



**Joseph M. Centorino**, Inspector General

TO: Honorable Mayor and Members of the City Commission

FROM: Joseph M. Centorino, Inspector General

DATE: September 5, 2023

PROJECT: Contract Oversight Performed of the Amended and Restated Restaurant Lease and Concession Agreements between the City and 1 Washington Avenue Corp. d/b/a Smith & Wollensky Restaurant and Related Follow-up  
OIG No. 22-21

PERIOD: January 1, 2022 – November 16, 2022

The City of Miami Beach Office of the Inspector General (OIG) examined the performance of 1 Washington Avenue Corporation d/b/a Smith & Wollensky Restaurant (Smith & Wollensky) with selected provisions in its Lease and Concession Agreements with the City. The OIG Auditor also reviewed the performance of the City Facilities and Fleet Management Department Asset Management Division, which is responsible for overseeing the agreements. This engagement initially focused on activities occurring from January 1, 2022, the inception of the agreements, through November 16, 2022.

Based on all provided information and documentation, each auditee was provided with the OIG draft report in December 2022. Subsequently, the OIG met with staff from Smith & Wollensky, Facilities and Fleet Management, and the Office of the City Attorney to discuss the report. New information was provided, which led to clarification of some issues between the City and Smith & Wollensky management. Once a consensus on these matters was reached in April 2023, the OIG performed some limited additional testing. The draft audit report was revised accordingly and disbursed to all auditees in May 2023.



## INTRODUCTION

On February 8, 1985, the City entered into a Lease Agreement with Specialty Restaurant Corporation to operate a restaurant at 1 Washington Avenue, Miami Beach, Florida. On September 22, 1993, the Mayor and City Commission adopted Resolution No. 93-20899, approving an assignment of the Lease Agreement to 1 Washington Avenue Corporation. The Lease Agreement was then assigned in 1996 to New York Restaurant Group, LLC, which had acquired the assets and interests of 1 Washington Corporation, including the leasehold in the building then housing the South Pointe Seafood House, to open the restaurant now known as Smith & Wollensky.

On April 16, 1997, the Mayor and City Commission adopted Resolution No. 97- 22359, approving an addendum to the Lease Agreement, designating New York Restaurant Group, LLC as the successor in the interest, later renamed 1 Washington Avenue Corp. (tenant). The premises consist of a two-story building, constructed in 1987 and renovated in 1997 and 2017, measuring 24,010 square feet on a 0.56-acre waterfront site overlooking the Park Bay Walk, Government Cut, and ocean access inlet that connects Biscayne Bay to the Atlantic Ocean.

The Lease Agreement contained an initial 20-year term and provided for two 10-year renewal options. The first renewal term commenced on November 7, 2005 and expired on November 6, 2015. The tenant subsequently exercised the second and final renewal term, commencing on November 7, 2015, and expiring on November 6, 2025.

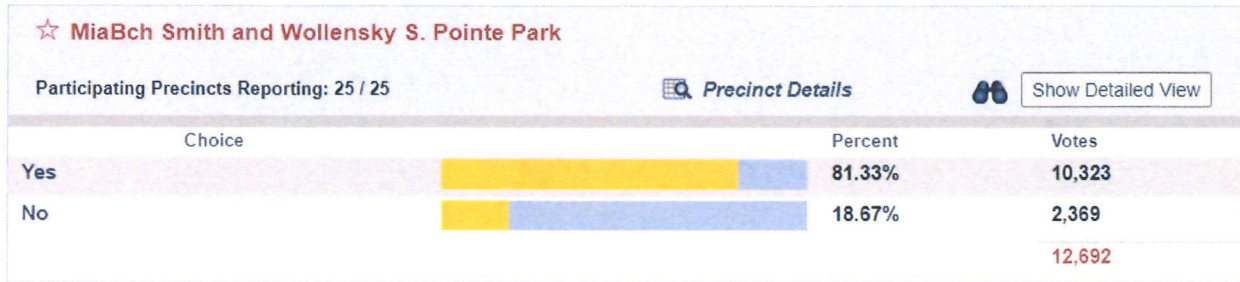
Since the last amendment to the Lease Agreement in 1997, the City has invested significantly in the surrounding South Pointe Park, creating a 22-acre world-class destination park, designed by internationally recognized Hargreaves Associates, which opened in 2009. In addition to the Lease Agreement, Smith & Wollensky signed a Concession Agreement dated October 1, 2009, which authorized a 581-square-foot food and beverage concession area located south of the premises along the cut walk.

More recently, Smith & Wollensky proposed a Lease Amendment to the City consisting of an extension of the term of the previous Lease Agreement, upgrading and improving the restaurant facility (including any improvements required to obtain the 40-year certification of the facility), and updating the financial terms of the existing Lease Agreement, including increasing the base rent and percentage rent based on appraised fair market value, and also negotiated other public benefits with the City.

On November 2, 2021, the Official General and Special Elections Ballot included Referendum 2 to extend the Lease Agreement of the Smith & Wollensky Restaurant Site at South Pointe Park through December 2045, plus renewal options, with the restaurant providing the following:

- Minimum \$3,305,970.00 in restaurant upgrades;
- Rent greater of guaranteed rent, increased annually by 2.5% (\$11,680,085 over first ten years) or percentage of revenues;
- Free restaurant mentorship seminars;
- Park's security gate installation

Referendum 2 was approved by a majority of the Miami Beach voters on November 5, 2021 as shown below:



Consequently, the City and 1 Washington Avenue Corporation agreed to the following: (1) an extension to the term of the existing Lease Agreement, through December 31, 2045, with two 10-year renewal term options; (2) increased rent due to the City for the premises, which included a payment to the City consisting of the greater of a \$1,042,550 minimum guarantee (MG) or 9% of gross sales to be phased in between 2022 and 2025, with a 2.5 percent annual escalator to the MG each year; (3) tenant Improvement to the premises, including upgrades and completion of the 40-year recertification for the premises; and (4) community benefit, including the reimbursement of the City’s costs, in an amount not to exceed \$60,000, for the City’s installation of a security gate for the entrance to the South Point Park parking lot.

At the same time, the parties entered into a Concession Agreement to manage and operate an outdoor food and beverage concession in connection with the Smith & Wollensky restaurant operation. The Concession Agreement included the following: (1) a combined outdoor concession area of 1,450 square feet; (2) a term of nine years commencing on January 1, 2022, and expiring on December 31, 2030; and (3) a concessionaire payment to the City consisting of the greater of \$400,000 MG or 10% of gross revenues derived from the operation of the Concession Area to be phased in between 2022 and 2025, with a 2.5 percent annual escalator on the MG.

Considering the significant capital investment required for the proposed Smith & Wollensky improvements to the premises and the substantial increase in rent, the parties agreed that the combined total payments by Smith & Wollensky for Annual Rent under both the Lease Agreement/Amendment and the new Concession Agreement would be capped at \$1,250,000 for 2022; \$1,500,000 for 2023; \$1,750,000 for 2024; and; \$2,000,000 for 2025, provided that the Annual Cap during this initial rent “ramp up” period would not affect the MG under the Lease Amendment, and would only be credited against the new Concession Agreement. Each lease year was to correspond with the calendar year, e.g., the lease year 2022 represents January 1, 2022, through December 31, 2022.

**FINDINGS, RECOMMENDATIONS, AND AUDITEE RESPONSES**

The following findings summarize the results of the testing performed by the OIG Auditor during the examined period, separated by whether each pertains to the Concession and/or Lease Agreement:

1. **MONTHLY MINIMUM GUARANTEE PAYMENTS WERE SUBMITTED AFTER THE DUE DATES SPECIFIED IN THE CONCESSION AND LEASE AGREEMENTS BUT INTEREST WAS NOT CHARGED RESULTING IN LATE CHARGES OF \$38,147.57 PLUS \$2,479.59 IN SALES TAXES DUE TO THE CITY.**

**Concession Agreement**

Section 4.1 "Minimum Guarantee (MG)" states, "In consideration of the City's granting of the rights provided in this Agreement, as of the Commencement Date, Concessionaire agrees to pay the City the **GREATER OF** a Minimum Guaranteed Annual Concession Fee ("MG") of Four Hundred Thousand Dollars (\$400,000.00), subject to an annual 2.5% escalator effective as of the Commencement Date, or ten percent (10%) of annual gross receipts ("Percentage Rent"). The MG shall be payable in monthly installments of Thirty-Three Thousand Three Hundred and Thirty-Three Dollars and 33/100 cents (\$33,333.33) ("Monthly Minimum Guarantee" or "MMG"). The MMG shall be due and payable in advance on the first day of each month throughout the Term of this Agreement."

Section 4.3 "Interest for Late Payment" states, "Any payment which Concessionaire is required to make to the City which is not paid on or before the respective date provided for in this Agreement shall be subject to a late charge of Fifty and 00/100 (\$50.00), plus Interest at the rate of eighteen (18%) percent per annum, or the maximum amount allowable under Florida law, whichever is greater, from the due date of payment until such time as payment is actually received by the City."

The Munis system, the City enterprise resource planning system, indicated that Smith & Wollensky remitted all its MMG Concession Agreement payments for February 2022 through November 2022 after the due dates established in Section 4.1. The late payments ranged from three to 62 days, resulting in interest of \$3,541.10 plus sales tax due to the City as of November 16, 2022.

**Lease Agreement**

Section 2.2 "Annual Rent" states, "Subject to any escalation which may be provided for in this Lease and the maximum amounts for the first four (4) Lease Years as described in Section 14 of the Lease Summary; Tenant shall pay Annual Rent for the Term in the initial amount specified in the Lease Summary, which, except for the first installment, shall be paid as follows, the monthly Minimum Guarantee shall be payable throughout the Term in equal monthly installments in advance on the first day of each calendar month of each year of the Term, such monthly installments to be in the amounts (subject to escalation) specified in the Lease Summary." Furthermore, Lease Agreement Summary #15 specifies the MG equals \$1,042,550 per year and is subject to a 2.5% annual escalator starting on the Lease Commencement Date (January 1).

Section 2.5 "Rent Past Due" states, "If any payment due from Tenant shall be overdue more than five (5) days, a late charge of five (5%) percent of the delinquent sum may be charged by Landlord. If any payment due from Tenant shall remain overdue for more than fifteen (15) days, an additional late charge in an amount equal to the lesser of the highest rate permitted by law or one and one-half (1 1/2%) percent per month eighteen (18%) percent per annum) of the delinquent amount may be charged by Landlord, such charge to be computed for the entire period for which the amount is overdue and which shall be in addition to and not in lieu of the five (5%) percent late charge or any other remedy available to Landlord."

The Munis system indicated that all Smith & Wollensky MMG Lease Agreement payments for February 2022 through November 2022 were remitted after the due dates specified in Section 2.2, ranging from 5 to 37 days late, resulting in interest of \$34,606.47 plus sales tax due to the City as of November 16, 2022.

Update:

On December 23, 2022, Smith & Wollensky paid the following invoices associated with late fees: Concession Agreement invoice #40663 for \$2,362.64 plus \$105.93 in sales tax and the Lease Agreement invoice #40605 for \$39,559.28 plus \$908.57 in sales tax. These payments totaled \$42,936.42, which is \$2,309.26 more than due (\$42,936.42 paid by Smith & Wollensky - \$40,627.16 due to the City). The resulting \$2,309.26 credit due to Smith & Wollensky was applied by the OIG Auditor to finding #4 related to the Percentage of Gross (P.G.) late fee.

Recommendation(s):

The Asset Management Division should verify that future required MG and MMG payments are remitted timely pursuant to the Concession and Lease Agreements, and if not, the appropriate late charges should be promptly levied.

Asset Management Division Response:

The Tenant has paid all applicable late fees and interest. During the beginning year of the Agreement, the Tenant had a turnover in their internal accounting division. Additionally, the Tenant changed their mailing addresses. The Tenant has collaborated with the City's Finance Department and Asset Management Division and transitioned to submitting payments via wire to ensure payments are received in a timely manner. The Asset Management Division continues to monitor the received payments on a monthly basis.

Smith & Wollensky Response: See Attachment A

**2. REQUIRED MONTHLY STATEMENTS OF GROSS SALES/RECEIPTS WERE NOT SUBMITTED TO THE CITY.**

**Concession Agreement**

Section 4.2 states the following: *...Within fifteen (15) days after each month of the term hereof, Tenant shall deliver to City a written monthly statement of the gross receipts for such month certified by Tenant to be true, accurate, and complete...*

**Lease Agreement**

Section 2.3.3 "Records, Accounts, Statements, Audits" states the following: *Tenant shall keep on the Premises, or such other place approved by Landlord, true, accurate, and complete records and accounts of all sales, gross sales, rentals, and business being transacted upon or from the Premises and shall give Landlord or Landlord's representative access during reasonable business hours, with advance notice, to examine and audit such records and accounts.*

*Within thirty (30) days after each month of the term hereof, Tenant shall deliver to Landlord a written monthly statement of the gross sales for such month certified by Tenant to be true, accurate, and complete.*

The OIG Auditor requested the related financial records and reports furnished to the Asset Management Division by Smith & Wollensky during the examined period to determine whether each was submitted timely. In response, the Asset Management Division Director said that, despite requesting the reports for months, the division had not received the required monthly reports due, according to the tenant, to its internal staff changes. Instead, Smith & Wollensky provided an unaudited Excel spreadsheet, titled "101 Miami Gross Sales," dated September 20, 2022, containing the restaurant and concessionaire sales from January 2022 to August 2022.

Recommendation(s):

Smith & Wollensky should timely submit all required reports to the City Asset Management Division in adherence to the executed agreements. If not timely received, the Asset Management Division should promptly notify Smith & Wollensky in writing of the deficiency and implement any available disciplinary actions.

Asset Management Division Response:

The Asset Management Division continues to monitor the required reports. If future reports are not timely, the Asset Division will determine the best course of action pursuant to the Agreement and discussions with the City Manager and City Attorney's office (if necessary). These will be reviewed on a case-by-case basis.

Smith & Wollensky Response: See Attachment A

**3. LACK OF CLARITY IN THE CONCESSION AND LEASE AGREEMENTS REGARDING PAYMENT REQUIREMENTS AFTER REACHING THE ANNUAL CAP.**

**Concession Agreement**

Section 4.2.1 "Cap on Rent" states, "Notwithstanding anything to the contrary under the Lease Agreement or this Agreement, in the first four Lease Years under the Lease Agreement, the sum of the total payment by Tenant under the Lease Agreement and Concessionaire under this Agreement, in the aggregate, shall be capped ("Annual Cap") as follows:

- \$1,250,000 Lease Year 2022
- \$1,500,000 Lease Year 2023
- \$1,750,000 Lease Year 2024
- \$2,000,000 Lease Year 2025

Notwithstanding anything to the foregoing, in the event the aggregate amount due under the Concession Agreement and amount due under the Lease in those Lease Years exceed the Annual Cap, such amounts **shall only be credited** to Tenant against the amounts otherwise due by Concessionaire pursuant to the Concession Agreement."

**Lease Agreement**

Lease Agreement Summary #14 "Annual Rent" states, "...The total payment by the Tenant for Annual Rent under both the Lease and the payments made by Tenant under the separate Concession Agreement, in the aggregate, shall be capped as follows (the "Annual Cap"):

\$1,250,000 Lease Year 2022,  
 \$1,500,000 Lease Year 2023,  
 \$1,750,000 Lease Year 2024, and  
 \$2,000,000 Lease Year 2025."

Section 2.2 "Annual Rent" states, "...Notwithstanding anything to the foregoing, in the event the aggregate amount due under the Concession Agreement and Annual Rent under the Lease in those Lease Years exceed the Annual Cap, such amounts shall only be credited to Tenant against the amounts otherwise due by Tenant pursuant to the Concession Agreement. In no event shall the Annual Cap impact the amounts due pursuant to the Minimum Guarantee herein."

The OIG Auditor initially determined that the total MG for 2022 in the aggregate for both the Concession Agreement (\$400,000) and the Lease Agreement (\$1,042,550) equaled \$1,442,550, which exceeds the corresponding established Annual Cap (\$1,250,000). In addition, this MG amount does not consider any P.G. payments that may be due.

Notwithstanding the Annual Cap, the OIG Auditor estimated the potential first-year credit based on the unaudited "101 Miami Gross Sales," spreadsheets received on September 20, 2022 from Smith & Wollensky, including any P.G. payments due, which resulted in a total 2022 projected credit of \$528,326 (see the table below). These spreadsheets prepared and provided by Smith & Wollensky, were not audited by the OIG, and the figures provided were assumed to be accurate and complete.

<b>2022 Projected Credit</b>	
Aggregate amount in which the MG exceeds the Annual CAP (January through December 2022)	\$192,550
Concession Agreement P.G. (January through August 2022)	\$9,406
Lease Agreement P.G. (January through August 2022)	\$326,370
<b>Total 2022 Projected Credit:</b>	<b>\$528,326</b>

The OIG was unsure how to interpret the relationship between the MMG, P.G., and Annual Cap, as the wording in the agreements was not clear. Carrying forward any excess to apply against prospective Concession Agreement amounts due, such as the above \$528,326 projected credit, would affect payments in multiple future years. As a result, the OIG Auditor contacted the Office of the City Attorney to request a Legal Opinion to clarify these relationships.

The Legal Opinion received on October 5, 2022, stated, "...Lease and the Concession Agreement is a hard cap, intended to provide Smith & Wollensky with a ramp-up period. The Minimum Rent and Percentage Rent payments under the new Lease and Concession Agreements were materially increased, as compared with the prior Lease and Concession Agreements, and this ramp-up period was a negotiated term. Although the Lease and Concession Agreements do not expressly state it, instead of accumulating large credits, Tenant is not obligated to pay more than the Annual Cap; provided, however, that they have to meet the Lease Minimum Guarantee payments at all times (subject to the appropriate Credit toward the Concession Agreement for 2022, as the Cap in 2022 is less than the aggregate of the Minimum Rent under the two agreements). Starting year 5, the

Annual Cap is no longer in effect and the Minimum Guarantee payments for the Lease and Concession Agreements, as have been escalated by 2.5% each year, would become effective."

Given this information, follow-up meetings were held on October 27, 2022, with staff from the Office of the City Attorney, Facilities and Fleet Management Department, and OIG; and on January 18, 2023, with representatives from the Office of the City Attorney, Facilities and Fleet Management Department, OIG and Smith & Wollensky. It was subsequently concluded that the Lease and Concession Agreements would be clarified as follows:

- (1) Once Smith & Wollensky reaches the maximum Annual CAP, no further payments would be required under the Lease and Concession Agreements for that given year; and
- (2) Any reference to a credit to the Concession Agreement account for payment exceeding the Annual Cap amount for the Lease and Concession Agreements would be removed.

Update:

The Lease and Concession Agreements were clarified by the Office of the City Attorney on March 9, 2023. The clarification stated that for the second through fourth Contract/Lease Years, to ensure that Smith & Wollensky pays the Minimum Guarantee as required by Section 2.2 of the Lease Agreement without exceeding the Annual Cap, (a) Smith & Wollensky shall pay the monthly Minimum Guarantees under the Lease and Concession Agreements and (b) Percentage Rent shall be determined and paid, subject to the Annual Cap, promptly following the end of each Lease/Contract Year.

Recommendation(s):

The Asset Management Division should ensure that Smith & Wollensky accurately pays the MMG and the MG until it equals the established CAP from the second contract year (2023) through the fourth contract year (2025). Afterwards, Smith & Wollensky should timely remit the MMG and P.G. payments due pursuant to the agreements.

Asset Management Division Response:

The Asset Management Division concurs with the recommendation of the OIG. See Attachment B

Office of the City Attorney Response: See Attachment C

4. ***THE PERCENTAGE GROSS PAYMENTS FOR THE FIRST CONCESSIONAIRE AND LEASE YEAR WERE NOT REMITTED TIMELY RESULTING IN \$43,248.08 IN INTEREST/LATE CHARGES DUE TO THE CITY PLUS \$2,811.13 IN SALES TAXES.***

**Concession Agreement**

Section 4.1 "Minimum Guarantee (MG)" states the following: *In consideration of the City's granting of the rights provided in this Agreement, as of the Commencement Date, Concessionaire agrees to pay the City the **GREATER OF** a Minimum Guaranteed Annual Concession Fee ("MG") of Four Hundred Thousand Dollars (\$400,000.00), subject to an annual 2.5% escalator effective as of the Commencement Date, or ten percent (10%) of*



annual gross receipts ("Percentage Rent"). The MG shall be payable in monthly installments of Thirty-Three Thousand Three Hundred and Thirty-Three Dollars and 33/100 cents (\$33,333.33) ("Monthly Minimum Guarantee" or "MMG"). The MMG shall be due and payable in advance on the first day of each month throughout the Term of this Agreement.

Section 4.2 "Percentage of Gross (P.G.) vs. MG" states the following: *In the event, the Percentage Rent for any month exceeds the MMG for the said month, Concessionaire shall pay to City the difference between Percentage Rent and the Minimum Guarantee on or before the 15th of the subsequent month.*

Section 4.3 "Interest for Late Payment" states the following: *Any payment which Concessionaire is required to make to the City which is not paid on or before the respective date provided for in this Agreement shall be subject to a late charge of Fifty and 00/100 (\$50.00), plus Interest at the rate of eighteen (18%) percent per annum, or the maximum amount allowable under Florida law, whichever is greater, from the due date of payment until such time as payment is actually received by the City."*

The Munis system indicated all Smith & Wollensky P.G. Concession Agreement payments for February 2022, through August 2022, were not remitted prior to the due dates specified in Section 4.2, resulting in interest due to the City of \$1,085.42 as of November 16, 2022 plus sales tax. P.G. payments were only calculated by the OIG Auditor through August 2022, because if paid, the P.G. payments would have equaled the Annual CAP and no additional monies would be due until the 2023 Contract year.

### **Lease Agreement**

Lease Agreement Summary #16 specifies that the Percentage Rent equals the sum of 9% of gross sales. Section 2.3.1 of the Lease Agreement defines gross sales as all receipts, whether collected or accrued, derived by tenant (or any licensee, concessionaire, or sub-tenant of tenant) from all business conducted upon or from the premises, including, without limitation, receipts from the sale of food, beverage, alcoholic beverages, merchandise, rental of space, or from any other source whatsoever; provided, however, that gross sales shall not include gratuities (tips) and taxes. Section 2.3.2 lists the following summarized items excluded from gross sales: the cost or value of meals or discounts given to its employees, the cost or value of food and beverage used for entertainment and business promotion purposes by its officers and employees, and receipts from off-site retail sales.

Section 2.2 "Annual Rent" states the following: *...Additionally, in the event the Percentage Rent for any month exceeds the Minimum Guarantee for said month, Tenant shall pay to City the difference between Percentage Rent and the Minimum Guarantee on or before the 15th of the subsequent month...*

Section 2.5 "Rent Past Due" states the following: *If any payment due from Tenant shall be overdue more than five (5) days, a late charge of five (5%) percent of the delinquent sum may be charged by Landlord. If any payment due from Tenant shall remain overdue for more than fifteen (15) days, an additional late charge in an amount equal to the lesser of the highest rate permitted by law or one and one-half (1 1/2%) percent per month eighteen (18%) percent per annum) of the delinquent amount may be charged by Landlord, such charge to be computed for the entire period for which the amount is*

*overdue and which shall be in addition to and not in lieu of the five (5%) percent late charge or any other remedy available to Landlord.*

The Munis system indicated all Smith & Wollensky P.G. Lease Agreement payments for February 2022 through August 2022 were not remitted prior to the due dates specified in Section 2.2, resulting in interest due to the City of \$42,162.66 as of November 16, 2022 plus sales tax. P.G. payments were only calculated by the OIG Auditor through August 2022, because if paid, P.G. payments by Smith & Wollensky would have equaled the Annual CAP and no additional monies would be due until the 2023 Contract year.

Update:

The Office of the City Attorney stated in a March 9, 2023 email that for the second through fourth Contract/Lease Years (2023 through 2025), the Percentage Rent shall be calculated and collected after year-end financial information is available and a reconciliation is performed. Once year-end gross sales data is finalized, Smith & Wollensky should pay the amount of percentage rent due, if any, subject to the Annual Cap.

On November 18, 2022, Smith & Wollensky paid Concession Agreement invoice #39295 for \$732.89 plus \$47.64 in sales tax and Lease Agreement invoice #39296 for \$25,581.29 plus \$1,662.78 in sales tax. Then, Smith & Wollensky paid invoice #40663 on December 23, 2022. Given these payments, and after applying the \$2,309.26 credit calculated in finding #1, it was determined that \$15,725.34 including sales tax was due related to P.G. late payments. This outstanding balance was applied to finding #9 of this audit report, which provides an updated calculation concerning the net of any amounts due and/or any credits earned.

Recommendation(s):

The Asset Management Division should verify that future required P.G. payments are remitted timely, and if not, the appropriate late charges should be promptly levied.

Asset Management Division Response:

The Asset Management Division will continue to monitor the required payments. If future payments are not timely, the Asset Division will determine the best course of action pursuant to the Agreement and discussions with the City Manager and City Attorney's office (if necessary). These will be reviewed on a case-by-case basis.

Smith & Wollensky Response: See attachment A

**5. SALES TAX RELATED TO THE JULY 2022 CONCESSION MMG PAYMENT WAS UNDERBILLED RESULTING IN \$1,950 DUE TO THE STATE.**

Florida Statutes (F.S.), Section 212.031(1)(a) – "Tax on rental or license fee for the use of the real property," states, "it is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property unless such property is specifically exempt." In addition, FS 212.031 (1)(c) asserts that for the exercise of such privilege, a tax is levied at the rate of 5.5 percent, plus any applicable discretionary sales surtax, on

the total Rent or license fee charged for such real property by the person charging or collecting the rental or license fee.

The discretionary sales surtax rate is the tax rate imposed by the county where the real property is located. There is no limitation on the amount of surtax for the rental, lease, let, or license to use commercial real property. As per form DR-15DSS Discretionary Sales Surtax for Calendar Year 2022, the corresponding surtax rate for Miami-Dade County is 1% for Calendar Year 2022.

The total rent charged includes all consideration due and payable by the tenant to the landlord for the privilege or right to use or occupy the real property. Payments for services required to be paid by the tenant as provided in the lease or license agreement, such as charges for common area maintenance, customer parking provided at no charge to the customer, or janitorial services, are included in the total rent charged and subject to sales tax and surtax.

The OIG Auditor examined all related invoices during the designated period and determined that the sales tax was accurately calculated for each month, except for the MMG payment pertaining to the July 2022 Concessionaire Agreement (invoice #37480). The Asset Management Division mistakenly invoiced Smith & Wollensky \$216.67 in state sales tax instead of the \$2,166.67 due ( $\$33,333.33 \times 6.5\%$ ), resulting in an \$1,950.00 (\$2,166.67 - \$216.67) underpayment to the State of Florida Department of Revenue.

Update:

The Asset Management Division created invoice # 40766 on December 21, 2022 billing Smith & Wollensky for the \$1,950.00 in sales tax due. Smith & Wollensky promptly paid the \$1,950.00 due on January 25, 2023.

Recommendation(s):

The City Finance Department should include the \$1,950.00 in its next sales tax payment to the State of Florida Department of Revenue.

Asset Management Division Response:

The Asset Management Division concurs with the recommendation of the OIG and has asked the Finance Department to remit such payment to the State. See Attachment B.

**6. *EXIGIS PARAMETERS WERE NOT ALIGNED WITH ALL INSURANCE REQUIREMENTS LISTED IN THE LEASE AND CONCESSION AGREEMENTS.***

**Concession Agreement**

Section 11 Concessionaire Insurance Requirements states, "Prior to occupying the Concession Area and throughout the Term of the Agreement (including renewal periods), Concessionaire shall, at its sole cost and expense, comply with all insurance requirements of the City. It is agreed by the parties that Concessionaire shall not occupy the Demised Premises until proof of the following insurance coverage have been reviewed and approved by the City's Risk Manager. All insurance policies required below shall be issued by companies authorized to do business under the laws of the State of Florida. Provider shall indicate that insurance coverage has been obtained which meets the requirements

as outlined below by submitting original certificates of insurance to the City's Risk Manager and Asset Manager respectively:

11.1.1. Worker's Compensation for all employees of the provider as required by Florida Statute 440 and Employer's Liability coverage in accordance with the Florida Statutory requirements.

11.1.2. Commercial General Liability on a comprehensive basis in an amount not less than \$1,000,000 combined single limit per occurrence, for bodily injury and property damage. City of Miami Beach must be shown as an additional insured with respect to this coverage.

11.1.3. Additionally, Concessionaire will be insured for the following coverage: 11.1.3.1. Business interruption insurance sufficient to insure Concessionaire for no less than one (1) full year of loss of business.

11.1.4. Intentionally Omitted

11.1.5. All-Risk property and casualty insurance, written at a minimum of eighty (80%) percent of replacement cost value and with replacement cost endorsement, covering all leasehold improvements installed in the Demised Premises by or on behalf of Concessionaire and including without limitation all of Concessionaire's personal property in the Demised Premises (including, without limitation, inventory, trade fixtures, floor coverings, furniture, and other property removable by Concessionaire under the provisions of this Agreement).

11.2 The insurance coverage required shall include those classifications, as listed in standard liability insurance manuals, which most nearly reflect the operations of the provider.

11.3 Any insurance coverage required above must include a waiver of subrogation in favor of the City. 11.4 The company must be rated no less than "A" as to management, and no less than "Class VII" as to financial strength, by the latest edition of Best's Insurance Guide, published by A.M. Best Company, Oldwick, New Jersey, or its equivalent, subject to the approval of the City Risk Management Division.

**CERTIFICATE HOLDER MUST READ:**  
C/O Insurance Tracking Services, Inc. (ITS)  
P.O. Box 20270  
Long Beach, CA 90801

**Lease Agreement**

Article VII Insurance and Indemnity Section 7.1 states, "Tenant shall, throughout the term (and any other period when Tenant is in possession of the Premises), maintain at its sole cost the following insurance:

(A) All risks property insurance against all risks of loss to any tenant improvements or betterments, at full replacement cost with no coinsurance penalty provision.

(B) Comprehensive General liability insurance on an occurrence basis, including products and completed operations, property damage, bodily injury and property damage, bodily

injury and personal & advertising injury with limits no less than \$2,000,000 per occurrence. If a general aggregate applies, either the general aggregate limit shall apply separately to this location or the general aggregate limit shall be twice the required occurrence limit. The policy must be endorsed to include Liquor Liability.

(C) Worker's compensation and employer's liability insurance in compliance with applicable legal requirements.

(D) Business interruption insurance, sufficient to insure Tenant for no less than one (1) full year of loss of business, with the Landlord named thereon as loss payee to the extent permitted by applicable law.

(E) Any other form of insurance which Landlord, acting reasonably, requires from time to time in form, in amounts, and for risks against which a prudent tenant would insure, but in any event not less than that carried by comparable restaurant establishments in Miami-Dade County, Florida.

(F) Building Improvements. All policies referred to above shall: (i) be taken out with insurers licensed to do business in Florida and reasonably acceptable to Landlord's City Manager; (ii) be in a form reasonably satisfactory to Landlord's City Manager; (iii) be non-contributing with, and shall apply only as primary and not as excess to any other insurance available to Landlord; (iv) contain an undertaking by the insurers to notify Landlord by certified mail not less than thirty (30) days prior to any material change, cancellation, or termination, and (v) with respect to subsection (A), contain replacement cost, demolition cost, and increased cost of construction endorsements. Certificates of insurance on Landlord's standard form or, if required by Landlord's City Manager, copies of such insurance policies certified by an authorized officer of Tenant's insurer as being complete and current, shall be delivered to Landlord's City Manager promptly upon request. If Tenant fails to take out or to keep in force any insurance referred to in this Section 7.1, or should any such insurance not be approved by Landlord, and Tenant does not commence and continue to diligently cure such default within two (2) business days after written notice by Landlord to Tenant specifying the nature of such default, then Landlord has the right, without assuming any obligation in connection therewith, to effect such insurance at the sole cost of Tenant and all outlays by Landlord shall be paid by Tenant to Landlord as additional Rent without prejudice to any other rights or remedies of Landlord under this Lease. Tenant shall not keep or use in the Premises any article which may be prohibited by any fire or casualty insurance policy in force from time to time covering the Premises.

(G) Additional insurance requirements:

**(i) Additional Insured**

City of Miami Beach, its officers, officials, employees, and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of operations performed by or on behalf of the Tenant including materials, parts, or equipment furnished in connection with such operations.

**(ii) Primary Coverage**

For any claims related to this contract, the Tenant's insurance coverage shall be primary insurance coverage at least as broad as ISO CG 20 01 04 13 as respects the City of Miami Beach, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City of Miami Beach, its officers, officials, employees, or volunteers shall be excess of the Tenant's insurance and shall not contribute with it.

**(iii) Legal Liability Coverage**

The property insurance is to be endorsed to include Legal Liability Coverage with a limit equal to the replacement cost of the leased property.

**(iv) Notice of Cancellation**

Each insurance policy required above shall provide that coverage shall not be cancelled, except with notice to the City of Miami Beach c/o EXIGIS Insurance Compliance Services.

**(v) Waiver of Subrogation**

Tenant hereby grants to the City of Miami Beach a waiver of any right to subrogation which any insurer of said Tenant may acquire against the City by virtue of the payment of any loss under such insurance. Tenant agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies whether or not a waiver of subrogation endorsement has been issued by the insurer, and each party shall indemnify the other against any loss or expense, including reasonable attorneys' fees, resulting from the failure to obtain such waiver.

**(vi) Self-Insured Retentions**

Self-insured retentions must be declared to and approved by the City. The City may require the Tenant to purchase coverage with a lower retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention. The policy language shall provide, or be endorsed to provide, that the self-insured retention may be satisfied by either the named insured or City.

**(vii) Acceptability of Insurers**

Insurance must be placed with insurers authorized to do business in the State of Florida with a current A.M. Best rating of A:VII or higher, unless otherwise acceptable to the City.

**(viii) Verification of Coverage**

Tenant shall furnish the City with original certificates and all amendatory endorsements, or copies of the applicable insurance language, effecting coverage required by this contract. The City reserves the right to require complete, certified copies of all required insurance policies, including endorsements, required by these specifications, at any time.

**(ix) Special Risks or Circumstances**

The City of Miami Beach reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

**(x) CERTIFICATE HOLDER MUST READ:**

CITY OF MIAMI BEACH  
c/o EXIGIS Insurance Compliance Services  
P.O. Box 4668 – ECM #35050  
New York, NY 10163-4668

Kindly submit all certificates of insurance, endorsements, exemption letters to our servicing agent, EXIGIS, at:

Certificates-miamibeach@riskworks.com

Compliance with the foregoing requirements shall not relieve the Tenant of his liability and obligation under this section or under any other section of this Agreement."

The City entered into a master customer agreement with Exigis LLC (Exigis) on July 14, 2018, to use its RiskWorks software. One of the software's claimed benefits on its website is to centralize the administration and automate the request, follow-up, processing, auditing, and tracking of Certificates of Insurance or COIs.

The OIG Auditor examined the Smith & Wollensky Lease and Concession Agreement insurance profiles in the Exigis software. Although both profiles were listed as compliant with the entered parameters, it was noted that the parameters set and reviewed by Exigis were not aligned with the requirements in the agreements, so the Exigis evaluation may not accurately reflect whether Smith & Wollensky was fully compliant with all contractual requirements. As Asset Management Division staff did not create the vendor profile in Exigis, they assumed the entered parameters were complete and accurate and relied on the Exigis evaluation results showing compliance.

OIG staff inquiries determined that Exigis staff evaluated compliance based on the requirements entered in its software by the City. The parameters set in the Exigis software for the Smith & Wollensky Concession and Lease Agreements are as follows:

## Summary

Compliance Type: Type 5 - Leases  
Vendor Type: Type 5 - Leases

Commercial General Liability

Workers Compensation/Employer's Liability

- Financial Strength Rating must be greater than or equal to B+
- Financial Size Category must be greater than or equal to VI
- Per Occurrence Limit must be greater than or equal to \$1,000,000
- City of Miami Beach shown as an additional insured with respect to this coverage
- Certificate Holder must contain CITY OF MIAMI BEACH
- Financial Strength Rating must be greater than or equal to B+
- Financial Size Category must be greater than or equal to VI
- Statutory Limit as required by applicable law.
- Certificate Holder name must contain City of Miami Beach

Given these incomplete parameters in the Exigis software, the OIG Auditor had concerns as to whether the insurance maintained by Smith & Wollensky was actually compliant with the requirements in the agreements. Therefore, the OIG Auditor requested the Risk Management Division Director review the COIs downloaded from Exigis to determine their compliance with the agreements on October 28, 2022. The response received in a November 3, 2022, e-mail stated, "Both agreements would be considered compliant per my review of the agreement and COI."

### Recommendation(s):

The Exigis software parameters related to Smith & Wollensky should be revised by City staff to mirror the insurance requirements listed in Section 11 of the Concession Agreement and Section 7.1 of the Lease Agreement.

### Risk Management Division Response:

No responses were received.

### Asset Management Division Response:

The Asset Management Division concurs with the recommendation of the OIG and has consulted with the City's Risk Management Division. See Attachment B.

## **7. *PARKING IMPACT FEES WERE NOT CORRECTLY BILLED RESULTING IN AN UNDERPAYMENT OF \$27,143.01 FOR THE 2021/22 AND 2022/23 FISCAL YEAR.***

Section 3.13.3 of the Lease Agreement states, "Considering the City of Miami Beach's zoning parking requirement is 138 spaces, Tenant shall be responsible to pay the Landlord's parking impact fee for 33 spaces; provided that one-half (1/2) of such fee shall be credited against Tenant's monthly Annual Rent payment as set forth in 2.1 of the Lease. Landlord hereby agrees that Tenant shall not be responsible or liable for any and all parking impact fees, if any, for the remaining 105 parking spaces."

The Planning Department invoices applicable entities Parking Impact fees pursuant to Article V- Fee in Lieu of Parking Program, Section 130-132 of the City Code, and the Appendix A- Fee Schedule approved by the City Commission each year. The invoice is usually created on May 1 each year and is related to June 1st through May 31st.



The OIG Auditor's examination of the Munis system found that the Planning Department created invoices #30932 (FY 2021/22) and #36247 (FY 2022/23) on May 1, 2021 and May 1, 2022 respectively. Both invoices were for \$16,800.00 which was calculated as follows: ((32 parking spaces x \$300.00 per parking space per Lease Agreement) + 9 additional parking spaces x \$800.00 per parking space per Appendix A) = \$9,600.00 + \$7,200.00 = \$16,800.00 due). The OIG Auditor's subsequent calculations found that the amounts billed did not appear to comply with Section 3.13.3.

As a result, the OIG Auditor contacted the Planning Department employee who created the invoices on March 21, 2023, to determine which figure was correct and the reasons for the identified differences. In response, the Planning Department Deputy Director replied that the department was not notified that a new contract/agreement was negotiated and that it will review the new terms against the invoice.

On March 28, 2023, the Planning Department Deputy Director replied that she "had an opportunity to review the new agreement and will be invoicing S&W (Smith & Wollensky) based on the current lease terms." She also stated that after discussing the issues with the Planning Department Director, it was determined that the deficiency was related to 45 spaces, based on a 600-seat capacity.

On April 7, 2023, the Planning Department created invoice #42921 billing Smith & Wollensky \$27,143.01 to correct the deficiency identified by the OIG Auditor for the 2022 and 2023 fiscal year Parking Impact fees. The invoice was adjusted based on the 600-seat capacity indicated on the annual Business Tax Receipt (BTR) billed to Smith & Wollensky (600 seats/4 seats per parking space = 150 parking spaces – 105 parking spaces that are the responsibility of the landlord (City) = 45 parking spaces x \$800.00 per parking space per Appendix A = \$36,000.00 due) prorated for the period applicable to the new agreement (January 2022 through May 2022).

However, Section 3.13.3 stated that the Parking Impact fee is based on 552 seats, which would indicate that Smith & Wollensky owes \$26,400.00 to the City (552 seats/4 seats per parking space = 138 parking spaces - 105 parking spaces that are the responsibility of the landlord (City) = 33 parking spaces x \$800.00 per parking space per Appendix A = \$26,400.00 due). Confusion arose as to whether Smith & Wollensky owes Parking Impact fees based on the 600 seats billed through the BTR process or the 552 seats referenced in Section 3.13.3 of the executed agreement. The Office of the City Attorney was subsequently requested to clarify this issue.

In response, the OIG auditor contacted Deputy City Attorney, who had various communications with an attorney representing Smith & Wollensky. He subsequently forwarded the OIG Auditor an April 18, 2023 email from the Smith & Wollensky attorney stating, "I spoke with our client. The 600 seats for our lease and the BTR (Business Tax Receipt) are confirmed. And we are fine with paying the parking impact fee for the delta between 150 spaces and the actual spaces onsite." The Deputy City Attorney also confirmed that the corresponding credit to be applied to the Annual Rent is based on the amount paid by Smith & Wollensky and not on the amount listed in Section 3.13.3.

Based on this information, the OIG Auditor determined that invoice #42921 was properly calculated. As of May 1, 2023, invoice #42921 had not been paid by Smith & Wollensky.

Recommendation(s):

Once Smith & Wollensky remits payment for invoice #42921, the Asset Management Division should apply the 50% credit to the Annual Rent pursuant to Section 3.13.3 of the Lease Agreement. The OIG Auditor estimates the credit to equal \$17,946.58 for the 2022 calendar year.

In addition, the Asset Management Division should confirm that Smith & Wollensky is accurately invoiced for its future Parking Impact fees. Once payment is remitted, the corresponding credit should be applied to the Annual Rent.

The Asset Management Division should develop and implement a procedure whereby it timely notifies pertinent Planning Department staff of any new or revised agreements that include Parking Impact fees, to better ensure that the corresponding Parking Impact fees are accurately calculated and billed.

Planning Department Response: See Attachment D.

Asset Management Division Response:

Now that the Asset Management Division has become aware of the Planning Department's involvement in the parking impact fees, this procedure will be followed. See Attachment B.

Smith & Wollensky Response: See Attachment A

8. ***SUGGESTION - THE CONCESSION AGREEMENT REQUIRES THE SUBMITTAL OF AN ANNUAL STATEMENT OF GROSS RECEIPTS AND A REPORT BY AN INDEPENDENT CPA FIRM REGARDING SMITH & WOLLENSKY'S COMPLIANCE WITH ESTABLISHED AGREED-UPON PROCEDURES, BUT THE LEASE AGREEMENT WITH ITS SIGNIFICANTLY LARGER AMOUNTS DUE, HAS NO SUCH REQUIREMENTS.***

**Concession Agreement**

*Section 5 states the following: ...Concessionaire shall submit to the City Finance Department's Revenue Manager, within sixty (60) days of the end of each Contract Year, an annual statement of gross receipts in a form consistent with generally accepted accounting principles. Additionally, within one hundred twenty (120) days of the end of each Contract Year, a report applying agreed-upon procedures shall be submitted to the City Finance Department's Revenue Manager, such statement shall be accompanied by a report from an independent CPA firm which shall perform certain agreed upon procedures, as described in Exhibit 5, attached hereto.*

**Lease Agreement**

*Section 2.3.3 states the following: ...Within sixty (60) days after each fiscal year, Tenant shall deliver to Landlord a written annual statement of the gross sales for such fiscal year. Said statement shall be certified as true, accurate and complete by Tenant, by and through a duly authorized officer of Tenant. The Landlord's City Auditor or his/her designee shall have the right, during regular business hours and upon the Landlord's written request to*

*Tenant to audit, inspect, examine and copy the Tenant's fiscal and financial records, books, ledgers, statements, reports, tax returns and documents relating to this Lease and the Tenant's revenues thereunder through the Term and Renewal Term(s), if any, of this Lease and for three (3) years following its expiration or cancellation. The Tenant agrees to have such audit(s) conducted at such locations within Miami-Dade County, Florida as are mutually convenient to the parties.*

Section 5 of the Concession Agreement requires Smith & Wollensky to submit an annual statement of gross receipts in a form consistent with generally accepted accounting principles. In addition, it must have an independent CPA firm prepare a report related to its performance of specific agreed-upon procedures, which is to be submitted to the City within 120 days of the end of each contract year. This requirement gives the City increased confidence that the reported concession figures are complete and accurate.

Although the amounts due under the Lease Agreement significantly exceed those due under the Concession Agreement, Section 2.3.3 of the Lease Agreement only requires that a duly authorized officer of Smith & Wollensky certify the submitted annual statement of gross receipts as true, accurate, and complete, and provides for the City's right to inspect and review the supporting documents and records locally. This requirement provides significantly less protection for the City than does Section 5 of the Concession Agreement and places a greater burden on the City to determine compliance with the stated terms at its expense, despite the significantly greater amounts due and the higher risk of inaccurate reporting under the Lease Agreement.

Recommendation(s):

The OIG recommends that the Lease Agreement be amended to require the completion of annual audits by an independent CPA firm.

Asset Management Division Response:

The Asset Management Division has discussed this recommendation with the City Manager and the City Attorney's office. The City will not pursue an amendment to the agreement at this time. See Attachment B.

**9. FOLLOW-UP - SMITH & WOLLENSKY MAY BE ENTITLED TO A \$184,935.62 CREDIT INCLUDING SALES TAX (\$112,300.97 YEAR 2022 + \$72,634.65 YEAR 2023) DUE TO OVERPAYMENTS**

On March 10, 2023, the OIG Auditor examined the Munis system to determine whether the Asset Management Division accurately invoiced Smith & Wollensky for the deficiencies noted in this report. In doing so, it was determined that Smith & Wollensky remitted \$1,370,212.50 to the City during the 2022 Lease/Contract year, which exceeds the 2022 Annual Cap of \$1,250,000.00. Therefore, it remitted \$120,212.50 plus sales tax of \$7,813.81, more than due. Conversely, Smith & Wollensky owed the City \$15,725.34 in late fees including sales tax stemming from P.G. payments as reported in finding #4. As such, after deducting the late fees dues the OIG believes that Smith & Wollensky may be entitled to a credit of \$112,300.97 for the Lease/Contract year 2022, as shown below.

Period	Invoice #	MMG Lease Paid	PG Lease paid	Late fees paid	Invoice #	MMG Concession Paid	PG Concession Paid	Late fees Paid	Cumulative	Total MMG Paid
1/1/2022	34446/34964	\$86,879.17	\$0.00	\$0.00	34445/34963	\$33,333.33	\$0.00	\$0.00	\$120,212.50	\$120,212.50
2/1/2022	34964	\$86,879.17	\$0.00	\$0.00	34963	\$33,333.33	\$0.00	\$0.00	\$240,425.00	\$120,212.50
3/1/2022	35222	\$86,879.17	\$0.00	\$0.00	35221	\$33,333.33	\$0.00	\$0.00	\$360,637.50	\$120,212.50
4/1/2022	35824	\$86,879.17	\$0.00	\$0.00	35823	\$33,333.33	\$0.00	\$0.00	\$480,850.00	\$120,212.50
5/1/2022	36337	\$86,879.17	\$0.00	\$0.00	36336	\$33,333.33	\$0.00	\$0.00	\$601,062.50	\$120,212.50
6/1/2022	36776	\$86,879.17	\$0.00	\$0.00	36775	\$33,333.33	\$0.00	\$0.00	\$721,275.00	\$120,212.50
7/1/2022	37481	\$86,879.17	\$0.00	\$0.00	37480	\$33,333.33	\$0.00	\$0.00	\$841,487.50	\$120,212.50
8/1/2022	37976	\$86,879.17	\$0.00	\$0.00	37975	\$33,333.33	\$0.00	\$0.00	\$961,700.00	\$120,212.50
9/1/2022	38485	\$86,879.17	\$0.00	\$0.00	38484	\$33,333.33	\$0.00	\$0.00	\$1,081,912.50	\$120,212.50
10/1/2022	39002	\$86,879.17	\$0.00	\$0.00	39001	\$33,333.33	\$0.00	\$0.00	\$1,202,125.00	\$120,212.50
11/1/2022	39517	\$86,879.17	\$0.00	\$0.00	39516	\$33,333.33	\$0.00	\$0.00	\$1,322,337.50	\$120,212.50
12/1/2022	40605	\$14,541.67	\$0.00	\$39,559.28	40663	\$33,333.33	\$0.00	\$2,362.64	\$1,370,212.50	\$47,875.00
10/1/2022	39296	\$0.00	\$0.00	\$25,581.29	39295	\$0.00	\$0.00	\$732.89	\$1,396,526.68	\$0.00

Amount Paid by S&W to the City **\$1,370,212.50**

2022 CAP \$1,250,000.00

Overbilled and Paid by S&W -\$120,212.50

Sales tax credit (120,212.50 x 6.5%) **-\$7,813.81**

Finding 4 Late fee balance due on Percentage rent payments including sales tax **\$15,725.34**

Estimated 2022 Credit **-\$112,300.97**

For Lease/Contract year 2023, the Asset Management Division invoiced Smith & Wollensky \$68,201.55 for January 2023 additional rent (Lease Agreement \$53,074.54 + Concessionaire Agreement \$15,127.01) which was subsequently paid in full by Smith & Wollensky. The clarification provided by the Office of the City Attorney stated that for the second through fourth contract years, the percentage rent shall be determined and paid, subject to the Annual Cap, promptly following the end of each Lease/Contract Year. As a result, Smith & Wollensky may be entitled to an additional credit of \$68,201.55 for year 2023 plus sales tax (\$4,433.10) as of March 1, 2023.

Recommendation(s):

The Asset Management Division should calculate and apply a credit to Smith & Wollensky for any payments during the 2022 and 2023 Contract/Lease years that exceed the Annual CAP.

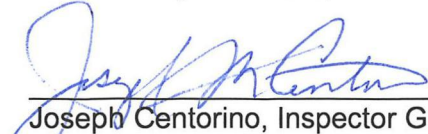
Asset Management Division Response:

The Asset Management Division will apply credits accordingly. See Attachment B.

Smith & Wollensky Response: See Attachment A

All management responses received pursuant to City Code Section 2-256(h) were included in this final report.

Respectfully submitted,

  
\_\_\_\_\_  
Joseph Centorino, Inspector General

09/05/2023  
Date

  
\_\_\_\_\_  
Mark Coolidge, Chief Auditor

09/05/2023  
Date

cc: Alina T. Hudak, City Manager  
Eric Carpenter, Deputy City Manager  
Mark Taxis, Assistant City Manager  
Rickelle Williams, Assistant City Manager  
Marla Alpizar, Human Resources Department Director  
Rafael Paz, City Attorney  
Elizabeth Miro, Interim Facilities and Fleet Management Department Director  
Ozzie Dominguez, Asset Management Division Director  
Thomas Mooney, Planning Department Director  
Jason Greene, Chief Financial Officer  
Peter J. Kelly, Smith & Wollensky, Director of Finance

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July 19, 2023

**VIA E-MAIL**

Mark D. Coolidge, CPA, CIA, CIGA, CIGE  
Chief Auditor  
Office of the Inspector General  
Email: [MarkCoolidge@miamibeachfl.gov](mailto:MarkCoolidge@miamibeachfl.gov)

**Re: Contract Oversight -- Smith & Wollensky Restaurant**

Dear Mr. Coolidge:

We represent 1 Washington Avenue Corp., the owner of "Smith & Wollensky" ("Smith"), and are in receipt of the second draft of the audit report dated June 5, 2023 ("Report") prepared by the Office of Inspector General ("IG"). We have set forth below our responses to the Report and are available to discuss them with you at any time.

We appreciate the time and effort expended by your office in this matter and thank you for giving us the opportunity to comment on the Report. In the course of reviewing the issues below, we thought it would be beneficial to explain our client's longstanding relationship with the City so that the issues can be viewed in their proper context.

**Overview**

1. History

For 22 years, the City of Miami Beach (the "City") and Smith have had an outstanding landlord-tenant relationship. As evidence of this great relationship, the City agreed in 2021 to renew its lease with Smith, subject to an increase in rent pursuant to appraisals that were ordered by the City. Moreover, as evidence of the excellent reputation of our client among City residents, the renewal of the lease received the approval of over 81% of the voters at the required referendum for the lease renewal.

In the 22 years that Smith and the City had a landlord/tenant relationship under the original lease, the City never imposed a late fee on Smith. Similarly, during that entire time, Smith never sent a notice of breach to the City on any topic. To the extent that one of Smith's rent payments

may have been a few days late or one of the City's obligations under the lease may have "fallen through the cracks," one party would simply pick up the phone and call the other to resolve the matter promptly and with no issues. Based on this history, our client was taken aback when the City began imposing late fees, which is something it never did before.

## 2. Late Fees

On January 1, 2022, the term commenced under the renewed lease that had recently been signed by the parties. As with the preceding 22 years, the renewed lease proceeded with no issues. On December 5, 2022, the IG issued a draft audit report for the period January 1, 2022 to November 16, 2022. In that report, the IG began recommending the imposition of late fees for rental payments, even for rental payments that were just one day late. As part of this approach, the IG recommended the imposition of late fees totaling almost \$90,000 for 2022. After the issuance of the draft report, the City's finance department sent invoices to Smith for the above late fees.

The IG's recommendation of late fees and the City's invoicing for same are concerning and improper for multiple reasons. First, every lease in Florida carries with it the obligation that the parties deal fairly with one another. (This obligation is generally referred to as the covenant of good faith and fair dealing.) The City had clearly established a course of dealing by never imposing a late fee on Smith in 22 years. Before changing that longstanding course of conduct, which understandably had been relied upon by Smith, the City should have provided notice to our client that its approach was going to change. Instead, no notice was provided and the City simply invoiced Smith for thousands and thousands of dollars.

Second, in addition to the covenant of good faith and fair dealing, it is well known that every landlord has the obligation to mitigate its damages (if any). It is inappropriate for a landlord to act in such a way as to unjustly reap a windfall from a tenant due to late fees assessed or in other ways. In this regard, the City should have provided timely notice to Smith if the landlord decided to impose any late fees on any payment. However, the City repeatedly failed to provide timely notice. For example, one of the late fees under the lease is the assessment of 18% interest per annum on payments that are late more than 15 days. The first time our client received notice from the City of late fees and 18% interest was on an invoice dated September 30, 2022, whereby the City levied late fees and interest for the period March 2022 to August 2002 with interest accruing from March 2022. This failure to provide timely notice of the imposition of 18% interest while interest was running was completely improper.

## 3. Percentage Rent Not Due in Year One

A major part of the late fees claimed by the IG arise from the differing views of the parties regarding percentage rent during the first lease year. However, despite the large amount of text

devoted to this item in the Report, the item is actually revenue-neutral to the City and nothing more than a difference in bookkeeping approach.

The rent structure under the lease and concession agreement consists of a minimum guaranteed rent and percentage rent (based on a percentage of gross receipts). Percentage rent applies only to the extent that it exceeds minimum rent. For example, assume that minimum rent in a given year is \$1 million and percentage rent (gross receipts multiplied by a percentage) for the same period is \$1.1 million. In the latter example, the percentage rent due would be \$100,000.

Under the terms of the lease and concession agreement, the aggregate rent under the lease and concession agreement is subject to an annual cap during the first four lease years. In the first lease year (2022), the annual cap exceeds the annual minimum rent due. Because percentage rent is due only to the extent it exceeds minimum rent, and because the full amount of minimum rent would not be reached in year one, no percentage rent was due in year one. As a result, Smith did not make percentage rent payments in year one nor did Smith submit reports of gross receipts used to calculate percentage rent as there was no need to do so.

Even though Smith paid the required amount of rent in year one (\$1.25 million), the IG claims that the percentage rent reconciliations should have been done monthly as opposed to annually. However, regardless of the bookkeeping approach used regarding monthly vs annual reconciliation, the total rent due in year one would be the same. Despite this fact, the IG is seeking thousands and thousands of dollars in late fees because Smith reconciled percentage rent annually vs. monthly, even though it would have made no difference in terms of total rent paid. The IG also criticizes Smith for failure to submit monthly statements of gross receipts. Again, such statements were not needed as there was no percentage rent due.

### **Comments to Sections of the Report**

(The numbers below in the left margin correspond to the section numbers of the Report.)

1. Payments made in October and November were received by the City less than 5 days after the due dates. (See attached FedEx receipts.) Therefore, the late fees claimed should be reduced by the sum of \$10,981.39. Also see *Overview* section above.
2. Monthly percentage rent statements were not due in year one as no percentage rent was due. See *Overview* section above.
3. The protocol of annual reconciliation of percentage rent for years 2-4 should be documented by the parties in an email. The percentage rent payment made for the month of January 2023 in the sum of \$72,634.65 should be returned to Smith via a credit against minimum rent due next



Mark D. Coolidge, CPA, CIA, CIGA, CIGE  
July 19, 2023  
Page 4

month (and the following months, if needed, in order to apply the full credit). See *Overview* section above.

4. See *Overview* section above. We are available to go over the dates of each payment and invoice with you.

5-7. No comments.

8. The Lease Agreement was heavily negotiated by both parties and is now a final binding document that cannot be amended without the consent of both parties. Smith does not agree to an amendment for purposes of requiring lease audits.

9. We agree that the rent overpayment for 2022 is in the amount of \$128,026.31 including sales tax. That sum should be returned to Smith via a credit against minimum rent due next month (and the following months, if needed, in order to apply the full credit).

### **Conclusion**

We are available to discuss the above with you at your convenience.

Nothing contained herein or in any other communications made by Smith regarding the IG Report shall be deemed an admission that any breaches or defaults under the lease or concession agreement were committed by Smith. All rights, remedies and arguments of Smith are expressly reserved.

Sincerely,

Shutts & Bowen LLP



Alexander I. Tachmes

cc: Alina Hudak (via email: [AlinaHudak@miamibeachfl.gov](mailto:AlinaHudak@miamibeachfl.gov))  
Eric Carpenter (via email: [EricCarpenter@miamibeachfl.gov](mailto:EricCarpenter@miamibeachfl.gov))  
Rafael A. Paz, Esq. (via email: [RafaelPaz@miamibeachfl.gov](mailto:RafaelPaz@miamibeachfl.gov))  
Ricardo J. Dopico, Esq. (via email: [RicardoDopico@miamibeachfl.gov](mailto:RicardoDopico@miamibeachfl.gov))

**Contract Oversight Performed of the Amended and Restated Restaurant Lease and Concession Agreements between the City and 1 Washington Avenue Corp. d/b/a Smith & Wollensky Restaurant and Related Follow-up**  
**OIG No. 22-21**

---

**Finding No. 1 Recommendation(s):**

The Asset Management Division should verify that future required MG and MMG payments are remitted timely pursuant to the Concession and Lease Agreements, and if not, the appropriate late charges should be promptly levied.

Asset Management Division Response:

The Tenant has paid all applicable late fees and interest. During the beginning year of the Agreement, the Tenant had a turnover in their internal accounting division. Additionally, the Tenant changed their mailing addresses. The Tenant has collaborated with the City's Finance Department and Asset Management Division and transitioned to submitting payments via wire to ensure payments are received in a timely manner. The Asset Management Division continues to monitor the received payments on a monthly basis.

**Finding No. 2 Recommendation(s):**

Smith & Wollensky should timely submit all required reports to the City Asset Management Division in adherence to the executed agreements. If not timely received, the Asset Management Division should promptly notify Smith & Wollensky in writing of the deficiency and implement any available disciplinary actions.

Asset Management Division Response:

The Asset Management Division continues to monitor the required reports. If future reports are not timely, the Asset Division will determine the best course of action pursuant to the Agreement and discussions with the City Manager and City Attorney's office (if necessary). These will be reviewed on a case-by-case basis.

**Finding No. 3 Recommendation(s):**

The Asset Management Division should ensure that Smith & Wollensky accurately pays the MMG and the MG until it equals the established CAP from the second contract year (2023) through the fourth contract year (2025). Afterwards, Smith & Wollensky should timely remit the MMG and P.G. payments due pursuant to the agreements.

Asset Management Division Response:

The Asset Management Division concurs with the recommendation of the OIG.

**Finding No. 4 Recommendation(s):**

The Asset Management Division should verify that future required P.G. payments are remitted timely, and if not, the appropriate late charges should be promptly levied.

Asset Management Division Response:

The Asset Management Division will continue to monitor the required payments. If future payments are not timely, the Asset Division will determine the best course of action pursuant to

the Agreement and discussions with the City Manager and City Attorney's office (if necessary). These will be reviewed on a case-by-case basis.

**Finding No. 5 Recommendation(s):**

The City Finance Department should include the \$1,950.00 in its next sales tax payment to the State of Florida Department of Revenue.

Asset Management Division Response:

The Asset Management Division concurs with the recommendation of the OIG and has asked the Finance Department to remit such payment to the State.

**Finding No. 6 Recommendation(s):**

The Exigis software parameters related to Smith & Wollensky should be revised by City staff to mirror the insurance requirements listed in Section 11 of the Concession Agreement and Section 7.1 of the Lease Agreement.

Asset Management Division Response:

The Asset Management Division concurs with the recommendation of the OIG and has consulted with the City's Risk Management Division.

**Finding No. 7 Recommendation(s):**

Once Smith & Wollensky remits payment for invoice #42921, the Asset Management Division should apply the 50% credit to the Annual Rent pursuant to Section 3.13.3 of the Lease Agreement. The OIG Auditor estimates the credit to equal \$17,946.58 for the 2022 calendar year.

In addition, the Asset Management Division should confirm that Smith & Wollensky is accurately invoiced for its future Parking Impact fees. Once payment is remitted, the corresponding credit should be applied to the Annual Rent.

The Asset Management Division should develop and implement a procedure whereby it timely notifies pertinent Planning Department staff of any new or revised agreements that include Parking Impact fees, to better ensure that the corresponding Parking Impact fees are accurately calculated and billed.

Asset Management Division Response:

Now that the Asset Management Division has become aware of the Planning Department's involvement in the parking impact fees, this procedure will be followed.

**Finding No. 8 Recommendation(s):**

The OIG recommends that the Lease Agreement be amended to require the completion of annual audits by an independent CPA firm.

Asset Management Division Response:

The Asset Management Division has discussed this recommendation with the City Manager and the City Attorney's office. The City will not pursue an amendment to the agreement at this time.

**Finding No. 9 Recommendation(s):**

The Asset Management Division should calculate and apply a credit to Smith & Wollensky for any payments during the 2022 and 2023 Contract/Lease years that exceed the Annual CAP.

Asset Management Division Response:

The Asset Management Division will apply credits accordingly.

# ATTACHMENT C

March 9, 2023

**Re: OIG Draft Report dated December 5, 2022 re: Amended and Restated Restaurant Lease and Concession Agreement between the City and 1 Washington Avenue Corp. dba Smith & Wollensky Restaurant**

## **Office of the City Attorney Response to Item 3**

Under the Lease Agreement in effect until December 31, 2021, Smith & Wollensky paid a minimum guarantee of \$95,000 and percentage rent each Lease Year as follows: (a) 2.5% of gross revenues up to \$2.5 million in the applicable Lease Year; (b) 3.0% of gross revenues up to \$3 million in the applicable Lease Year; and 3.5% of gross revenues over \$3 million in the applicable Lease Year.

Under the new Lease Agreement, approved pursuant to a voter referendum in 2021, effective January 1, 2022 Smith & Wollensky pays a minimum guarantee of \$1,042,550 with percentage rent equal to 9% of gross revenues. The minimum guarantee is subject to annual escalation of 2.5%.

Under the Concession Agreement in effect until December 31, 2021, Smith & Wollensky paid a minimum guarantee of \$120,000 (this amount would have increased to \$140,000 in 2024) with percentage rent equal to 10% of gross receipts.

Under the new Concession Agreement, effective January 1, 2022, Smith & Wollensky pays a minimum guarantee of \$400,000 with percentage rent equal to 10% of gross receipts.

As previously indicated in a communication from this Office to the Office of the Inspector General (OIG) dated October 5, 2022, because of the substantial increase in the rents and concession fees payable pursuant to the new Lease Agreement and new Concession Agreement, the City and Smith & Wollensky agreed to a hard cap (the "Annual Cap") on the aggregate annual rent and concession fee to be collected under the two agreements during the first four years, with the Annual Cap commencing at \$1,250,000 and increasing by \$250,000 each year to allow for a ramp-up period. After the fourth year, the Annual Cap no longer applies.

At a meeting on October 27, 2022 which included representatives from this Office, the Asset Management Division, Smith & Wollensky and the OIG, the meeting attendees discussed clarifying the two agreements by (a) providing that once Smith & Wollensky reached the Annual Cap, no further payments would be required for that year and (b) removing references to a credit for payments exceeding the Annual Cap. This Office has given further consideration to the matter and does not believe an amendment is required.

The Annual Cap language in both the new Lease Agreement and the new Concession Agreement must be interpreted and applied in the context of (a) the reason the Annual Cap was included and (b) the overriding principle contained in the last sentence of Section 2.3 of the Lease Agreement: **“In no event shall the Annual Cap impact the amounts due pursuant to the Minimum Guarantee [under the Lease Agreement].”**

The Annual Cap for 2022 was \$1,250,000 and Smith & Wollensky paid \$1,250,000 in rent and concession fees in 2022. Smith & Wollensky has also paid late fees because it failed to make payments when due.

The Lease Agreement and the Concession Agreement contemplate that percentage rent is to be collected monthly. However, the Lease Agreement and Concession Agreement provisions should be construed in such manner as will avoid frustrating the purpose of the Annual Cap or compromising the overriding principle contained in the last sentence of Section 2.3 (i.e., that the Minimum Guarantee under the Lease Agreement must be paid in all circumstances).

If both the minimum guarantee and percentage rent is collected in respect of both agreements on a monthly basis, the Annual Cap will almost certainly be exceeded before Smith & Wollensky has paid the Minimum Guarantee under the Lease Agreement. Accordingly, percentage rent in respect of the second through fourth years should only be calculated and collected after year-end financial information is available and a reconciliation is performed. Once year-end gross sales data are finalized, Smith & Wollensky should pay the amount of percentage rent due, if any, subject to the Annual Cap. The total percentage rent paid for each of these years should be allocated pro rata between the Lease Agreement and Concession Agreement based on the gross sales allocable to each agreement for the applicable year relative to aggregate gross sales under both agreements for such year. Applying the Annual Cap in this manner is both consistent with the parties' intent and with

the express provisions of the new Lease Agreement and new Concession Agreement.

The Asset Management Division should send a written communication to Smith & Wollensky to clarify the manner in which the Annual Cap will be applied for the second through fourth Lease Years substantially in the form attached as Exhibit 1.

Exhibit 1  
Clarification of Annual Cap

Reference is made to that certain Amended and Restated Lease Agreement (the "Lease") dated November 5, 2021 between the City of Miami Beach (the "City"), as Landlord, and 1 Washington Avenue Corp. dba Smith & Wollensky ("S&W"), as Tenant, and to that certain Concession Agreement (the "Concession Agreement", and together with the Lease, the "S&W Agreements") dated November 5, 2021 between the City and S&W. Capitalized terms used in this letter and not otherwise defined shall have the meanings given to them in the Lease and/or the Concession Agreement, as applicable.

This letter is being provided to clarify the applicability of the Annual Cap in the S&W Agreements.

As you are aware, the S&W Agreements both include minimum annual guarantees as well as percentage rent. Both agreements establish an Annual Cap that applies to the aggregate payments of Annual Rent and Concession Fees made by S&W pursuant to both agreements during the first four years, as follows:

1. \$1,250,000.00 for Lease/Contract Year 2022
2. \$1,500,000.00 for Lease/Contract Year 2023
3. \$1,750,000.00 for Lease/Contract Year 2024
4. \$2,000,000.00 for Lease/Contract Year 2025

The Lease stipulates that the Annual Cap will not impact the Minimum Guarantee required to be paid pursuant to the Lease.

S&W has paid rent and concession fees equal to the Annual Cap for 2022. For the second through fourth Contract/Lease Years, to ensure that S&W pays the Minimum Guarantee as required by Section 2.2 of the Lease without exceeding the Annual Cap, (a) S&W shall pay the monthly minimum guarantees under the Lease and Concession Agreement and (b) percentage rent shall be determined and paid, subject to the Annual Cap, promptly following the end of each Lease/Contract Year. The amount of percentage rent determined to be due after application of the Annual Cap shall be



allocated pro rata between the Lease and Concession Agreement based on the gross sales allocable to each agreement for the applicable Lease/Contract Year relative to aggregate gross sales under both agreements for such Lease/Contract Year.

# MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, [www.miamibeachfl.gov](http://www.miamibeachfl.gov)

Office of the City Attorney  
Tel: 305-673-7470, Fax: 305-673-7002

September 5, 2023

**SENT VIA E-MAIL:** [ATachmes@shutts.com](mailto:ATachmes@shutts.com)

Alexander I. Tachmes  
Shutts & Bowen LLP  
200 South Biscayne Blvd., Suite 4100  
Miami, FL 33131

**Re: Contract Oversight – Smith & Wollensky Restaurant**

Dear Mr. Tachmes,

The Office of the Inspector General (“OIG”) has provided this Office a copy of your letter dated July 19, 2023 regarding the second draft of the OIG’s Contract Oversight Report dated June 5, 2023 (the “Report”) relating to that certain Amended and Restated Restaurant Lease dated November 5, 2021 (the “New Lease”) by and between the City of Miami Beach (the “City”) and 1 Washington Avenue Corp. (“Smith”) and that certain Concession Agreement dated November 5, 2021 (the “Concession Agreement”) between the City and Smith. Capitalized terms used in this letter and not otherwise defined shall have the meanings given to them in the Lease or Concession Agreement, as applicable.

Your letter contains a number of misstatements and/or mischaracterization of certain facts. In addition, your legal analysis ignores certain express provisions in the New Lease and Concession Agreement. Accordingly, the City deems a response is necessary. For convenience, we have used the same headings and subheadings in your letter.

## **Overview**

### 1. History

The City agrees that, overall, it has had a great landlord-tenant relationship with Smith during Smith’s time at the Premises. And the City would certainly not have renewed the lease dated February 8, 1985 (the “Original Lease”) between the City and Smith’s predecessor-in-interest, Specialty Restaurants Corporation, if the City did not believe Smith was a good tenant. As you point out, the New Lease was heavily negotiated. One of the new terms the parties agreed

to is reflected in Section 2.5 which includes the imposition of a five percent (5%) late fee if any payment due from Tenant is overdue by more than five (5) days and interest at the lesser of the highest rate permitted by law or one and one-half percent (1.5%) per month (eighteen percent (18%) per annum). The Original Lease did not include a late fee provision. So, the City never imposed a late fee during the 22 years the City and Smith maintained a landlord/tenant relationship under the Original Lease is because it did not include any provision allowing the City to impose late fees. There was, therefore, no "history" or course of conduct for Smith to rely upon. The New Lease contained new terms that the Original Lease did not contain. The individuals who negotiated the New Lease should have notified the appropriate Smith personnel of all modified or new provisions in the heavily negotiated New Lease, including the late fee provision.

## 2. Late Fees

You assert that the City first sent invoices for late fees after the OIG issued its draft report in this matter. The City's invoices 39296 and 39296 for late fees were issued on September 30, 2022. Jessica Romero of the OIG first requested copies of the New Lease and Concession Agreement from Gabriela Alfonsin in the Asset Management Division on Friday, September 30, 2022. On Monday, October 3, 2022, Ms. Alfonsin responded that she had been working on the agreement. On Tuesday, October 4, 2023, Ms. Romero first notified Ozzie Dominguez and Ms. Alfonsin that the OIG was performing a random monitoring of the Smith agreements. The first draft report of the OIG was not issued until December 5, 2022. The OIG and the Facilities Department ultimately worked together to accurately calculate the late fees owed under the New Lease and Concession Agreement. However, the Asset Management Division was already conducting its own internal audit of the two agreements at the time the OIG decided to monitor the two agreements. (See Exhibit A, which includes an email thread reflecting communications between Jessica Romero and Gabriela Alfonsin between September 30, 2022 and October 6, 2022.)

Your suggestion that the City has violated the implied covenant of good faith and fair dealing by changing its course of conduct without notice is inappropriate. First, the implied covenant of good faith and fair dealing cannot be used to vary the terms of an express contract. Second, as alluded to above, a "course of conduct" modification of terms is inapplicable here as the Original Lease did not include a provision for the imposition of late fees. Suggesting that Smith can rely on the City's failure to enforce a non-existent provision is absurd. Third, each invoice issued to Smith in respect of minimum guarantee payments due under the New Lease and Concession Agreement contains the following legend in bold: "**Interest and Penalty charges may be assessed if amount due is not paid by the due date.**" Any suggestion that the City did not provide notice to Smith that it would seek interest and late fees is factually incorrect. Fourth, the City, in its discretion, elected not to impose late fees or interest with regard to Smith's delinquent payment of the balance owed on the minimum guarantee for the month of January 2022. This payment was 37 days late. Although the individuals who negotiated the New Lease should have ensured that the appropriate Smith personnel were aware of the new (higher) Minimum Guarantee, the City, acting in good faith, gave Smith a break for the first month under the New Lease. Finally, Smith paid the various invoices issued by the City for late fees and interest, thereby affirming, through its course of conduct, the terms of the New Lease and conceding that such interest was due and owing.

Your mitigation of damages argument is similarly flawed. First, you state the City imposed interest from March 2022 to August 2022. It is apparent you have not reviewed the interest

calculations. Interest was charged based on the date invoices were issued; interest was charged based on the number of days of delinquency<sup>1</sup>. The City collected the same amount of interest it would have collected if the invoices had been issued after receipt of the late payments. Certainly, the City could not have issued invoices for interest prior to receiving payment as the City would not have known how much interest to charge. Second, I previously indicated in my email to you dated June 30, 2023, there is no requirement in the Lease that notice be provided for late fees or interest to be assessed. Section 2.1 of the Lease requires that demand be made by Landlord for payments other than Annual Rent. The City demanded the payment of late fees and interest by issuing invoices. Third, although notice is not required, as indicated above, notice was in fact provided with each invoice issued pursuant to the New Lease and Concession Agreement.

### 3. Percentage Rent Not Due in Year One

As written, the express terms of both the heavily negotiated New Lease and Concession Agreement require Smith to pay both the minimum guarantee payments on the first day of each calendar month AND percentage rent within fifteen (15) days following the end of each calendar month in respect of the prior month. The last sentence in Section 2.2 of the New Lease contemplates that there could be amounts due under the Concession Agreement and the Lease that exceed the Annual Cap and that such amounts would only be credited against amounts otherwise due pursuant to the Concession Agreement:

Notwithstanding anything to the foregoing, in the event the **aggregate amount due under the Concession Agreement and Annual Rent** under the Lease in those Lease Years exceed the Annual Cap, such amounts shall only be credited to Tenant against the amounts otherwise due by Tenant pursuant to the Concession Agreement. In no event shall the Annual Cap impact the amounts due pursuant to the Minimum Guarantee herein. (emphasis added)

In brief, the language in the New Lease (and similar language in Section 4.2.1 of the Concession Agreement) expressly reflects the parties' intent that overpayment would be credited against amounts due under the Concession Agreement. There is nothing suggesting that payments should cease when the Annual Cap is reached, nothing that suggests that percentage rent is to be paid other than on the date due and certainly nothing specifically regarding year one. Notably, the language refers to the aggregate amount due under the Concession Agreement and Annual Rent due under the New Lease. It does not refer to the MMG nor the monthly Minimum Guarantee.

At a meeting held on October 27, 2022 which included representatives from this Office, the Asset Management Division, Smith & Wollensky and the OIG, the meeting attendees discussed clarifying the two agreements by (a) providing that once Smith & Wollensky reached the Annual Cap, no further payments would be required for that year and (b) removing references to a credit for payments exceeding the Annual Cap. This agreement reached by Smith and the City at this meeting was intended to ease the accounting complications that would arise if the Lease and Concession Agreements were strictly construed and amounts in excess of the Annual Cap held as a credit. The late fees and interest due in respect of 2022 were calculated, and payments were made by Smith, on the basis of this arrangement.

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<sup>1</sup> Interest on percentage rent was accrued from March through August, not because the City failed to notify Smith it would charge late fees and interest, but because Smith, in violation of its obligations, did not pay percentage rent as it became due.

Subsequently, at a meeting held on March 8, 2023, having given further consideration to this matter, this Office suggested a different solution to be applied prospectively for the second through fourth years (i.e., 2023, 2024 and 2025) under both agreements. Specifically, this Office suggested that instead of proceeding with payments of both minimum guarantees and percentage rents until the Cap was reached, that Smith should pay the minimum guarantees pursuant to both the New Lease and Concession Agreement percentage rent in respect of the second through fourth years should only be calculated and collected after year-end financial information is available and a reconciliation is performed. Once year-end gross sales data are finalized, Smith is to pay the amount of percentage rent due, if any, subject to the Annual Cap. This suggestion was memorialized in this Office's comments to the OIG's initial draft report dated December 5, 2022. This Office also suggested that the Asset Management Division should send a written communication to Smith to clarify the manner in which the Annual Cap is to be applied for the second through fourth Lease Years.

You state that whether percentage rent was collected on a monthly basis as required by the lease or reconciled at the end of the year as suggested by the Office of the City Attorney for the second through fourth years, the result would be "revenue neutral" to the City. This is not exactly true because it fails to take into account the time value of money. Putting this aside, on October 27, 2022, the parties agreed that for the first lease year, the parties would apply the Annual Cap in the manner expressly stated in the Lease except that Smith would not be required to pay more than the Annual Cap. This agreed-upon methodology was used to calculate and the late fees and interest with regard to minimum guarantee and percentage rent payments due under the New Lease and Concession Agreement.

Until the March 8, 2023 meeting between the parties, there was never any discussion about the calculation of percentage rent on an annual basis and Smith sent no notice to the City to request that such a methodology be used. Until October 27, 2022, Smith did not seek clarification regarding application of the Annual Cap. Rather, Smith failed to make payments when due under the New Lease and Concession Agreement.

Your suggestion that the monthly reports were not needed because there was no percentage rent due is concerning. First, because this Office had not suggested the use of year-end reconciliation for percentage rent until March 2023, percentage rent was in fact due in year one. Second, the monthly and annual sales reports required by the New Lease and Concession Agreement are independent of whether percentage rent is due in respect of a given month or not. Please be sure to explain this to your client.

#### **Comments to Sections of the Report**

(The numbers below correspond to the section numbers of the Report.)

1. Subject to confirmation by the Asset Management Division that the payments were received less than 5 days from the due dates, this Office would agree that late fees and/or interest should not apply.
2. All Annual Rent (which term includes both minimum guarantee and percentage rent) under the New Lease and all payments due under the Concession Agreement (both minimum concession fee and percentage) were due in year one, subject to the Annual Cap. For years two through four, this Office has recommended that only the minimum guarantees

- be paid under both agreements, with percentage rent to be reconciled on an annual basis. See paragraph 3, in the *Overview* section above.
3. The protocol for annual reconciliation of percentage payments for years 2-4, as well as the protocol that was applied in year 1, should be documented between the parties. This Office does not object to a credit for percentage rent paid in January 2023.
  4. See paragraph 3, in the *Overview* section above.
  5. No comments
  6. No comments
  7. No comments
  8. The City agrees that it cannot amend the New Lease absent Smith's consent. The City is comfortable that there are sufficient other mechanisms included in the New Lease to ensure Smith submits true and accurate annual statements of gross sales, including the City's rights, pursuant to Section 2.3.3 of the New Lease, to audit, inspect, examine and copy Tenant's fiscal and financial records, books, ledgers, statements, reports, tax returns and documents relating to the New Lease and Smith's revenues. In short, the City can produce its own audited statements if it determines the need. Furthermore, the Inspector General can also retain the services of independent private sector auditors pursuant to Section 15.24 of the New Lease.
  9. The OIG has recommended a credit in the amount of \$112,300.97. This Office believes that any credit provided by the Asset Management Division should ensure that it does not affect the Minimum Guaranteed rent required under to the New Lease.

This letter is not intended to forgive any breaches or defaults committed by Smith under the New Lease or Concession Agreement, whether or not specifically addressed. All rights, remedies and arguments of the City under the New Lease, the Concession Agreement and applicable law are expressly reserved.

Sincerely,



Ricardo J. Dopico  
Deputy City Attorney

cc: Rafael A. Paz, City Attorney  
Alina T. Hudak, City Manager  
Eric Carpenter, Deputy City Manager  
Joseph M. Centorino, Inspector General  
Ozzie Dominguez, Asset Management Division Director

## Exhibit A

**From:** [Alfonsin, Gabriela](#)  
**To:** [Dominguez, Ozzie](#); [Romero, Jessica](#)  
**Cc:** [Coolidge, Mark](#); [Morales, Adrian](#)  
**Subject:** RE: Agreements Request  
**Date:** Thursday, October 6, 2022 9:19:46 AM  
**Attachments:** [Gross Sales.msg](#)  
[RE Miami Sales JANUARY - August2022.msg](#)

---

Good morning Jessica,

Attached please find the emails containing the reports received.

Thank you,

**MIAMIBEACH**

**Gabriela Alfonsin, MPA**, Real Estate Asset Specialist  
ASSET MANAGEMENT DIVISION  
FACILITIES AND FLEET MANAGEMENT DEPARTMENT  
1833 Bay Rd, Miami Beach, FL 33139  
T: [305-673-7000](tel:305-673-7000) Ext: 26161 / C: 305-317-9955  
[www.miamibeachfl.gov](http://www.miamibeachfl.gov)

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---

**From:** Dominguez, Ozzie <[OzzieDominguez@miamibeachfl.gov](mailto:OzzieDominguez@miamibeachfl.gov)>  
**Sent:** Wednesday, October 5, 2022 2:40 PM  
**To:** Romero, Jessica <[JessicaRomero@miamibeachfl.gov](mailto:JessicaRomero@miamibeachfl.gov)>; Alfonsin, Gabriela <[GabrielaAlfonsin@miamibeachfl.gov](mailto:GabrielaAlfonsin@miamibeachfl.gov)>  
**Cc:** Coolidge, Mark <[MarkCoolidge@miamibeachfl.gov](mailto:MarkCoolidge@miamibeachfl.gov)>; Morales, Adrian <[AdrianMorales@miamibeachfl.gov](mailto:AdrianMorales@miamibeachfl.gov)>  
**Subject:** RE: Agreements Request

Hi Jessica,

I will call you tomorrow to discuss further, but we are working on some time pressing deadlines today. Gabby will send you the emails showing the dates. After months of requesting these reports, this is what we received due to Tenant internal staff changes. We recently completed a review and issued late fees/interest invoice. Thank you.

**MIAMIBEACH**

**Ozzie Dominguez, CSM** Division Director  
ASSET MANAGEMENT DIVISION  
FACILITIES AND FLEET MANAGEMENT DEPARTMENT  
1833 Bay Rd, Miami Beach, FL 33139  
Tel: [305-673-7000](tel:305-673-7000) Ext: 22986 / Fax: 786-394-5350 / Mobile: 786-920-5278  
[www.miamibeachfl.gov](http://www.miamibeachfl.gov)

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**From:** Romero, Jessica <[JessicaRomero@miamibeachfl.gov](mailto:JessicaRomero@miamibeachfl.gov)>  
**Sent:** Wednesday, October 5, 2022 2:35 PM  
**To:** Alfonsin, Gabriela <[GabrielaAlfonsin@miamibeachfl.gov](mailto:GabrielaAlfonsin@miamibeachfl.gov)>; Dominguez, Ozzie <[OzzieDominguez@miamibeachfl.gov](mailto:OzzieDominguez@miamibeachfl.gov)>  
**Cc:** Coolidge, Mark <[MarkCoolidge@miamibeachfl.gov](mailto:MarkCoolidge@miamibeachfl.gov)>; Morales, Adrian <[AdrianMorales@miamibeachfl.gov](mailto:AdrianMorales@miamibeachfl.gov)>  
**Subject:** RE: Agreements Request

Hi Gabriela:

I called you but couldn't reach you. Thank you for the information provided; however, the spreadsheet summarizes various months of the agreements. I requested the individual monthly report, including evidence of the date it was received, to validate timeliness. If you received it by e-mail, you could forward the e-mail, and that will prove the submitted date. Please don't hesitate to contact me if you have any questions.

Regards,  
Jessica



**Jessica Romero, CIGA, MBA**

Auditor  
OFFICE OF THE INSPECTOR GENERAL  
1130 Washington Avenue, 6<sup>th</sup> Floor  
Miami Beach, FL 33139  
Tel: 305-673-7000 ext. 26057 | Fax: 305-587-2401  
**Hotline: 786-897-1111**  
[www.miamibeachfl.gov/inspectorgeneral/](http://www.miamibeachfl.gov/inspectorgeneral/)

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**From:** Alfonsin, Gabriela <[GabrielaAlfonsin@miamibeachfl.gov](mailto:GabrielaAlfonsin@miamibeachfl.gov)>  
**Sent:** Wednesday, October 5, 2022 1:17 PM  
**To:** Romero, Jessica <[JessicaRomero@miamibeachfl.gov](mailto:JessicaRomero@miamibeachfl.gov)>; Dominguez, Ozzie <[OzzieDominguez@miamibeachfl.gov](mailto:OzzieDominguez@miamibeachfl.gov)>  
**Cc:** Coolidge, Mark <[MarkCoolidge@miamibeachfl.gov](mailto:MarkCoolidge@miamibeachfl.gov)>; Morales, Adrian <[AdrianMorales@miamibeachfl.gov](mailto:AdrianMorales@miamibeachfl.gov)>



**Subject:** RE: Agreements Request

Good afternoon Jessica,

Attached please find the reports received from the tenant.

Thank you,

**MIAMIBEACH**

**Gabriela Alfonsin, MPA**, Real Estate Asset Specialist  
ASSET MANAGEMENT DIVISION  
FACILITIES AND FLEET MANAGEMENT DEPARTMENT  
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*We are committed to providing excellent public service and safety to all who live, work and play in our vibrant, tropical, historic community.*

**From:** Romero, Jessica <[JessicaRomero@miamibeachfl.gov](mailto:JessicaRomero@miamibeachfl.gov)>  
**Sent:** Wednesday, October 5, 2022 12:35 PM  
**To:** Dominguez, Ozzie <[OzzieDominguez@miamibeachfl.gov](mailto:OzzieDominguez@miamibeachfl.gov)>  
**Cc:** Coolidge, Mark <[MarkCoolidge@miamibeachfl.gov](mailto:MarkCoolidge@miamibeachfl.gov)>; Alfonsin, Gabriela <[GabrielaAlfonsin@miamibeachfl.gov](mailto:GabrielaAlfonsin@miamibeachfl.gov)>; Morales, Adrian <[AdrianMorales@miamibeachfl.gov](mailto:AdrianMorales@miamibeachfl.gov)>  
**Subject:** RE: Agreements Request

Hi Ozzie:

In addition to the **Concession Monthly statement of the gross receipts**, I will also need the **Monthly statement of the gross sales** from January 2022 to August 2022 related to the Lease Agreement due within thirty (30) days after each month.

I appreciate your attention to this request,

Jessica



**Jessica Romero, CIGA, MBA**

Auditor

OFFICE OF THE INSPECTOR GENERAL

1130 Washington Avenue, 6<sup>th</sup> Floor

Miami Beach, FL 33139

Tel: 305-673-7000 ext. 26057 | Fax: 305-587-2401

**Hotline: 786-897-1111**

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delete the message.

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**From:** Romero, Jessica

**Sent:** Tuesday, October 4, 2022 1:23 PM

**To:** Dominguez, Ozzie <[OzzieDominguez@miamibeachfl.gov](mailto:OzzieDominguez@miamibeachfl.gov)>

**Cc:** Coolidge, Mark <[MarkCoolidge@miamibeachfl.gov](mailto:MarkCoolidge@miamibeachfl.gov)>; Alfonsin, Gabriela <[GabrielaAlfonsin@miamibeachfl.gov](mailto:GabrielaAlfonsin@miamibeachfl.gov)>; Morales, Adrian <[AdrianMorales@miamibeachfl.gov](mailto:AdrianMorales@miamibeachfl.gov)>

**Subject:** RE: Agreements Request

Hi Ozzie:

The office of the Inspector General is performing random monitoring of the Smith and Wollensky Agreements. Can you please provide the Concession monthly statement of the gross receipts from January 2022 to August 2022, due within fifteen (15) days after each month?

Thank you,

Jessica



**Jessica Romero, CIGA, MBA**

Auditor

OFFICE OF THE INSPECTOR GENERAL

1130 Washington Avenue, 6<sup>th</sup> Floor

Miami Beach, FL 33139

Tel: 305-673-7000 ext. 26057 | Fax: 305-587-2401

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**From:** Dominguez, Ozzie <[OzzieDominguez@miamibeachfl.gov](mailto:OzzieDominguez@miamibeachfl.gov)>

**Sent:** Monday, October 3, 2022 3:31 PM

**To:** Romero, Jessica <[JessicaRomero@miamibeachfl.gov](mailto:JessicaRomero@miamibeachfl.gov)>

**Cc:** Coolidge, Mark <[MarkCoolidge@miamibeachfl.gov](mailto:MarkCoolidge@miamibeachfl.gov)>; Alfonsin, Gabriela <[GabrielaAlfonsin@miamibeachfl.gov](mailto:GabrielaAlfonsin@miamibeachfl.gov)>; Morales, Adrian <[AdrianMorales@miamibeachfl.gov](mailto:AdrianMorales@miamibeachfl.gov)>

**Subject:** RE: Agreements Request

Hi Jessica,

Please see attached. I've actually been working on this agreement...

## MIAMIBEACH

**Ozzie Dominguez, CSM** *Division Director*  
ASSET MANAGEMENT DIVISION  
FACILITIES AND FLEET MANAGEMENT DEPARTMENT  
1833 Bay Rd, Miami Beach, FL 33139  
Tel: 305-673-7000 Ext: 22986 / Fax: 786-394-5350 / Mobile: 786-920-5278  
[www.miamibeachfl.gov](http://www.miamibeachfl.gov)

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**From:** Romero, Jessica <[JessicaRomero@miamibeachfl.gov](mailto:JessicaRomero@miamibeachfl.gov)>  
**Sent:** Friday, September 30, 2022 4:12 PM  
**To:** Dominguez, Ozzie <[OzzieDominguez@miamibeachfl.gov](mailto:OzzieDominguez@miamibeachfl.gov)>  
**Cc:** Coolidge, Mark <[MarkCoolidge@miamibeachfl.gov](mailto:MarkCoolidge@miamibeachfl.gov)>  
**Subject:** Agreements Request

Good Afternoon Ozzie:

I hope this e-mail finds you well. Can you please provide a copy of the following executed agreements:

1. Washington Avenue Corp. DBA Smith and Wollensky Restaurant Lease Agreement.
2. Concession Agreement between the City of Miami Beach and 1 Washington Avenue Corporation for management and operation of a Food & Beverage concession.

Thank you,  
Jessica

**Jessica Romero, CIGA, MBA**  
Auditor  
OFFICE OF THE INSPECTOR GENERAL  
1130 Washington Avenue, 6<sup>th</sup> Floor  
Miami Beach, FL 33139  
Tel: 305-673-7000 ext. 26057 | Fax: 305-587-2401



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# ATTACHMENT D

**From:** [Mooney, Thomas](#)  
**To:** [Alonso, Elisa](#)  
**Cc:** [Sanchez, Carmen](#); [Sacher, Lydia](#); [Hudak, Alina](#); [Williams, Rickelle](#); [Carpenter, Eric](#); [Taxis, Mark](#); [Centorino, Joseph](#); [Coolidge, Mark](#); [Blaiotta, Norman](#); [Romero, Jessica](#); [Valdes, Tomas](#); [Bain, Tiffany](#)  
**Subject:** Planning Response::: OIG draft report: OIG No. 22-21 Smith and Wollensky Contract Oversight  
**Date:** Friday, June 2, 2023 12:40:29 PM  
**Attachments:** [OIG No. 22-21 Smith and Wollensky Contract Oversight -- Draft Report.pdf](#)  
**Importance:** High

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Hi Elisa

The following are the Planning Responses:

**FINDING NO. 7: PARKING IMPACT FEES WERE NOT CORRECTLY BILLED BY THE PLANNING DEPARTMENT RESULTING IN AN UNDERPAYMENT OF \$27,143.01 FOR THE 2021/22 AND 2022/23 FISCAL YEAR**

1. The title of the finding should be revised to include the following underlined text, which reflects the actual finding.

**THE NEW AGREEMENT BETWEEN SMITH AND WOLLENSKY AND THE CITY OF MIAMI BEACH DATED NOVEMBER 5, 2021 WAS NOT ROUTED TO THE PLANNING DEPARTMENT. AS SUCH THE PARKING IMPACT FEES WERE NOT CORRECTLY BILLED BY THE PLANNING DEPARTMENT RESULTING IN AN UNDERPAYMENT OF \$27,143.01 FOR THE FY2021/2022 AND 2022/23 FISCAL YEAR.**

Thank you, Tom

**Thomas R. Mooney, AICP**  
Planning Director  
Planning Department

1700 Convention Center Drive – 2<sup>nd</sup> Floor, Miami Beach, FL 33139  
Tel: 305-673-7000 x6191 / [tmooney@miamibeachfl.gov](mailto:tmooney@miamibeachfl.gov)  
[www.miamibeachfl.gov](http://www.miamibeachfl.gov)

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**From:** Alonso, Elisa <[ElisaAlonso@miamibeachfl.gov](mailto:ElisaAlonso@miamibeachfl.gov)>  
**Sent:** Tuesday, May 30, 2023 12:04  
**To:** Hudak, Alina <[AlinaHudak@miamibeachfl.gov](mailto:AlinaHudak@miamibeachfl.gov)>; Carpenter, Eric <[EricCarpenter@miamibeachfl.gov](mailto:EricCarpenter@miamibeachfl.gov)>; Taxis, Mark <[MarkTaxis@miamibeachfl.gov](mailto:MarkTaxis@miamibeachfl.gov)>; Williams, Rickelle <[RickelleWilliams@miamibeachfl.gov](mailto:RickelleWilliams@miamibeachfl.gov)>; Alpizar, Marla <[MarlaAlpizar@miamibeachfl.gov](mailto:MarlaAlpizar@miamibeachfl.gov)>; Paz, Rafael <[RafaelPaz@miamibeachfl.gov](mailto:RafaelPaz@miamibeachfl.gov)>; Morales, Adrian <[AdrianMorales@miamibeachfl.gov](mailto:AdrianMorales@miamibeachfl.gov)>; Dominguez, Ozzie <[OzzieDominguez@miamibeachfl.gov](mailto:OzzieDominguez@miamibeachfl.gov)>; Mooney, Thomas <[ThomasMooney@miamibeachfl.gov](mailto:ThomasMooney@miamibeachfl.gov)>; Greene, Jason <[JasonGreene@miamibeachfl.gov](mailto:JasonGreene@miamibeachfl.gov)>  
**Cc:** Centorino, Joseph <[JosephCentorino@miamibeachfl.gov](mailto:JosephCentorino@miamibeachfl.gov)>; Coolidge, Mark <[MarkCoolidge@miamibeachfl.gov](mailto:MarkCoolidge@miamibeachfl.gov)>; Blaiotta, Norman <[NormanBlaiotta@miamibeachfl.gov](mailto:NormanBlaiotta@miamibeachfl.gov)>; Romero, Jessica <[JessicaRomero@miamibeachfl.gov](mailto:JessicaRomero@miamibeachfl.gov)>; Valdes, Tomas <[TomasValdes@miamibeachfl.gov](mailto:TomasValdes@miamibeachfl.gov)>  
**Subject:** OIG draft report: OIG No. 22-21 Smith and Wollensky Contract Oversight

Good afternoon,

Please see attached the updated OIG draft report: OIG No. 22-21 Smith and Wollensky Contract Oversight. We decided to send it to the City first for your review. Please send us your comments, if any, by Friday June 2<sup>nd</sup>.

On Monday, June 5<sup>th</sup>, we will send out the draft report with the 30-days notice letter to all parties.

Thank you!



**Elisa Alonso**

*Executive Assistant/Office Manager*

City of Miami Beach

OFFICE OF INSPECTOR GENERAL

1130 Washington Avenue, 6<sup>th</sup> Floor

Miami Beach, FL 33139

Tel: 305-673-7000 ext. 26725 | Fax: 305-587-2401

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