess of Two Thousand Two Hundred Dollars (\$2,200) annually over the previous term.

(c) Food and Beverage Laws and Regulations: Lessee will comply with all city, county, state and federal laws and regulations regarding food and beverage operations.

(29) Acceptance and Counterparts

This Lease shall terminate unless accepted in writing by all parties, as evidenced by their signatures below, on or before May 1, 2011 ("Acceptance Deadline"). A copy of this document may be executed by each party, separately, and when each party has executed a copy thereof, such copies taken together shall be deemed to be a full and completed Lease between the parties.

(30) Exhibits

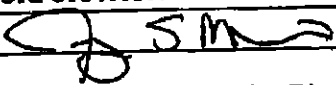
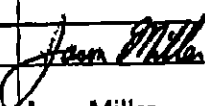

All exhibits attached to this Lease are made a part of this Lease and are incorporated herein.

- a) Floor plans
- b. Third Floor Operating Guidelines

IN WITNESS WHEREOF, the parties have executed this Gross Lease Agreement the day and year first written above.

LESSOR:

LESSEE:

WHEELING NATIONAL HERITAGE AREA CORPORATION	RIVER CITY ALE WORKS, L.L.C.
	 
Jeremy S. Morris, Executive Director	Jason Miller Becky Schmidt

BS.

Bailey & Wyant

P. L. L. C.

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Mark A. Kepple, Esq.
Email: mkepple@baileywyant.com

February 13, 2017

REPLY TO WHEELING:

Jake Dougherty
Executive Director Wheeling National Heritage Area
1400 Main Street
P.O. Box 350
Wheeling, WV 26003

**VIA HAND DELIVERY &
CERTIFIED MAIL**

Re: River City Ale Works

Dear Mr. Dougherty:

I hope this letter finds you well. I write at the request of Jason Miller and Becky Schmidt, owners of River City Ale Works, LLC. I write to clear up what appears to be a mistake or a simple misunderstanding regarding the payment of rent with regard to the space leased by River City Ale Works, LLC.

I am in receipt of letters dated February 10th, 2017 and January 31st, 2017 and a Default Notice accompanying the January 31st, 2017 letter. I have asked Jason to investigate this issue.

Jason has provided the following accounting regarding the payments of rent. Please see as follows:

MONTH	AMOUNT	CHECK NUMBER
December, 2015	\$5,787.39	29058
January, 2016	\$5,787.39	29211
February, 2016	\$5,787.39	29340
March, 2016	\$5,787.39	29517
April, 2016	\$5,787.39	29639
May, 2016	\$5,787.39	29850
May-Supplemental payment	\$ 183.33	29988
June, 2016	\$5,787.39	29987
June-Supplemental payment	\$ 183.33	30260
July, 2016	\$5,970.72	30110
August, 2016	\$5,970.72	30262
September, 2016	\$6,154.05	30481
October, 2016	\$6,154.05	30702
November, 2016	\$6,154.05	30973



February 13, 2017

December, 2016	\$6,154.05	31142
January, 2017	\$6,154.05	31243
February, 2017	<u>\$6,335.82</u>	31251
Total: \$89,925.90		

River City records reflect that all of these checks have been cashed by WNHAC with the exception of the January and February rent payments.

The following information shows the additional payments for the six percent of gross sales from events conducted on the third floor of the Artisan Center:

MONTH	AMOUNT	CHECK NUMBER
January, 2016	\$182.40	29342
February, 2016	No February activities	N/A
March, 2016	\$396.00	29640
April, 2016	\$934.50	29851
April, 2016 - prom	\$202.50	29892
May, 2016	\$1,026.30	29990
June, 2016	\$1,199.40	30077
July, 2016	\$1,059.30	30279
August, 2016	\$826.50	30690
September, 2016	\$746.10	30482
October, 2016	\$956.40	31140
November, 2016	\$596.70	30974
December, 2016	\$721.50	31141
January, 2017	<u>\$272.40</u>	31242
Total: \$9,120.00		

Thus, as you can see, the information contained in the Default Notice is incorrect and the information contained in the February 10th correspondence is also incorrect. Over this period of time, River City Ale Works has paid WNHAC \$99,045.90. Thus, in our view, WNHAC has no ability to claim default under the circumstances. River City Ale Works, LLC does not recognize the Default Notice nor any position WNHAC alleges to take pursuant to the February 10th, 2017 letter.

I hope this information serves to clarify the circumstances. As you can imagine, advising a business such as River City Ale Works, that their lease could be terminated within two weeks is very alarming. No restaurant operation such as this can operate on a month to month horizon as the February 10th, 2017 letter contemplates. For this reason, I would ask that you immediately rescind the Default Notice of January 31st, 2017 and the letter dated February 10th, 2017. I also request that you, in writing, indicate that the circumstances were indeed a mistake, there is no default by River City Ale Works, and that the lease dated May 1st, 2011 and the renewal term will continue uninterrupted. Please provide this to me in seven (7) days.

With regard to your request for Mr. Felton to evaluate the books and financial records, please ask Mr. Felton to contact me and I will work with him to provide a time that he can review this information at his convenience and pleasure.

February 13, 2017

Thank you for your consideration and understanding in this regard. I look forward to hearing from you.

Very truly yours,

Mark A. Kepple

MAK/dlt

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Mark A. Kepple, Esq.
Email: mkepple@baileywyant.com

February 16, 2017

REPLY TO WHEELING:

Jake Dougherty
Executive Director Wheeling National Heritage Area
1400 Main Street
P.O. Box 350
Wheeling, WV 26003

**VIA HAND DELIVERY &
CERTIFIED MAIL**

Re: River City Ale Works

Dear Mr. Dougherty:

I received a phone call today from Jason Miller at River City Ale Works. Jason indicated that, today, he had to give special considerations and assurances to one of the patrons of River City Ale Works. This customer had retained River City Ale Works for a wedding. She had heard that the lease for River City Ale Works was not going to continue, and thus she was concerned that she would not have a place for her wedding. As you can see, the mere rumor that the lease is jeopardy is causing complications for River City Ale Works. The devastating impact that this would have on River City Ale Works is substantial. Therefore, I again request that you clarify the mistake or misunderstanding, indicate that the lease is not in default, and that the relationship between River City Ale Works and WNHAC will continue. Please contact me to discuss and please provide me with a letter indicating the matters as discussed in this letter.

Additionally, would you please take measures to prevent rumors from being disseminated from your organization.

Thank you for your consideration and understanding in this regard. I look forward to hearing from you.

Very truly yours,

Mark A. Kepple

MAK/dlt



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Mark A. Kepple, Esq.
Email: mkepple@baileywyant.com

February 21, 2017

REPLY TO WHEELING:

Jake Dougherty
Executive Director Wheeling National Heritage Area
1400 Main Street
P.O. Box 350
Wheeling, WV 26003

**VIA HAND DELIVERY &
CERTIFIED MAIL**

Re: River City Ale Works

Dear Mr. Dougherty:

I have written to you two times over the past week requesting your immediate attention in this matter. Because you have apparently ignored my requests, I am left with no other recourse but to file suit against WNHAC. This is something that I do not want to do, but you have left me with no choice. If I do not hear from you by 12:00 p.m. today, I will file the attached lawsuit. All my client wants is to know that the default was entered by mistake and that the lease is continuing pursuant to its terms. I do not understand why this simple request cannot be honored. If you are unable to enter this agreement, please have the company's attorney contact me so that we can discuss scheduling the hearing for the issuance of a Preliminary Injunction. Certainly, the simplest solution is for you to send me a letter that indicates that the default notice is rescinded and that the lease terms will continue as they have for many years. Please contact me to discuss this option or have your attorney contact me to discuss scheduling of the Preliminary Injunction hearing.

Thank you for your consideration. I look forward to hearing from you.

Very truly yours,

Mark A. Kepple

MAK/dlt

