

RESOLUTION R-4842

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND AUTHORIZING THE CITY MANAGER TO EXECUTE A LEASE AGREEMENT WITH MY HOME WHOLESALE, INC. FOR PROPERTY COMMONLY KNOWN AS 11831 – 120<sup>TH</sup> NE, KIRKLAND, WASHINGTON.

WHEREAS, the City recently purchased the property commonly known as 11831 – 120<sup>th</sup> NE, Kirkland, Washington ("Property"); and

WHEREAS, My Home Wholesale, Inc. ("MHW") has occupied the Property since July 2009 and currently operates a furniture and home accessory store on the Property; and


WHEREAS, The City would like MHW to continue to be in possession of the Property as a tenant of the City under the terms and conditions of the attached Lease Agreement.

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. The City Manager is hereby authorized and directed to execute on behalf of the City of Kirkland a Lease Agreement with My Home Wholesale, Inc. substantially similar to that attached to this Resolution as Exhibit "A."

Passed by majority vote of the Kirkland City Council in open meeting this 1st day of November, 2010.

Signed in authentication thereof this 1st day of November, 2010.

  
MAYOR

Attest:

  
City Clerk

## **LEASE AGREEMENT**

This Lease Agreement ("Lease") is made effective September 1, 2010, by and between City of Kirkland ("City") and My Home Wholesale, Inc., a Washington corporation ("MHW"). The City and MHW are referred to in this Lease collectively as the "Parties."

### **RECITALS**

A. On September 1, 2010, the City purchased the property commonly known as 11831 – 120<sup>th</sup> Avenue NE, Kirkland, WA 98034 (the "Property") from Dayhu Investments Ltd., a Canadian Corporation ("Dayhu").

B. Prior to the City's acquisition of the Property, Dayhu leased the Property to Costco Wholesale Corporation, a Washington Corporation ("Costco"). The City and Costco terminated that Lease effective September 1, 2010, pursuant to a Lease Cancellation and Termination Agreement between the City and Costco.

C. From July 10, 2009 through August 31, 2010, Costco subleased the Property to MHW pursuant to a Sublease entered into between Costco and MHW.

D. MHW would like to remain in possession of the Property, as a tenant of the City, upon the terms and conditions set forth in this Lease.

NOW, THEREFORE, in consideration of the covenants set forth in this Lease, and for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

**1. Lease of Property.** The City hereby leases to MHW, upon the terms and conditions set forth in this Lease, the Property and the buildings located on the Property, situated in the City of Kirkland, King County, Washington, the legal description of which is attached hereto as **Exhibit A** and incorporated herein.

**2. Use of Property.** The Property shall be used by MHW for operation of a retail and/or wholesale furniture and home accessory store, together with any uses that are necessary or incidental to such use.

**3. Term.** The term of this Lease shall commence on September 1, 2010 and shall continue on a month to month basis until terminated by either party. The City may terminate this Lease on ninety (90) days written notice and MHW may terminate this lease with 60 days notice, both in accordance with the notification provisions of this Lease.

#### **4. Rent and Security Deposit.**

**4.1 Rent.** MHW covenants and agrees to pay to the City rent and maintenance for the Property in the amount of \$25,000 per month. Monthly installments of rent shall be due and payable on the first day of each and every calendar month, in advance. In the event MHW is obligated to pay rent for a period which is less than a calendar month, the amounts set forth

above shall be prorated based upon the ratio which is the number of days in such partial month bears to the total number of days in the month in which such partial month occurs.

**4.2 First Month Rent and Previous Security Deposit.** MHW posted a \$50,000 security deposit pursuant to its Sublease with Costco. Costco has transferred the \$50,000 security deposit to the City of Kirkland. The parties agree that \$25,000 of the security deposit shall be applied to September 2010 rent under this lease. The remaining \$25,000 shall be retained by the City as a security deposit under this Lease.

**4.3 Security Deposit.** As described in Section 4.2 of this Lease, MHW has deposited with the City a security deposit in the amount of \$25,000 (the "Security Deposit") to be held by the City as set forth in this Lease. The Security Deposit shall be held by the City, without liability for interest, as security for the performance by MHW of MHW's covenants and obligations under this Lease, it being expressly understood that the Security Deposit shall not be considered as a measure of the City's damages in the case of a default by MHW. The City may, in its sole discretion, from time to time without prejudice to any other remedy, use the Security Deposit to the extent necessary to make good any default under this Lease or to satisfy any other covenant or obligation of MHW under this Lease. Following any such application of the Security Deposit, MHW shall pay to the City on demand the amount so applied in order to restore the Security Deposit to its original amount. If MHW is not in default at the termination of this Lease, the balance of the Security Deposit remaining after any such application shall be returned to MHW within a reasonable period after such termination, after deducting any unpaid obligation of MHW to the City that may arise under this Lease.

## **5. Utilities.**

**5.1 Utility Charges.** MHW shall pay all charges for amounts of water, sewer, electrical, telephone, internet and any other utility services rendered or furnished to the Property during the Lease term.

**5.2 Interruption of Utilities.** The City, in its capacity as landlord, shall not be liable for any loss, injury or damage to persons or property caused by or resulting from any variation, interruption, or failure of any utilities or services due to any cause whatsoever, and no such event shall be deemed an eviction of MHW or relieve MHW from any of its obligations under this Lease.

**5.3 Security Alarm.** MHW shall pay all costs relating to the security alarm, including but not limited to monthly service payments and inspection, repair and maintenance fees.

**6. City Right of Entry.** The City shall have the right to inspect the Property upon 24 hours notice to MHW. The City shall have the right to make monthly inspections of the Property. In addition, nothing in this Section shall limit the City's right at any time during MHW's operating hours to enter any areas of the Property that are open to the public.

**7. Repairs and Maintenance.** The City shall not be required to alter, remodel or improve the Property or any part of it. MHW shall, at its sole cost and expense, keep the Property and every part of it in good condition and repair, ordinary wear and tear excepted. All

damage or injury done to the Property by MHW or by any persons who may be in or upon the Property with the express or implied consent of MHW, including but not limited to the cracking or breaking of any glass, windows or doors, shall be paid for by MHW.

**8. Alterations.** MHW shall not make any alterations, changes or additions to the Property without the prior written approval of the City, which the City may withhold in its sole discretion. Following any material alteration by MHW, MHW agrees to furnish the City with copies of any plans and specifications for any such alterations.

**9. Insurance.**

**9.1** During this Lease, MHW, at its sole cost and expense, and for the mutual benefit of the City and MHW, shall carry and maintain the following types of insurance in the amount specified: (1) comprehensive commercial general liability insurance which includes premises liability coverage (occurrence, not claims-made form) with minimum limits of \$2,000,000 combined single limit; (2) where required by law, workers' compensation coverage for all persons entering onto the Property; (3) employer's liability insurance with minimum limits of \$500,000; (4) automobile liability insurance for all vehicles entering onto the Property including owned, non-owned, and hired vehicles, with minimum limits of \$1,000,000 combined single limit; and (5) personal property insurance in an amount sufficient to cover all personal property on the Property. Such coverage shall be primary insurance over any separate insurance the City may provide for itself. All insurance policies provided under this Section 9 shall ensure that the City is named as an additional insured, and shall be issued by financially responsible insurers, duly authorized to do business in the State of Washington, with at least a B+/VII rating or better, utilizing the A.M. Best company rating system.

**9.2** All policies of insurance shall provide by endorsement, that any loss shall be payable to the City or MHW as their respective interests may appear. MHW shall deliver to the City proof of the insurance required in Section 9.1 of this Lease within 10 days of execution of this Lease. All insurance policies required hereunder shall contain an agreement by the insurance company that the policy or policies will not be canceled, or the coverage changed, without 10 days prior written notice to the City. If MHW fails to do so, the City may procure such insurance and MHW shall, on demand, pay the premiums or reimburse the City for all monies expended by it for that purpose, with interest at the maximum rate of interest permitted under applicable law, which may be added to and be collectible as additional rent under this Lease.

**9.3** MHW agrees not to knowingly violate or permit to be violated any of the conditions or provisions of the insurance policies required to be furnished hereunder, and agrees to promptly notify the City of a fire or other casualty. MHW agrees not to knowingly increase the hazards on the Property by any of its own acts. MHW agrees to comply promptly with the requirements of any companies issuing such insurance policies in order to keep the insurance in full force and effect. In the event that any policies shall be canceled for non-compliance with the conditions or provisions of said policies, or requirements of the insurance companies, or in the event that MHW shall fail to notify the insurance companies of any claims which may arise in accordance with the terms of said insurance, then MHW agrees to indemnify and save harmless the City from any claims or damages whatsoever which would otherwise be covered by insurance, including reasonable attorney fees incurred or expended by the City.

**9.4** The City and MHW each waive any and all rights to recover against the other, or against the officers, directors, shareholders, partners, joint ventures, employees, agents, customers, invitees or business visitors of such other party, for any loss or damage to such waiving party arising from any cause covered by any property insurance required to be carried pursuant to this Lease or any other property insurance actually carried by such party. The City and MHW from time to time will cause their respective insurers to issue appropriate waiver of subrogation rights endorsements to all property insurance policies carried in connection with the Property or its contents.

**10. Hazardous Substances.** Except for normal office and cleaning supplies typically found in office environments and used in accordance with label instructions and applicable laws, MHW shall not use, dispose of or otherwise allow the release of any hazardous substance, waste or materials in, on or under the Property or any adjacent property. MHW represents and warrants to the City that, except as set forth in the preceding sentence, MHW's intended use of the Property does not involve the use, production, disposal or bringing on to the Property of any hazardous waste and materials. As used in this Lease, the term "hazardous substance, waste or materials" includes any substance, waste or material defined or designated as hazardous, toxic or dangerous by any federal state or local statute, regulation, rule or ordinance now or hereafter in effect. MHW shall promptly comply with all applicable laws and with all orders, decrees or judgments of governmental authorities or courts having jurisdiction relating to hazardous waste or materials. MHW agrees to indemnify, defend and hold harmless the City against any and all loss, cost and expense (including, without limitation, consultant fees, attorneys' fees and disbursements) which may be incurred by the City in connection with any act or omission by MHW that constitutes a breach of this Section of the Lease.

**11. Assignment and Subletting.**

**11.1** MHW shall keep its interest in this Lease and any property of MHW (other than unattached personal property) and the Property free and clear from any liens arising out of any work performed or material ordered or obligations incurred by or on behalf of MHW and hereby indemnifies and holds the City harmless from any liability for any such lien. MHW shall have no right or authority to cause or allow the Property to be subjected to any such lien.

**11.2** This Lease shall not be assigned or encumbered nor shall all or any portion of the Property be sublet, used or occupied by any other person or entity without the prior written consent of the City, which may be withheld in the City's sole discretion. The Parties acknowledge that MHW will be renting space within the Property to certain vendors, subject to the approval of the City.

**12. Surrender.** Upon the expiration or termination of this Lease, Tenant will at once surrender and deliver up the Property, together with all improvements thereon, to the City in good condition and repair, reasonable wear and tear excepted; conditions existing because of MHW's failure to perform maintenance, repairs or replacements as required of MHW under this Lease shall not be deemed "reasonable wear and tear." Said improvements shall include all plumbing, lighting, electrical, heating, cooling and ventilating fixtures and equipment and other articles of personal property used in the operation of the Property (as distinguished from MHW's trade fixtures). MHW understands and acknowledges that the City acquired Costco's personal

property on the Property from Costco and MHW agrees that it will not remove any of the Costco personal property from the Property without the written consent of the City. MHW shall surrender to the City all keys to the Property and make known to the City the combination of all combination locks which MHW is permitted to leave on the Property. Any alterations in or upon the Property made by MHW shall be removed from the Property upon such termination or expiration without allowance, compensation or credit to MHW.

**13. Permitted Signs.** MHW may erect signs (subject to compliance with this Lease and all applicable City ordinances), at its sole cost and expense, upon the Property subject to the City's prior written approval. No exposed neon sign, flashing or animated sign, or roof or free standing sign is presently erected, and no such sign will be permitted to be erected on the Property.

**14. City Remedies.**

**14.1 Events of Default.** The term "Event of Default," for which the City shall have the rights specified in this Section, shall mean any of the following:

(a) MHW shall fail to pay any installment of rent, or any other sums or charges which MHW may be required to pay pursuant to this Lease;

(b) (i) if the estate hereby created shall be attached or taken on execution or by other process of law, or (ii) if MHW shall be judicially declared bankrupt or insolvent according to law, or (iii) if any assignment shall be made of the property of MHW for the benefit of creditors, or (iv) if a receiver, guardian, conservator, trustee or other similar officer shall be appointed to take charge of all or any substantial part of MHW's property by a court of competent jurisdiction and not dismissed within ninety (90) days, or (v) if a petition shall be filed by anyone other than MHW respecting the bankruptcy or insolvency of MHW under any provisions of any bankruptcy or insolvency act now or hereafter enacted, and such proceeding is not dismissed within ninety (90) days after it is begun, or (vi) if MHW shall file such a petition;

(c) If MHW shall breach or fail to perform or observe any covenant under this Lease;

(d) If (a) MHW shall breach or fail to perform or observe any other covenant on MHW's part to be performed or observed under this Lease and (b) such failure has continued for thirty (30) days after written notice of such failure from the City to MHW.

**14.2 Remedies.** Upon the occurrence of an Event of Default, the City shall have the following remedies in addition to the City's right to cure defaults as provided below:

(a) Bring Suit for Specific Performance. The City may bring suit for collection of unpaid rent or other amounts for which MHW is in default, or for the performance of any other covenant or agreement contained in this Lease, without the necessity of terminating the Lease or entering into possession of the Property.

(b) Re-Entry Without Termination. The City may reenter the Property, by summary proceedings or otherwise, and take possession thereof, without terminating this Lease, and remove all persons and property from the Property, without becoming liable to prosecution, and lease the whole or any part or parts of the Property from time to time, either in the name of the City or on account of MHW or otherwise, to such person or persons, for such terms ending before, on or after the expiration date, at such rental and upon such other conditions as the City in its sole discretion shall determine. The City will make a good faith and reasonable effort to lease the Property or any part thereof and shall in no event be liable for refusal or failure to lease the Property and any part of it. It is understood that MHW's liability as provided for in this Lease shall survive and continue after such dispossession, reentry or repossession.

(c) Termination of Lease. The City may terminate this Lease upon ten (10) days written notice to MHW. No act by the City, other than giving MHW written notice of termination shall be required to terminate this Lease. Upon termination of this Lease, neither the City nor MHW shall have any further obligation except as provided in this Lease and the right of the City to recover all unpaid rent to the date of termination.

**14.3. Cost to Cure with Interest.** In the event of any breach of this Lease by MHW, the City may elect, following any notice period for MHW to cure under this Lease, as another alternate remedy, to cure such breach for the account and at the expense of MHW. Any sums so expended by the City shall be deemed additional rent under this Lease and shall be reimbursed by MHW upon demand, together with interest at the rate of ten percent (10%) per annum, which interest shall accrue from the date of such expenditure by the City until the date of payment by MHW.

**15. Indemnity; Hold Harmless.**

**15.1** MHW shall save the City harmless from, and defend and indemnify the City against, any and all injury, loss or damage or claims for injury, loss or damage, of whatever nature, to any person or property caused by or resulting from any act, omission or negligence of MHW, including without limitation, reasonable attorneys' fees. It is a condition of this save harmless and indemnification, that MHW shall receive reasonably prompt notice of any such claim from the City.

**15.2** The City shall save MHW harmless from, and defend and indemnify MHW against, any and all injury, loss or damage or claims for injury, loss or damage, of whatever nature, to any person or property caused by or resulting from any act, omission or sole negligence of the City, including without limitation, reasonable attorneys' fees. It is a condition of this save harmless and indemnification that the City shall receive reasonably prompt notice of any such claim from MHW.

**16. Waiver.** Failure of either party to complain of any act or omission on the part of the other party, no matter how long the same may continue, shall not be deemed to be a waiver by said party of any of its rights under this Lease.

**17. Notices.** All notices required or permitted to be sent under this Lease shall be delivered by any one of the following methods: (a) United States certified mail, return receipt

requested; (b) Federal Express or similar overnight delivery; or (c) commercial courier with either receipt for delivery signed by the addressee or a sworn declaration that delivery was refused. Notice shall be deemed given on the date of delivery to or refusal thereof by the addressee. Notices shall be sent as follows:

To the City of Kirkland:

City of Kirkland, Attn. Facility Services  
915 Eighth Street  
Kirkland, WA 98033

With a copy to:

Kirkland City Attorney's Office  
123 Fifth Avenue  
Kirkland, WA 98033

To My Home Wholesale:

My Home Wholesale, Inc.

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Either party shall have the right to change its designees for the receipt of notices by use of the notice provisions contained in this section.

## **18. General Terms.**

**18.1 Choice of Law.** This Lease shall be construed in accordance with the laws of the state of Washington.

**18.2 Accord and Satisfaction.** No payment by either party or receipt by the other party of a lesser amount than the rental and other charges under this Lease shall be deemed to be other than payment on account of the earliest rent and other charges then unpaid and due hereunder, nor shall any endorsement or statement on any check or any letter accompanying any check or payment be deemed an accord and satisfaction, and either party may accept such check or payment without prejudice to its right to recover the balance of such rent and other charges or pursue any other remedy provided for in this Lease or available at law or in equity.

**18.3 Brokers.** The City and MHW each represents and warrants that it has not dealt with any real estate agent or broker in connection with this Lease, and each shall and hereby agrees to defend, indemnify and hold the other party harmless, including reasonable attorneys' fees, from and against all claims for commissions and/or other compensation made by any broker or agents or other damage for breach of the foregoing representations by the indemnifying party.

**18.4. Independent Operation.** Nothing in this Lease shall cause the City in any way to be construed as a partner, joint-venturer or an associate of MHW in the operation of the Property.

**18.5 No Recordation of Lease.** Neither this Lease, nor any memorandum thereof, shall be recorded.

**18.6 Attorneys' Fees; Waiver of Jury Trial.** In the event of any action or proceeding brought by either party against the other under this Lease, each party shall, and hereby does (to the extent permitted by law) waive trial by jury, and the prevailing party shall be entitled to recover all costs and expenses, including its reasonable attorneys' fees.

**18.7 Jurisdiction and Venue.** Jurisdiction for any dispute concerning this Lease shall be exclusively in King County, Washington.

**18.8 Time of the Essence.** Time is of the essence with respect to the performance of all of the obligations of MHW specified in this Lease.

**18.9 Entire Agreement; Modification.** This Lease is the final and complete expression of the City and MHW relating in any matter to the leasing, use and occupancy of the Property, and other matters set forth in this Lease. No prior agreements or understandings pertaining to the same shall be valid or of any force or effect and the covenants and agreements of this Lease shall not be altered, modified or added to except in writing signed by both the City and MHW.

**18.10 Authority.** Each individual executing this Lease on behalf of MHW represents and warrants that he or she is duly authorized to execute and deliver this Lease on behalf of MHW, and that this Lease is binding upon MHW in accordance with its terms.

IN WITNESS THEREOF, the parties hereto have caused this Lease to be executed under seal as of the day and year first above written.

CITY OF KIRKLAND

By: \_\_\_\_\_  
Its: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
Title: \_\_\_\_\_

MY HOME WHOLESALE, INC

By: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF WASHINGTON     )  
  ) ss.  
COUNTY OF KING         )

On this \_\_\_\_ day of \_\_\_\_\_, 2010, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_, to me known to be the \_\_\_\_\_ of **My Home Wholesale, Inc.**, the Washington corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

WITNESS my hand and official seal hereto affixed the day and year first above written.

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
Notary Public in and for the State of  
Washington, residing: \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_

STATE OF WASHINGTON     )  
  ) ss.  
COUNTY OF KING         )

On this \_\_\_\_ day of \_\_\_\_\_, 2010, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_, to me known to be the \_\_\_\_\_ of the **City of Kirkland**, the Washington municipal corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said municipal corporation, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

WITNESS my hand and official seal hereto affixed the day and year first above written.

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
Notary Public in and for the State of  
Washington, residing: \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_