

Port

ASSIGNMENT AND AMENDMENT OF LEASES

This Assignment and Amendment of Leases ("Assignment") is made by and between **Carola Svedise**, as successor in interest to **Joseph Svedise**, doing business as **United Shellfish Company** ("Assignor"), **Scoma's Restaurant, Inc.**, a California corporation ("Assignee"), and the **City and County of San Francisco**, a municipal corporation ("City") operating by and through the **San Francisco Port Commission** ("Port"), and as to the provisions of Paragraph 6 only, **Michael Svedise** ("Sublessee"), who agree as follows:

RECITALS

This Assignment and Amendment of Leases is made with reference to the following facts:

A. Port, as landlord, and Assignor, as tenant, entered into three written leases dated February 11, 1976, referred to as L-9170, L-9174 and L-9175, (collectively, the "Leases"), in which Port leased to Assignor and Assignor leased from Port premises located in the City and County of San Francisco, commonly known as Pier 47, foot of Jones Street, San Francisco, California and described in greater detail in Exhibit A to each of the Leases (collectively, the "Premises"). Lease L-9175 was amended on May 7, 1979. Lease L-9170 was amended on June 16, 1983. A map of the Premises is attached hereto as Exhibit 1.

B. Assignor wishes to assign all of its right, title and interest in the Leases to Assignee on the condition that Assignor be released from all of Assignor's obligations under the Leases.

C. Port shall consent to the proposed assignment on the conditions and subject to the lease amendments set forth in this Assignment.

Now, therefore, in consideration of their mutual covenants and agreements, the parties hereto agree as follows:

AGREEMENT

1. **Effective Date of Assignment**. This Assignment shall take effect upon the first day of the month immediately following the month in which this Assignment

is approved by the San Francisco Port Commission and the Board of Supervisors, and this Assignment is fully executed by the parties hereto ("Effective Date"). Assignor shall give possession of the Premises to Assignee on the Effective Date.

2. **Assignment and Assumption.** Assignor assigns and transfers to Assignee all its right, title and interest in the Leases, and Assignee accepts the Assignment and assumes and agrees to perform, from and after the Effective Date, as a direct obligation to Port, all the provisions of the Leases, and Port hereby consents to such assignment, upon all of the terms and conditions hereof. In particular, without limiting the foregoing, Assignee shall be bound by the use restrictions and terms set forth in Paragraph 5 of the Leases as amended hereby. Port's consent to this Assignment shall not waive the restriction concerning further assignment.

3. **Consideration.** In consideration of this Assignment, Assignee agrees to pay Assignor the sum of Sixteen Thousand Dollars (\$16,000.00). Assignee agrees to pay to Port on Assignor's behalf, on or before the Effective Date hereof, all outstanding bills charged to Assignor under the Leases through July 31, 1994, in the amount of \$26,336.60. Failure of Assignee to pay such sum to Port on or before the Effective Date shall be deemed a material default under the Leases. Assignor shall be responsible for any additional amounts due the Port for the period prior to the Effective Date, and in the event that said amounts are not paid prior to the Effective Date, this Assignment shall be null and void.

4. **Indemnity.** Assignee accepts the Premises "as is," and agrees to defend, indemnify and hold Assignor harmless from any liability, claims, actions, and damages (including attorney's fees) under Paragraphs 5, 6, 7, 8 and 22 of the Leases, whether or not arising prior to the Effective Date of this Assignment.

5. **Assignment Conditioned upon Consent to Sublease and Release.** Concurrent with this Assignment, Assignee hereby agrees to sublease certain of its rights and interests under the Leases to Michael Svedise, effective on the Effective Date, in the form set forth in Exhibit 2 attached hereto ("Sublease"). Port hereby consents to the Sublease in the form attached hereto.

6. **Indemnity by Sublessee.** Sublessee and any successor to Sublessee agrees to defend, indemnify and hold Assignor harmless from any and all liability, claims, actions and damages (including attorney's fees) not assumed by Assignee, it being the intent of this indemnity agreement by Sublessee that in consideration of the cancellation of said Leases, Assignor shall be fully indemnified from all liability, claims, action, and damages (including attorney's fees), of whatsoever kind or character

whether known or unknown arising prior to or after the Effective Date of this agreement.

7. **Guarantee Deposit.** The parties acknowledge that Port now holds a guarantee deposit from Assignor pursuant to the Leases in the amount of \$2,177.66. Assignor hereby releases all claims to that sum against Port, and that sum shall be held by Port for the benefit of Assignee, subject to the provisions of the Leases. On or before the Effective Date, Assignee shall reimburse Assignor for the amount of the actual guarantee deposit on the Leases in the approximate amount of \$2,177.66, plus any interest accumulated thereon.

8. **Attorneys' Fees.** If either party hereto brings an action or proceeding (including any cross-complaint or counterclaim) against the other party by reason of a default, or otherwise arising out of this Agreement, the prevailing party in such action or proceeding shall be entitled to recover from the other party its costs and expenses of suit, including but not limited to reasonable attorneys' fees, which shall be payable whether or not such action is prosecuted to judgment. "Prevailing party" within the meaning of this Section 8 shall include, without limitation, a party who substantially obtains or defeats, as the case may be, the relief sought in the action, whether by compromise, settlement, judgment or the abandonment by the other party of its claim or defense. If any party commences an action against any of the parties arising out of or in connection with this Assignment, the prevailing party shall be entitled to recover from the losing party reasonable attorneys' fees and costs of suit.

9. **Successors.** This Assignment shall be binding on and inure to the benefit of the parties and their successors.

10. **Counterparts.** This Assignment may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11. **Notices.** All notices, requests, demands and other communications under this agreement shall be in writing and served personally on the party to whom notice is to be given, or upon transmission if delivered by facsimile, or on the third day after mailing if mailed to the party to whom notice is to be given, by first-class mail, registered or certified, postage prepaid, and properly addressed as follows:

To Assignor at: Carola Svedise
2313 Cipriani Blvd.
Belmont, CA 94002

To Assignee at: Scoma's Restaurant, Inc.
Pier 47
San Francisco, CA 94133

To Port at: Manager, Fisherman's Wharf
Port of San Francisco
Ferry Building, Room 3100
San Francisco, CA 94111

12. **Governing Law.** This agreement shall be construed in accordance with and governed by the laws of the State of California as applied to contracts that are executed and performed entirely in California.

13. **Releases.**

a. **Release of Assignor and Port Under the Leases.** As of the Effective Date, Port and Assignor, its successors and assigns, shall fully and unconditionally release and discharge each other from their respective rights and obligations under the Leases and any oral or written modifications thereof.

b. **Release of Port by Assignor.** Assignor, after having consulted with their attorneys, hereby waives the benefit of, releases and forever discharges City, Port and their commissioners, officers, employees and agents (the "Releasees"), from any and all presently existing liabilities, claims, demands, damages, causes of action, rights of offset or defenses of every kind and nature (including without limitation, tort claims), whether known or unknown, which Assignor may have against the Releasees, or which they may be entitled to assert in connection with or arising in any way out of the Leases or the Premises defined therein, including without limitation any presently existing claim or defense (including any and all claims or defenses based upon the allegedly tortious or other conduct of the Releasees or on their behalf) with respect to the Leases or the Premises defined therein, whether or not presently suspected, contemplated or anticipated to the extent the events giving rise to the same shall have occurred on or prior to the date hereof. Assignor, after having consulted with their attorneys, hereby expressly waive the benefits of the provisions of Section 1542 of the California Civil Code, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at

the time of executing the release which, if known by him, must have materially affected his settlement with the debtor.

14. **Time is of the Essence.** Time is of the essence as to each and every provision of this Lease.

15. **Amendment of Leases.**

a. **Assignment and Subletting.** Paragraph 10 of each of the Leases is hereby deleted in its entirety and replaced by the following language:

10. **Assignment and Subletting.**

10.1 **Definition of Transfer.** The occurrence of any of the following (whether voluntarily, involuntarily or by operation of Law) shall constitute a "Transfer" of this Lease:

(a) any direct or indirect assignment, conveyance, alienation, sublease, or other transfer of Tenant's interest in this Lease or in the Premises, or any part thereof or interest therein; or

(b) the use of all or part of the Premises by any person or entity other than Tenant, except Tenant's authorized agents or invitees; or

(c) if Tenant is a privately-held corporation, the dissolution, merger, consolidation or other reorganization of Tenant, or any cumulative or aggregate sale, transfer, assignment or hypothecation of fifty percent (50%) or more of the total capital stock of Tenant or any sale or cumulative sales of fifty percent (50%) or more of the value of the assets of Tenant; or

(d) if Tenant is a partnership or an unincorporated association, (i) the withdrawal or substitution (whether voluntarily, involuntarily or by operation of Law and whether occurring at one time or over a period of time) of any partner(s) owning fifty percent (50%) or more of said partnership or association, or (ii) the cumulative or aggregate sale, transfer, assignment or hypothecation of fifty percent (50%) or more of any interest in the capital or

profits of such partnership or association, or (iii) the dissolution of the partnership or association.

As used herein, the term "Transfer" includes a transfer of any interest in this Lease held by any subtenant, assignee, or transferee, but does not include any hypothecation, encumbrance or mortgage of this Lease made in accordance with Section 11.

10.2 Port's Consent Required. Tenant shall not make or permit any Transfer of this Lease except with the prior written consent of Port in each instance as evidenced by Port Commission resolution and in full compliance with all of the terms and provisions of this Section 10. Any Transfer of this Lease occurring without full compliance with all of the terms and conditions hereof shall constitute an incurable breach by Tenant and shall be voidable at the option of Port.

10.3 Request for Transfer. Tenant shall give Port at least forty-five (45) days prior written notice of any desired Transfer (herein "Notice of Request to Transfer") and shall provide Port with the following information in writing: (1) the name, address, legal composition and ownership of the proposed transferee; (2) the current balance sheet and profit and loss statements (herein "financial statements") for the proposed transferee and for any other entity or person who is to be liable for Tenant's obligations under this Lease, such financial statements to be certified in writing to be true and correct and to be prepared in accordance with generally accepted accounting principles and to cover a period of three years prior to the proposed effective date of the Transfer (or for such shorter period as the proposed transferee or other person may have been in existence); (3) a full description of the terms and conditions of the proposed Transfer, including copies of any and all proposed sublease or assignment agreements or other documents and instruments concerning the proposed Transfer; (4) a description of the proposed use of the Premises by the proposed transferee, including any required or desired alteration or improvements to the Premises that may be undertaken by such transferee in order to facilitate its proposed use; (5) complete information regarding all payments to be made or other consideration to be given in connection with the Transfer; (6) a list of personal,

business and credit references of the proposed transferee, (7) a current financial statement of Tenant, and (8) any other information, documentation or evidence as may be requested by Port, all in sufficient detail to enable Port to evaluate the proposed Transfer and the prospective transferee. Tenant's Notice of Request to Transfer shall not be deemed to have been served or given until such time as Tenant has provided Port with all information set forth hereinabove. Tenant shall immediately notify Port of any modifications to the proposed terms of the Transfer.

10.4 Port's Consent/Refusal to Consent. Upon receiving a Notice of Request to Transfer, Port shall have the right to do any of the following:

(a) Port may consent to the proposed Transfer, subject to any reasonable conditions upon such Transfer, which conditions may include, without limitation: (i) that the proposed transferee expressly assume all obligations of Tenant under this Lease without, however, Port releasing Tenant therefrom; (ii) that in the event this Lease is terminated prior to the expiration of any sublease, at the election of Port, such termination shall operate to terminate all existing subleases entered into by Tenant without further notice from Port; and (iii) that the sublease or other Transfer agreement contain: (A) an indemnification clause and waiver of claims provisions in favor of Port and City identical to those contained in Section 14 of this Lease; (B) a clause requiring the proposed transferee to name City, Port and their agents as additional insureds under all liability and other insurance policies; and (C) a clause requiring the proposed transferee to acknowledge Port's right to demand increased insurance coverage to normal amounts consistent with the proposed transferee's business activities on the Premises.

(b) Port may deny its consent to the proposed Transfer on any reasonable ground. Reasonable grounds shall include, without limitation, any one or more of the following: (i) that the proposed transferee's financial condition is or may become insufficient to support all of the financial and other obligations of this Lease; (ii) that the use to which the Premises will be put by the proposed transferee is inconsistent with the terms of this Lease or otherwise will materially and adversely affect any interest

of Port; (iii) that the nature of the proposed transferee's intended or likely use of the Premises would involve an increased risk of the use, release or mishandling of hazardous materials or otherwise increase the risk of fire or other casualty; (iv) that the business reputation or character of the proposed transferee or any of its affiliates is not reasonably acceptable to Port; (v) that the proposed transferee is not likely to conduct on the property a business of a quality substantially equal to that conducted by Tenant; or (vi) that Port has not received assurances acceptable to Port in its sole discretion that all past due amounts owing from Tenant to Port (if any) will be paid and all other defaults on the part of Tenant (if any) will be cured prior to the effectiveness of the proposed Transfer.

If Port denies its consent to the proposed Transfer pursuant to this subsection (b), and if Tenant shall so request in writing, Port shall provide to Tenant a statement of the basis on which Port denied its consent.

(c) One hundred percent (100%) of all sums paid or payable to Tenant by the transferee in excess of the then-existing Rent payable by Tenant attributable to the portion of the Premises being transferred, including without limitation, any rent and all other sums or other consideration received by Tenant as a result of the Transfer, in whatever form (less expenses for verifiable, reasonable and customary brokerage commissions, Tenant Improvements, lease concessions, value of Tenant's trade fixtures conveyed and other expenses actually paid or obligations incurred by Tenant in connection with the Transfer and/or expenses of operating the Premises paid or incurred by Tenant) shall be paid by Tenant to Port immediately upon receipt thereof by Tenant as Additional Rent hereunder. Notwithstanding the foregoing, in the event this Lease is assigned in connection with a sale of Tenant's business, including the sale of Tenant's trade fixtures at the Premises and Tenant's goodwill, and the assignee will continue to operate the same business that Tenant operated at the Premises, then the sums payable by Tenant to Port pursuant to this Section 10.4(c) shall be limited to those amounts attributable to the value of Tenant's leasehold interest and shall not include amounts attributable to the value of Tenant's goodwill, as such amounts are determined by Port in Port's reasonable discretion.

(d) Tenant acknowledges and agrees that each of the rights of Port set forth in this Section 10 is a reasonable limitation on Tenant's right to assign or sublet for purposes of California Civil Code Section 1951.4.

(e) No consent to any proposed Transfer, whether conditional or unconditional, shall be deemed to be a consent to any other or further Transfer of this Lease, or any other Transfer of this Lease on the same or other conditions. No interest of Tenant in this Lease shall be assignable by operation of law.

10.5 Fees for Review. Tenant shall reimburse Port for all costs, including without limitation attorney's fees, which are incurred by Port in connection with the review, investigation, processing, documentation and/or approval of any proposed Transfer.

10.6 No Release of Tenant. The acceptance by Port of Rent or other payment from any other person shall not be deemed to be a waiver by Port of any provision of this Lease or to be a consent to any subsequent Transfer or to be a release of Tenant from any obligation under this Lease. No Transfer of this Lease shall in any way diminish, impair or release any of the liabilities and obligations of Tenant, any guarantor or any other person liable for all or any portion of Tenant's obligations under this Lease. The joint and several liability of Tenant and Tenant's successors or transferees and the obligations of Tenant under this Lease shall not be discharged, released or impaired by any agreement by Port modifying any provision of this Lease or extending time for performance hereunder or by any waiver or failure of Port to enforce any obligations hereunder.

10.7 Assignment of Sublease Rents. Tenant immediately and irrevocably assigns to Port, as security for Tenant's obligations under this Lease, all of Tenant's interest in any rent from any Transfer of all or any part of the Premises; except that, until the occurrence of an act of default by Tenant, Tenant shall have the right to receive, collect and enjoy such rents.

b. Use of Premises. Paragraph 5 of Lease No. L-9175 is hereby amended to include the following additional language:

The Premises may also be used for a bait and tackle retail business; charter boat booking office and/or related office uses; and/or services supporting commercial and sport fishing boats, and their owners, employees, and customers (for example, laundry, restroom, and shower facilities) (collectively, "Fishing Support Uses"). Fishing Support Uses shall be limited to the area designated by cross-hatches on Exhibit 1 attached hereto.

c. City Requirements. The following language is added to the Leases as new paragraph 33:

33. City Requirements.

33.1 Non-Discrimination. Tenant shall not, in the operation and use of the Premises, discriminate against any person or group of persons solely because of race, color, creed, national origin, ancestry, age, sex, sexual orientation, disability or acquired immune deficiency syndrome (AIDS) or AIDS related condition (ARC). The provisions of Chapters 12B and 12C of the San Francisco Administrative Code, relating to nondiscrimination by parties contracting with the City and County of San Francisco, are incorporated herein by this reference and made a part hereof as though fully set forth herein. Tenant agrees to comply with all provisions of such Chapters 12B and 12C that apply to tenants of the City and County of San Francisco.

33.2 MacBride Principles-Northern Ireland. City urges companies doing business in Northern Ireland to move towards resolving employment inequities and encourages such companies to abide by the MacBride Principles. City urges San Francisco companies to do business with corporations that abide by the MacBride Principles.

33.3 Tropical Hardwood Ban. City urges Tenant not to import, purchase, obtain, or use for any purpose, any tropical hardwood or tropical hardwood product.

IN WITNESS WHEREOF, Assignor and Assignee have executed this Assignment and Amendment of Leases in the City and County of San Francisco on the dates written below.

ASSIGNOR:

Date: 11-9-94

Carola Svedise
CAROLA SVEDISE

ASSIGNEE:

SCOMA'S RESTAURANT, INC.

Date: 11-4-94

By: Thomas W. Cresson

Its: President

AS TO PARAGRAPH 6 ONLY:

SUBLESSEE:

Date: 11-7-94

Michael Svedise
MICHAEL SVEDISE

APPROVED AS TO FORM:

PORT:

LOUISE H. RENNE
CITY ATTORNEY

CITY AND COUNTY OF SAN
FRANCISCO, a municipal corporation
operating by and through the SAN
FRANCISCO PORT COMMISSION

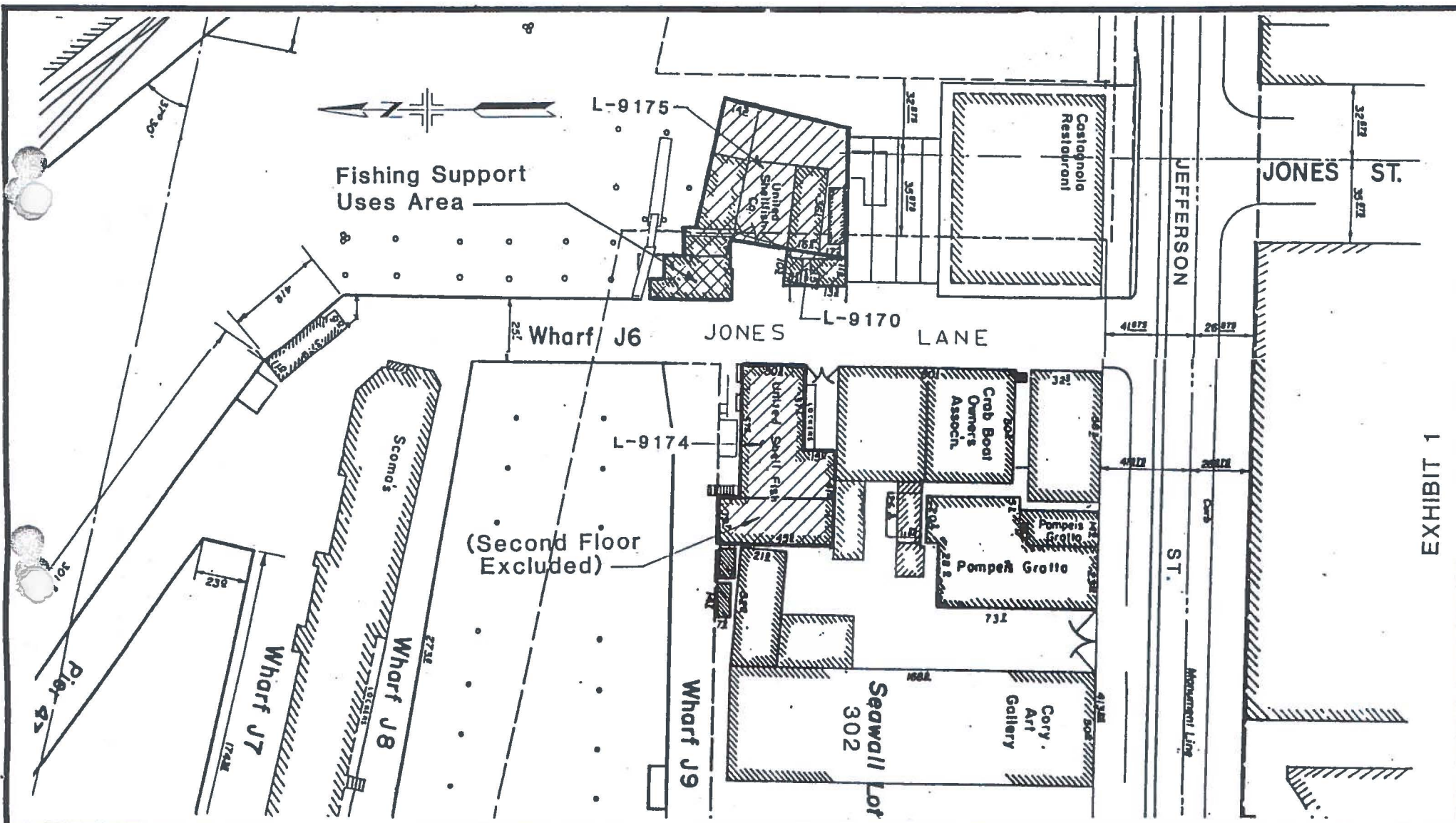
By: Neil H. Sekhri
NEIL H. SEKHRI
Deputy City Attorney

By: Dennis P. Bouey
DENNIS P. BOUEY
Executive Director

Port Commission Resolution No. 94-132

Date: 2-6-95

Board of Supervisors Ordinance No.
16-95



APPROVED BY
SAN FRANCISCO PORT COMMISSION
DATE _____

CHIEF HARBOR ENGINEER

SAN FRANCISCO PORT COMMISSION
PORT OF SAN FRANCISCO
DEPARTMENT OF ENGINEERING

UNITED SHELLFISH/SCOMA'S
LEASES

DESIGNED BY:	CHECKED BY:
DRAWN BY: R.C.	DATE: 11-1-94
CONTRACT NO.	SCALE: 1"=40'
DRAWING NO. 1470	SHEET NO.
	OF SHEETS

EXHIBIT 2
Form of Sublease

